IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 427 OF 2014

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 23, 201, 255, 256, 257, 258, AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 35, 38 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REFERENDUM UNDER THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE PROPOSED AMENDMENT OF THE CONSTITUTION OF KENYA BY POPULAR INITIATIVE PROMOTED BY OKOA KENYA MOVEMENT, ORANGE DEMOCRATIC MOVEMENT, WIPER DEMOCRATIC MOVEMENT-KENYA AND FORD-KENYA PARTY

AND

IN THE MATTER OF THE FIFTH SCHEDULE AND SECTION 5 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

HON. KANINI KEGA.....PETITIONER

VERSUS

OKOA KENYA MOVEMENT.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

WIPER DEMOCRATIC MOVEMENT - KENYA.....3RD RESPONDENT

FORD-KENYA PARTY.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

THE CONSTITUTION IMPLEMENTATION

COMMISSION.....6TH RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....7TH RESPONDENT

R U L I N G

Introduction

1. By a Motion dated 27th August, 2014, the Petitioner herein, **Hon. Kanini Kega**, seeks the following orders:

1. **THAT this application be certified as urgent and heard ex-parte at the first instance.**

2. **THAT the Honourable Court be pleased to certify that this Application/Petition be heard on priority basis during the current High Court Vacation.**

3. **THAT pending the hearing and determination of this Petition the Honourable Court be pleased to issue a conservatory order of stay to restrain the 1st – 4th Respondents from soliciting or procuring for signatures pursuant to their popular initiative under Article 257 of the Constitution.**

4. **THAT pending the hearing and determination of this Petition the 7th Respondent-Independent Electoral and Boundaries Commission – be restrained from receiving any draft Bill and signatures delivered by the 1st – 4th Respondents pursuant to their popular initiative under Article 257 of the Constitution.**

2. The application was based on the following grounds:

a. **The 1st – 4th Respondents have embarked on a signature collection exercise pursuant to Article 257 of the Constitution.**

b. **Prima facie the process that the 1st – 4th Respondents have embarked on contravenes Articles 257(4) of the Constitution.**

c. **During the transitional period for implementation of the Constitution which lapse on 27th August 2015 the Constitution cannot be lawfully amended.**

d. **Unless the orders sought are granted the Petition herein will be rendered nugatory.**

e. **The grounds set out in the petition.**

Applicant/Petitioner's Case

3. The application was supported by a verifying affidavit sworn by the Petitioner on 27th August, 2014.

4. According to the Petitioner, he is the serving Member of the National Assembly of Kieni Constituency, Nyeri County having been elected during the first General Election under the Constitution of Kenya, 2010, hereinafter referred to as the Constitution, held on 4th March, 2013. The said Constitution, 2010 was promulgated on 27th August, 2010 following a referendum conducted on 4th August 2010. The Fifth Schedule of the Constitution sets out a five year period of transition which the Tenth Parliament was enjoined to ensure its implemented and after the General Election held on 4th March 2013 the current Parliament is required to implement.

5. According to the Petitioner, during the transitional period of implementation of the Constitution envisaged in Article 261 and set out in the Fifth Schedule the Parliament in place is deemed as a transitional Parliament whose principal duty is to implement- as opposed to the amendment of the Constitution and any deliberate act or omission on its part that results in impediment or delay may occasion its dissolution upon such a finding by this Honourable. In his view, the provisions of Article 261 and the Fifth Schedule of the Constitution were informed by the enlightened opinion of the Committee of Experts and informed society in Kenya that one of the fundamental reasons for the failure of the 1963 Independence Constitution was the refusal and/or failure of the Government and Parliament of the day to implement it. In the premises Article 261 and the Fifth Schedule of the Constitution preconditions the tenure of the transitional parliament(s) to the full implementation of the Constitution.

6. Since 27th August 2014 marks the Fourth Anniversary of the Constitution 2010, the Petitioner averred that the transitional period for constitutional implementation is yet to expire and indeed Parliament is yet to enact several legislations that under Fifth Schedule are required to be enacted by the said date and in fact Parliament had to extend the period of implementation of those legislation by a further six months. He therefore deposed that in view of the provisions of Articles 259(1) and 261 of the Constitution, during the five years transition period for constitutional implementation which expires on 27th August 2015 the principle role of Parliament is to ensure the full implementation of the Constitution which would be seriously impeded and compromised by any involvement on its part in amendment of the Constitution either under Article 256 or 257 thereof. Therefore, since Parliament cannot lawfully aid or abet amendment of the Constitution until after 27th August 2015 or such other date that it determines that the Constitution has been implemented in full, any initiative to amend the Constitution during the transitions period is null and void *ad initio.*

7. It was further deposed that on 7th July 2014 the CORD Coalition held a rally at Uhuru Park, Nairobi to agitate for a national dialogue to be held to discuss matters of public

importance which rally was organized by the senior leaders of the major CORD parties popularly known as CORD Principals namely **Hon. Raila Odinga**, **Hon. Moses Wentagula** and **Hon. Kalonzo Musyoka** and the end of which the said principals announced that they were no longer interested in dialogue with the Jubilee Government and instead they would agitate for amendment of the Constitution by way of popular initiative. It was averred that the CORD Coalition has 136 members in the National Assembly and 28 members in the Senate.

8. On Wednesday August 13th 2014 the CORD Principals accompanied by their associates and supporters in the civil society convened a meeting at Ufungamano Conference Hall, Nairobi during which they launched an organization or movement known as Okoa Kenya Movement whose general objectives are to address and to help in resolving pressing social economic and political problems/challenges facing Kenya. More specifically, Okoa Kenya Movement was launched as the vehicle to spearhead and promote the agenda of the CORD Coalition to amend the Constitution by popular initiative under Article 257 of the Constitution. Pursuant thereto, on Saturday 23rd August, 2014 the CORD Principals launched the signature-collection programme as follows:-

(i) Hon. Raila Odinga in Migori.

(ii) Hon. Kalonzo Musyoka – Embakasi, Nairobi.

(iii) Hon. Moses Wetangula – Kitale.

9. According to the Petitioner, whereas Article 257(4) makes the formulation of a draft Bill a precondition for procurement of at least one million signatures by registered voters, the 1st – 4th Respondents have not formulated the draft Bill that should be supported by the voters. Further, under Article 1(2), 35 and 38 of the Constitution the Petitioner, his constituents and other Kenyans have a right to information that relates to the exercise of their political rights. In this regard a draft Bill seeking the amendment of the Constitution is a matter of Public importance and the promoters of such an initiative have a positive duty to formulate and furnish it to all citizens through publication in national newspapers and broadcast media. Further the right of the people to public participation in law-making enjoins the promoters of a draft bill to publish the same and avail it to persons whose endorsement is being sought.

10. The Petitioner further averred that the 1st-4th Respondents have no *locus standi* to seek for constitutional amendment through a popular initiative *inter-alia* because they are part of Parliament whose participation in constitutional amendment is provided for in law. Accordingly, the provisions for popular initiative is not an alternative method for members of parliament and parliamentary parties to amend the Constitution. On the contrary the said mechanism is available to citizens of Kenya to try and effect necessary constitutional amendments upon failure by Parliament to do so. Further, a constitutional amendment through the popular initiative is a rather than a first resort. In this regard by dint of Article 1(2) and 4(2) of the Constitution, citizens of Kenya must first seek amendment through Parliament and only resort to the popular amendment after Parliament has refused or otherwise failed to amend the Constitution. In view of Article 94 of the Constitution, and the

necessity to ensure that the institutions of the Kenya State work effectively, Parliament must in the first instance deal with any proposal to amend the Constitution and only after it has failed may the citizens resort to the popular initiative. However, as no citizen of Kenya who are members of or associated with the 1st – 4th Respondents have sought to have Parliament amend the Constitution, it is premature for the 1st – 4th Respondents to invoke the popular initiative to amend the Constitution.

11. Apart from that under Article 201(d) of the Constitution all institutions of the State and Kenyan citizens are enjoined to ensure that public money is used prudently and in a responsible way. In this regard, given the high cost of a popular initiative it is incumbent upon all Kenyans to first seek constitutional amendment through the parliamentary initiative and turn to the popular initiative as a last resort.

12. To the Petitioner, the 5th – 7th Respondents have failed in their constitutional duties as a result of which the Country has been seized by an election mood based on the ignorance that the Referendum rather than Parliament is the first resort for anyone seeking to amend the Constitution. The ongoing collection of signatures by the 1st-4th Respondents, it was deposed is unlawful on the grounds set out in the Petition hence the Petition herein should be allowed.

13. It was asserted that Part V (Section 49-55) of the ***Elections Act***, 2011 is unconstitutional to the extent that it does not provide that a constitutional amendment through a referendum must be on the same day as the General Election.

1st and 2nd Respondents' Response

14. In response to the application, the 1st and 2nd Respondents filed a notice of preliminary objection in which it was pleaded that:

1. **The Court lacks the jurisdiction to entertain this petition as currently drafted.**

2. **The petition and orders sought are defective and the Court has no jurisdiction to grant the orders as framed as this would amount to prior judicial restraint.**

3. **The petition and orders sought are in breach of Article 24 and 25 of the Constitution and would amount to restricting exercise of rights of millions of Kenyans not party to this petition without giving them a right to be heard.**

4. **The entire petition and application is bad in law and ought to be struck out or dismissed with costs to the respondents.**

15. Apart from that the 1st respondents filed a replying affidavit sworn by **Paul Mwangi**, the Chairman of the Committee of Experts under the initiative of the 1st Respondent herein.

16. According to him, the 1st Respondent an amalgam of citizens who have come together to propose a popular initiative for amendment of the Constitution, which initiative is being promoted by a Committee chaired by the deponent.

17. According to the deponent, the entire application and petition is utterly, misconceived and an abuse of the process of this Court, and in its entirety is defective and ought to be dismissed for the following reasons:

i. This Honourable Court lacks the jurisdiction to entertain the petition as the Constitution commits the process of verification of signatures accompanying the draft bill as well as authenticating and satisfying itself that the initiative meets the requirement of Article 257, to the Independent electoral and Boundaries Commission and not the High Court, in the first instance.

ii. The Petition and orders sought if granted would amount to prior judicial restraint which the court has no jurisdiction to do.

iii. The Petition has the effect of limiting or seeking to take away rights of millions of Kenyans to exercise their sovereign rights under Article, 1(2), 38 and 257, without being party to the Petition.

18. It was deposed that the process that OKOA initiative has followed so far is in compliance with Article 257 of the Constitution and according to the deponent, he was unaware of any provision of the Constitution or written law that the Constitution shall not be amended during its implementation period since the provisions of Article 255 and 257 are not suspended under the 5th Schedule to the Constitution and the Constitution has already being amended on a number of occasions by the National Assembly, the last instance being the amendment made in order to extend the time within which to enact legislation necessary to fully operationalize the Constitution. To him, the Constitution is already a living document and the provisions therein in force as such the implementation phase, which may be extended for as long a as the National Assembly deems necessary, and any proposed amendment to improve it and or strengthen institutions created therein are not mutually exclusive.

19. Further to the foregoing, the deponent was of the view that the collection is done through public forums where the general suggestions and the specific issues under each are explained and discussed to the public hence everyone who signs the petition book do it with sufficient knowledge. The collection of signatures process, he averred began two weeks before and had been rolled out in many parts of the country, though the program of collection of signatures had not yet been rolled out in Kieni Constituency and there was no signature collection program happening in Kieni Constituency. Apart from that the deponent averred that he was not aware of any approach to the Petitioner to procure his signature or that of any of his

Constituents nor of any complaints either in Kieni of any other part of the Country that the signature form and the general suggestion were insufficient in terms of information on what is proposed to be amended or that a signature was obtained fraudulently.

20. The deponent's position was that the Petition is premature and the Petitioner should wait for the draft bill which when compared with the general suggestion would found the basis of making an informed decision whether the draft accords with the general suggestions used to obtain the signatures. To him, under Article 38 of the Constitution as well as Article 257 (10) the Constitution contemplates that the signatories and indeed other Kenyans will have an opportunity to vote the draft in a yes or no ballot and any person aggrieved in terms of having been fraudulently led into signing the signature would have a chance to vote against the draft. Further, the Constitution provides further safeguards in terms of Article 257(6) in which the County Assembly members, who are representative of the People have the opportunity to vote for or against the draft for any number of reasons including the fact that signatures were obtained fraudulently before a bill is formulated.

21. The deponent deposed that prior to the collection of signatures, the Committee of Experts and the deponent sat with Independent Electoral and Boundaries Commissions, discussed the 1st Respondent's form for signature collection and the general questions and the procedures and process leading to the proposed referendum and the 7th Respondent made changes and suggestions to the final form which was then printed into a booklet for signature collection and the 7th Respondent put forward some conditions which the 1st Respondent complied with. The 1st and 7th Respondent reached a concurrence that the process for a popular initiative is launched by either general suggestion or a bill and we informed the IEBC that the OKOA process would be through the general suggestions which shall be placed on every page of the signature collection book. He contended that the indications from all areas that the book has been sent for signature collection show that 1,000,000 signatures has already been attained however the intentions of OKOA is to collect as many signatures as possible with a target of 5,000,000 signatures.

22. His view was that any compliant ought to be raised by the 7th Respondent or any person the Respondent and only after exhausting the local and inbuilt mechanism under the 7th Respondent can a dis-satisfied party raised a petition to this court and that it will be a fundamental breach of the rights of the promoters and supporters this initiative and prior restraint which is against the Constitution, should this court grant the orders sought. Further, the Petitioner has failed to disclose material facts to the court which disentitle him from any interlocutory orders sought to the extent that prior to the filling of the petition he had made it known that signature collection was going on in Kieni which is untrue; that he is a member of Jubilee coalition of parties which has publicly stated that they do not support the proposed referendum; that that the petitioner has a political interest in initiating this petition and stopping the Respondents from going further with this initiative and that the Petitioner has not indicated the capacity in which he brings this petition to which he has not named any persons, group or class of persons, association of persons on behalf of whom he has brought this petition nor any identification public interest that he seeks to represent.

23. To him, the Petitioner has not demonstrated his personal rights that have or will be violated if the referendum continues and the petition also fails to show the relevance of all the articles referenced to and supposedly which the petition is based.

24. The deponent further averred that he was a researcher and author on matters regarding political intrigues and the judiciary having authored the book "The Black Bar: Corruption and Political intrigues within Kenya's legal fraternity" and asserted that each time a proposal has been made to change the Constitutional order in Kenya, attempts have been made to use the court by political forces to do their "dirty work" of stopping the initiatives.

3rd Respondent's Case

25. In response to the application, the 3rd Respondent filed the following grounds of opposition:

1. **The Petition has the effect of limiting or seeking to take away rights of millions of Kenyans to exercise sovereign rights under Articles, 1 (2) 38 and 257,, without being party to the Petition**

2. **The process that that has been followed so far is in compliance with Article 257 of the Constitution which provides as follows:**

> **i. The Constitution may be amended or proposed for amendment by way of a popular initiative.**
>
> **ii. The initiative requires to be backed by at least one (1) million signatures of registered voters.**
>
> **iii. A popular initiative to amend the Constitution may (in the first instance be my way of general suggestion or;**
>
> **iv. By way of a draft bill.**
>
> **v. It is the promoters of the popular initiative who choose whether to commence the process by way of a general suggestion or a draft bill.**
>
> **vi. There is no requirement that the draft bill must be prepared prior to collection of signatures.**
>
> **vii. The general suggestion if embossed on the signature collection form is sufficient for purposes of informing in a general way the supporters or prospective one million signatories of the initiative.**

viii. Article 257(3) permits the promoters of the initiative to commence by way of a general suggestion then prior to delivery of the signature to the Independent Electoral and Boundaries Commission, formulate a draft bill.

ix. The duty and power to verify if the one (1) million signatures are registered voters is committed to the 7th Respondent.

x. Similarly it is the 7th Respondent who are charged with the responsibility to satisfy itself that the initiative including the procedure for collection of signature, the form used for collection and the general suggestions and draft bill is in accordance with the law.

3. **There is no provision of the Constitution or written law that this Constitution shall not be amended during its implementation period:**

i. The provisions of Article 255 and 257 are not suspended under the 5th Schedule to the Constitution.

ii. The Constitution has already being amended on a number of occasions by the National Assembly, the last instance being the amendment made in-order to extend the time within which to enact legislation necessary to fully operationalize the Constitution

4. **The Petition is premature as the Petitioner should wait for the draft bill which when compared with the general suggestion would found the basis of making an informed decision whether the draft accords with the general suggestions used to obtain the signatures.**

5. **The Constitution contemplates that the Kenyans will have an opportunity to vote for the draft in a yes or no ballot and any person aggrieved in terms of having been fraudulently led into signing the signature would have a chance to vote against the draft.**

6. **The Petitioner has not demonstrated his personal rights that have or will be violated if the referendum continues.**

4th Respondent's Case

26. On behalf of the 4th Respondent the following grounds of opposition were similarly filed:

1. **The application is incompetent, without merit, frivolous and vexations.**

2. **The application is premature and moot.**

3. **The application in inviting this Hon Court to enter into the arena of political competition and seeking of the court to take a preferred political position.**

4. **The application has misjoined IEBC who is an umpire in disputes of the nature raised in this Petition.**

5. **The Application does not disclose any right that is being infringed or threatened with infringement as to affect the Petitioner/Applicant.**

6. **There is material non-disclosure by the Applicant that he belongs to a rival political coalition that has publicly indicated its opposition to the matter complained of.**

7. **The matters complained of are sufficiently provided for in the Constitution.**

8. **The application is misconceived.**

7th Respondent's Case

27. The 7th Respondent on its part opposed the application by way of a replying affidavit sworn by **Praxedes Tororey**, the 7th Respondent's Director, Legal and Public Affairs on 4th September, 2014.

28. According to her, the 7th Respondent is a constitutional commission established by Article 88 (1) of the Constitution and is responsible for, *inter alia*, conducting and supervising referenda and elections. In addition, Article 257 of the Constitution further mandates the 7th Respondent to receive a draft Bill proposing amendment to the Constitution, where the Constitution is being amended by popular initiative. The mandate of the 7th Respondent to receive a draft Bill proposing amendment of the Constitution by popular initiative is ordained by the Constitution. Article 257(2) of the Constitution states that an amendment to the Constitution may be in the form of a general suggestion or a formulated draft Bill and the popular initiative must be supported by at least one million registered voters.

29. Pursuant to Article 257(2) of the Constitution, where the popular initiative is in the form of general suggestion, then the promoters shall formulate it into a draft Bill and shall thereafter deliver that draft Bill and the supporting signatures to the 7th Respondent. The 7th Respondent is then mandated under Article 257(4) and (5) of the Constitution, to verify that the popular initiative is supported by at least one million registered voters and that the popular initiative meets the requirements of Article 257 of the Constitution.

30. According to the deponent, the verification contemplated in Article 257(4) and (5) of the Constitution is not only meant to ensure that the initiative is supported by one million registered voters. The verification is, where the one million signatures were sought on the strength of a general suggestion, supposed to ensure that the draft Bill, presented to the 7th Respondent as required by Article 257(4) of the Constitution, by the promoters of the

amendment of the Constitution by popular initiative is the same as the general suggestion by which the support of one million registered voters was sought and obtained. Where the draft Bill does not conform to the general suggestion, then the 7th Respondent is under a constitutional duty reject it and refer it back to the promoters of the popular initiative requiring them to redraft the Bill to conform with the general suggestion.

31. It was deposed that currently, no draft Bill has been presented to the 7th Respondent to warrant rejection or acceptance by the 7th Respondent. Further, the prayer sought by the Petitioner that the 7th Respondent should be restrained from receiving any draft Bill from the 1st – 4th Respondents on the ground that the same is obtained contrary to Article 257 of the Constitution is speculative since no draft Bill has been presented for the 7th Respondent to determine whether or not it complies with Article 257 of the Constitution.

32. In the deponent's view, the Petitioner is asking this honourable Court to do that which the Constitution reserves expressly and exclusively for the 7th Respondent, that is, for this Honourable Court to determine whether or not any draft Bill submitted to the 7th Respondent by the 1st – 4th Respondents comply with Article 257 of the Constitution and for this Honourable Court to make a decision regarding the rejection of the draft Bill. However, this Honourable Court should not interfere with the 7th Respondent's constitutional mandate unless and until the 7th Respondent had conducted its mandate in a manner that is contrary to the Constitution and the law. By granting the orders sought it was contended the Court will be usurping the 7th Respondent's role contrary to the doctrine of separation of powers and contrary to the institutional independence of the 7th Respondent guaranteed by Article 249 of the Constitution.

Applicant's Submissions

33. On behalf of the applicant, it was submitted by his learned counsel **Mr Kibe Mungai** that in urging the reliefs for grant of prayers 3 and 4 of the application, there are 5 limbs to the petition.

34. The first limb was that the 1st and 4th Respondents, the Promoters of the popular initiative have no locus standi to invoke Article 257 of the Constitution. In order to amend the Constitution, the basic argument is that under Article 255(3) the Constitution may be amended through Parliament under Article 256 and secondly, by the people and Parliament under Article 257 of the Constitution.

35. It was contended that the Constitution draws distinction between the People and Parliament and the reason for this is that before the People can amend the Constitution through popular initiative, they must do it in conjunction or jointly with Parliament so that contrary to the popular talk there is no procedure for amendment per se by referendum. The procedure for amendment by referendum is only arrived at if Parliament via Article 255(2)(b) and 257(8) fails to amend the draft presented to it hence the concept now is that the People initiate and Parliament disposes. It was therefore submitted that the Bill will not come to the

people unless Parliament fails to enact it hence the procedure for referendum is a default mechanism.

36. According to learned counsel, the foregoing means that Parliament or a section of Parliament cannot initiate amendment of the Constitution under Article 257 for the reason that Article 256 provides a procedure for doing so. Since a section of Parliament includes the 2nd to 4th Respondents who are already in Parliament, they are not the people. The first Respondent, Okoa Movement, on the other hand is an association of political parties or individuals and is not an entity which can exercise the constituent power – the people's sovereignty- which is the People of Kenya and registered voters. The petitioner would therefore be raising a serious question of the locus of the promoters of the present initiative under Article 1 of the Constitution to initiate the subject process.

37. The second limb was the legality of collecting the signatures in the absence of a draft Bill. It was submitted that under the Constitution, nothing can be more serious than an initiative at either level to amend the Constitution. Under Article 257(4), it is clear that the promoters of a popular initiative shall deliver the Bill and signatures for verification to the IEBC. A reading of Article 257(2) and (3) is clear that the first step in popular initiative is either the promoters drafting a Bill or formulating it into a Bill. The second step is the collection of signatures of at least 1 million Kenyan voters and the third step is the delivery of the Bill and the signatures to IEBC to verify that the persons are registered voters and to pass it on to the County Assemblies.

38. The dispute is whether the signature collection can commence in the absence of a Bill. The plain reading of the Constitution, it was submitted, is that the first duty is to formulate it into a draft Bill before soliciting for signatures since the mode of amendment of the law is through a Bill. If therefore, before Parliament can enact a legislation, there must be public participation in relation to a Bill setting out the sections to be amended, the promoters are in the same position as Members of Parliament seeking to amend and their first duty is to come up with a Bill. This is so because Articles 10 and 35 of the Constitution applies with respect to publication of what is to be amended and the reasons for doing so which ought to be transparent and Constitutional. It was submitted that the issue of collection of the signatures is a serious issue.

39. . The third limb was whether during the transition period the Constitution of Kenya can be amended. It was submitted that the Court is aware of the history of the clamour for amendment and it was for this reason that there is a clear framework in the 5th Schedule to implement the Constitution. This issue, it was submitted, is so serious that the law provides that if Parliament fails to implement the Constitution, the Court can dissolve Parliament.

40. In effect, it was contended that even the present Parliament is a transitional Parliament hence that raises the question whether it is the role of a transitional Parliament to implement the Constitution or get a Constitution of its own making during the transition period. If accepted that a transitional Parliament can amend the Constitution it would mean that no lessons were learnt in the past from the independent Constitution and the issue of making a new Constitution will never be put to a rest.

41. It was submitted that public interest for the Kenyan Nation is that all organs of State must ensure the Constitution is implemented at least during the transition period otherwise it would be a mockery to pass a Constitution and before implementation, amend the same which would not serve the interest of Kenyans.

42. The fourth limb was when the referendum should be held. Article 201(d) of the Constitution provides that the Public Funds must be used prudently and responsibly. A referendum, it was argued, is for all practical reasons a general election involving campaigns.

43. However the Constitution does not provide for when a referendum can be held and the issue was left to Parliament which must however act within the Constitution. If Parliament had properly considered Article 201(d) of the Constitution and public interest it would have provided that constitutional amendment referendum be held at the same time as the General Election. If several referenda were to be undertaken, so much money would be spent thereon and the country risks being permanently in the electoral mode.

44. It was submitted that the better interpretation would be that preparations for amendment of the Constitution may be undertaken but that the amendment to await the general election.

45. The fifth limb was the issue of the Constitutionality of Part V of the ***Elections Act***.

46. It was therefore submitted that the petition raises profound questions of the application and interpretation of the Constitution and before the determination thereof, it would be important that the initiatives commenced by the 1st to 4th Respondents do not get to the stage of predetermining the petition before the Court rules on it. From the replying affidavit of **Paul Mwangi**, it was disclosed that already more than 1.2 million signatures had been collected so that for the purposes of Article 257(1) the promoters already had the necessary constitutional requirement. Coupled with the suggestion that the process of the Bill was ongoing, unless the conservatory orders sought are granted nothing would prevent the 4th Respondent from submitting the Bill and the signatures collected and if and when that happens and IEBC verifies the signatures, the Bill would move to the next stage. It was submitted that the remainder of the process can be finalised within a week and would enter the stage where its legality could not be salvaged.

47. It was submitted that from the documents emanating from the 1st Respondent, the IEBC would be an interested party and that the Constitution does not give IEBC the powers to determine the conformity of the Bill with the general suggestion. Since serious issues have been raised, it was submitted that pending the determination thereof no irreversible movements should be undertaken hence the process ought not to reach the IEBC.

48. In support of the submissions, learned counsel relied on *inter alia*, **Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] eKLR, Njoya & Others vs. Attorney General and Others [2004] 1 EA, Judicial Service Commission vs Speaker of the National Assembly & Another Petition No. 518 of 2013, Hon. Martin Nyaga Wambora vs. the Speaker, County Assembly of Embu & 5 Others [2014] eKLR, and Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**.

1st and 2nd Respondents' Submissions

49. **Mr Oluoch** learned counsel for the 1st and 2nd Respondent on his part submitted that since the matter before the Court is an application for conservatory orders the Court is not required to go into the merits of the petition but the Court only has to satisfy itself that a *prima facie* case exists which according to learned counsel does not exist and it has not been proved that unless the said orders are granted the petition will be rendered nugatory.

50. It was submitted that this Court lacks the jurisdiction and the petition is premature and amounts to judicial restraint on the Respondents' constitutional rights. It was submitted that the petition was brought both in the Petitioner's individual and juridical capacity but there is nothing to show that it was brought in the names of other people. Further there is no provision which is alleged to have been threatened or breached.

51. In an application for conservator orders, it was submitted the Court exercises discretionary powers and needs to balance the rights of the petitioner and the larger public and in reading the Constitution each Article must be read with others. To the learned counsel, in considering public interest component, Article 2 is the basis upon which Article 257 is being invoked by the promoters of public initiative with respect to exercise sovereignty directly which avenue was meant to enable the common man remove themselves from the fetters of the elected representatives and destine how they are to be rules.

52. Therefore in balancing the rights of the individuals the Court must take cognisance of the millions of Kenyans who want to exercise sovereignty and take into account Article 24 with respect to limitations of rights. Secondly, in exercise of the discretion, the conduct of the Petitioner must be considered. In this case the promoters made the declaration on 7th, July, 2014 and the process of collection of signatures have been going on for close to two months yet the petitioner filed the petition in August and wants the Court to believe that the matter is so urgent that it would violate his undemonstrated rights.

53. It was contended that in the exercise of the discretion the Court must consider whether notwithstanding Articles 23 and 165 of the Constitution, it can injunct a process committed under the Constitution to another organ of government. Further, it ought to ask itself whether it would be more injurious to deny the petitioner the orders sought or to less injurious if the Court allows the exercise of the guaranteed constitutional rights which have not yet crystallised. It was submitted that this is a process rather than an event and the process crystallises when IEBC formally becomes seized of the matter. In other words there are two processes – one leading to the submission of the draft and the second, being the popular initiative germinated by the general ideas which is not restricted. The signature collection, it was submitted is merely to demonstrate its popularity and trigger IEBC to become formally seised of the matter. It was urged that this is a process contemplated under the Constitution and there is no requirement to generate the Bill before the collection of the signatures. Under Article 257(4) and (5) of the Constitution, the Constitution commits the duty and responsibility to the IEBC which is the body entrusted to verify and deal with the Petitioner's complaint and not this Court.

54. It was these Respondents' case that there is no pleading or demonstration that anything has been denied the petitioner, no violation of any Article, no infringement alleged and no threats to any fundamental freedoms and on that score alone the application must collapse as it does not meet the threshold.

55. According to the 1st and 2nd Respondents, the replying affidavit sworn on their behalf captured the suggestions which were explained hence there is no nexus between the Petitioner and the alleged fraud. There was no indication that the promoters do not constitute individual persons. At this stage the promoters are only demonstrating that there is a popular initiative and how it will be framed in the Bill is speculative at this stage. To tem the process can only be subject of challenge after the same has been submitted to the IEBC hence the Court lacks the jurisdiction to entertain the petition and grant the orders sought herein.

56. The Court was urged to refrain from exercising prior judicial restraint as that would be pre-emptive as the parties ought to exhaust all the available avenues.

57. It was submitted that there is nothing in the Constitution which expressly or impliedly show that the Constitution cannot be amended during the transition period. To the contrary the replying affidavit shows instances when the said Constitution has been amended.

58. The court was therefore urged to find that the application is premature, speculative and invites the Court to enter an arena committed to another arm of government without demonstration of prejudice. To the respondents, the petitioner will have an opportunity to vote in the negative and the avenue is still available to challenge the powers of the IEBC or the process itself.

59. In support of his submissions, **Mr Oluoch** relied *inter alia* on **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR, 14, 15**, ***Wikipedia, the free Encyclopaedia on Prior Judicial Restraint***, **Organisation for a Better Austin vs. Keefe 402 US 415 (1971)**, US Supreme Court, **New Times Company vs. United States, 403 US 713**, (1971) at 1 & 6, Supreme Court of Canada, **The Attorney General of Canada vs. La Chaussure Browns' Inc. [1988] 2 SCR 712**, **Ghana Bar Association vs. Attorney General and Another (ABBAN CASE), Supreme Court Accra [2003-2004] SCGLR at 251, 252, 253, 254 & 255**, Uganda Constitutional Court, **Miria Matembe & Others vs. Attorney General (Constitutional Petition No. 2 of 2005 [2005] UGCC 3** and Petition 147of 2013, the **National Gender and Equality Commission & Others vs. Attorney General**.

3rd Respondent's Case

60. Submitting on behalf of the 3rd Respondent, **Hon. Judith Sijeny** asserted that the application was brought in bad faith, was frivolous and vexatious and was meant to frustrate the lawful process being conducted by the 1st Respondent supported by the 3rd Respondent in conjunction with the 2nd and the 4th Respondents. In learned counsel's view, the orders sought stood to infringe not only the rights of the 1st to 4th Respondents but also the rights of the common man because the initiative is not only supported by the 1st to the 4th Respondents but

other parties as well who were however not served and joined to the application. If granted, the common man's rights will be violated.

61. It was submitted that the Petitioner is seeking permanent orders which will paralyse the lawful legal excuse of the constitutional rights by the Respondents who stand to suffer irreparable loss and who have chosen the avenue provided under Article 1 of the Constitution. The Court was therefore urged to exercise discretion not to take away the sovereign power from the people to participate in the popular initiative. The Constitution, it was submitted, gives the power to amend the Constitution directly and the Court should not be compelled to force the Respondents to go through an alternative method which they have no desire to follow as they participate individually. It was contended that whereas the petition cites Article 255 of the Constitution, the said Article gives alternatives which are either parliamentary or by the people in accordance with Articles 256 and 257 respectively. The issues raised, learned counsel submitted, were only fears and malicious allegations by the petitioner which ought not to stop a lawful process.

62. The drafters of the Constitution, it was argued, were aware that it is not every day that people would agree on the amendment to the Constitution and if the petitioner does not wish to amend the Constitution he can participate in the referendum. It was submitted that the 1st and 4th Respondents are Kenyans who are protected under Article 38 and the Bill of Rights and the petition is trying to infringe their right of association and expression which is unlawful. It was submitted at so far the 1st to 4th Respondents have engaged in a transparent process and the Court was urged not to interfere since Article 257 has been complied with to the letter. The Court was urged not to be swayed by the petition who himself seek to amend the Constitution through the instant petition.

63. On the issue of the transitional parliament, it was submitted that the 11th Parliament has all the powers to do all that it desires as nothing in Schedule 6 states that the Constitution cannot be amended at this stage. If anything, it has already been amended and there is nothing to prove that only through Parliament can it be amended.

64. Since the 1st Respondent has engaged in public exercise, the people are aware of at the issues are and there is no evidence that anybody has been forced to engage in the exercise. Based on the decision in **Hon Njoroge Baiya & Others vs.The National Alliance & Another [2013] eKLR**, the Court was urged to exercise restraint and let the matter go to the 7th Respondent first before it can be corrected.

4th Respondent's Submissions

65. On behalf of the 4th Respondent, it was submitted by **Mr Okoth** that the Court has been treated to submissions on the main petition rather than the application for conservatory orders. He was of the view that the petitioner has not demonstrated any cause for the issuance of the conservatory orders.

66. Learned counsel was of the view that the Court was being asked to deal with a political question by entering into a political arena and take sides with political bodies before the Court. In support of his submissions he relied on **Ghana Bar Association vs. Attorney General and Another (supra).**

67. The Court was urged to look at the Constitution as a whole and find that the amendment of the Constitution is either in the form of a Bill or a general suggestion.

5th and 6th Respondents' Submissions

68. On behalf of the 5th and6th Respondents, **Miss Muchiri** and **Miss Onzare** respectively informed the Court that having considered the submissions made, they did not wish to submit and would reserve their submissions to a later stage in the proceedings.

7th Respondent's Submissions

69. The 7th Respondent on its part filed written submissions which were highlighted by its learned counsel **Mr Nyamodi**.

70. According to the 7th Respondent the contention that an amendment by popular initiative must be commenced by a Bill is not correct since Article 257(2) of the Constitution deals with general suggestion **or** a draft Bill and the word "or" does not elevate one method above the other since the promoters have a choice as to how the amendment is to be commenced. It was therefore submitted that in respect of the popular initiative, it has been commenced as envisaged by the Constitution.

71. It was further submitted that the Constitution vests in the 7th Respondent at Article 257(4) the power to verify that the initiative is supported by at least 1 million signatures and at Article 257(5) the 7th Respondent is vested with the ability to be satisfied to pass it to the County Assemblies. In learned counsel's view, the said provisions bestow a function which is not merely mechanical and since it is only when the matter is submitted that a draft Bill is required, it stands to reason that it is the duty of the 7th Respondent in discharge of its functions to determine whether the draft Bill has similar provisions by which the initiative was commenced and the 1 million signatures were collected. This mandate, it was contended is ordained exclusively on the 7th Respondent which is an organ of State and a creature of the Republic whose intention is to develop strong institutions and in deference to the Constitutional provisions the Court has adopted the attitude that in such instances the Court allows those bodies to discharge the functions bestowed upon them by the Constitution. Being a Chapter 15 Commission, the 7th Respondent by dint of Article 249(2) is only subject to the Constitution and the law.

72. In this case there is no allegation that there has been any conduct in violation of the Constitution or any provision of the law yet to properly invoke the Court's jurisdiction, it is

not enough to make allegations but there must be prima facie proof of allegation of violation of the Constitution.

Applicant's Rejoinder

73. In his rejoinder, **Mr Kibe Mungai**, submitted that this Court has jurisdiction under Article 165 as read with Article 23 of the Constitution According to him the Petition is brought under Articles 3 and 258 of the Constitution and Article 3(1) recognises the duty to uphold and defend the constitution which include the right to commence proceedings where there is actual or threatened violation thereof.

74. In his view, the collection of signatures without a Bill contravenes Article 258 of the Constitution and the Petitioner has the right to bring proceedings such as the instant one. The Petitioner, it was submitted is entitled to the publication of the Bill under Articles 10 and 38 whether or not he is supporting the same. Amendment being a dispute in rem, it was submitted that the same is for all Kenyans. Since transparency is a requirement, one cannot collect signatures in respect of a Bill which is ty to come.

75. It was submitted that the role of the 7th Respondent is to verify the signatures and not to reject the Bill for non-compliance.

76. In support of the submissions reliance was placed on **Diana Kethi Kilonzo & Another vs. the Independent Electoral and Boundaries Commission and 10 Others [2013] eKLR**, **Evans Nyambega Akuma vs. Attorney General and 2 Others [2013] eKLR**, **Tom Kusienya & 11 Others vs. Kenya Railways Corporation and 2 Others [2013] eKLR**, **Julius Chacha Mabanga vs. The Independent Electoral and Boundaries Commission [2013] eKLR**.

Determination

77. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

78. Before delving into the merits of the application, an issue of jurisdiction was raised. The issue of jurisdiction was extensively dealt with by the Court of Appeal in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** in which **Nyarangi, JA** while citing ***Words and Phrases Legally Defined*** – Vol. 3: I-N page 13 held:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of 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 the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of 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 the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

6. In that case the Court further held:

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

79. It is therefore from the point of jurisdiction that I intend to start my determination since without jurisdiction I have no option but to lay down my tools.

80. It was contended that the issues the subject of this petition are not justiciable since the issue herein is a "political question". Justiciability of a matter depends on the nature of the dispute whether the matter is one amenable to the judicial process or whether it is purely a "political question". A political question, it is recognised does not lend itself to scrutiny by courts of law. This was recognised by **Odoki, JA** (as he then was) in **Andrew LutakomeKayira and Paul KawangaSemogerere vs. EdwadRugumayo, Omwony Ojok, Dr. F. E Sempebwa& 8 Others Constitutional Case No. 1 of 1979** where it was held by the Court of Appeal of Uganda as follows:

> **"The removal of Prof. Lule from the office of the Presidency was a political act, which is not justiciable in courts of law but is reserved to political organs of the state. A political question is a question relating to the possession of political power of sovereignty, of government, determination of which is based on Congress and the President whose decisions are conclusive on the courts. The tribunal should be the last to overstep the boundaries, which limit its own foundation. And while it should always be ready to meet any question confined to it by the constitution it is equally its duty to take care not to involve itself in discussions, which properly belong to other forums. No one has ever**

doubted the proposition that according to the institutions of this country, the sovereignty in every state resides in the state, and that they may alter, and change their form of government at pleasure. But whether they have changed it or not by abolishing an old government, and by establishing a new one in its place, it is a question to be settled by political power. And when that power has decided, the courts are bound to take notice of its decision and follow it. Political questions are not settled on strict legal principles but rather on political considerations and expediency. But fortunately for freedom from political excitements in judicial duties the court can never with propriety be called on to be the umpire in questions merely political. The adjustment of these questions belong to the people and their political representatives, either in the state or general government. These questions relate to matters not to be settled on strict legal principles. These are adjusted rather by inclination or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone or mere naked power rather than intrinsic right."

81. Similar sentiments have been expressed by this Court in **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** where the Court expressed itself as follows:

"There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under political question doctrine which states that being political acts they are non justiciable and not reviewable by a court. It is the court's view that when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land…..In the court's view the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities hence the duty to act consistently with and according to the law. If public officers including the President fail to act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review. The protection given to the President under section 14 of the Constitution cannot be absolute and is only meant to protect the interest of the wider citizens who have a stake in the presidency or who have elected the president to be the symbol of unity and protection of collective and individual rights of all citizens. The constitutional provisions protecting the President from legal proceedings can be said to be against public policy when it is used in a manner likely to affect the interest of an individual or issues concerning human rights and

environmental protection which is meant for the greater public good. It is therefore, the duty of the High Court in that regard to say what is the law and those who apply the rule of absolute immunity must of necessity expound and interpret the rule in a broad manner likely to benefit the interest of the wider public and when two interests conflict with each other the court must decide on the operation of each. If the courts are to regard the constitution for the benefit of the citizens, it cannot be said the President is superior to the Constitution and to any other legislation…..The rationale for official immunity applies where only personal and private conduct by a president is at issue. It means that there shall be no case in which any public official can be granted any immunity from suit from his unofficial acts. There has been argument that unless immunity is available, the threat of judicial interference with executive branch through judicial review orders, potential contempt citations and sanctions would violate separation of powers principle. It is also alleged that the fear of answering to court for his actions would impair or limit the president's discharge of his constitutional powers and duties. On our part, we thinks that the President being a public servant represents the interests of the society as a whole and the conduct of his duties may adversely affect a wide variety of different individuals each of whom may be a potential source of current or future controversy. In some quarters the societal interest in providing the President with maximum ability to deal fearlessly and impartially with the public at large has long been recognised as an acceptable justification for official immunity. The immunity for the President in such circumstances is meant to forestall an atmosphere of intimidation that will conflict with his resolve to perform his designated functions in a principled fashion."

82. Therefore whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If public officers fail to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.

83. In this case, the issue for determination is whether the actions of the 1st to the 4th Respondents contravene or violate or threaten to contravene or violate the Constitution, the Supreme Law of the land. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it was held that it is the responsibility of the Court to ensure that executive action is exercised; that Parliament

intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

84. Article 165(3)(d)(ii) of the Constitution donates to the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

85. I wish to associate myself with the holding of **Mulenga, JSC** in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** to the effect that:

> **"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."**

86. I similarly agree with this Court's decision in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** where it was held that:

> **"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."**

87. In my view this holding is even more appropriate in cases where the Court is called upon to uphold the provisions of the Constitution.

88. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. See **Smith vs. East Elloe Rural District Council [1965] AC 736.**

89. The Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity. The old school of thought articulated by **Sir Charles Bacon**, that "Judges must be like lions, but yet lions who sit at the feet of the throne" has no place. Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits. See **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331.**

90. Having considered the Constitutional provisions under which the instant petition is founded I am not prepared to perform the last rites for this petition at this stage. Accordingly, based on the material before me I decline to hold that this Court has no jurisdiction to entertain this petition at this stage of the proceedings.

91. It was contended that since the political party to which the Petitioner belongs has taken a position adverse to the initiative in question, this petition is brought in bad faith and is hence malicious. The petitioner, it must be remembered, apart from belonging to a political party is first and foremost a human being with fundamental rights and freedoms and his being a member of a political party does not mean that his rights as a human being are necessarily curtailed, abridged or subsumed by the fact of his membership of a political party. Accordingly, I do not accede to the argument that since his political party has taken a position on the issue before this Court, to pursue his rights as an individual *per se* amounts to malice. Political parties in this country are vehicles through which politicians climb to the high offices of Members of Parliament and the mere fact that one has boarded a vehicle does not mean that one loses all his or her attributes as a person and merely becomes a passenger. The right to apply to the High Court under Article 165(3) of the Constitution is itself a fundamental right and it cannot be stifled, clogged or fettered except where the application violates fundamental principles of law. See **Labhsons Limited vs. Manula Hauliers Milimani HCCC No. 204 of 2003.**

92. The next issue for determination is the circumstances under which the Court grants conservatory orders.

93. 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 Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See **Centre for Rights, Education and Awareness (CREAW) & 7 others** vs. **The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.**

94. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

> **"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must**

> **"hold the scales of justice evenly not only between man and man but also between man and state."**

95. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

> **"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."**

96. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

> **"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

97. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

98. The first issue for determination is therefore whether the applicant has established a *prima facie* case. 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 applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

99. The applicant in this case has identified five issues for trial.

100. The first issue is whether the 1st to the 4th Respondents have locus standi to invoke Article 257 of the Constitution. It was contended that under Article 255(3) of the Constitution, the Constitution may be amended through Parliament pursuant to Article 256 and by the people and Parliament under Article 257. It was contended that before the people can amend the Constitution through popular initiative they must do it in conjunction with Parliament so that contrary to the popular belief, there is no procedure for amendment by referendum *per se*. The procedure by way of amendment is only arrived at where Parliament via Article 255(2)(b) and 257(8) fails to amend the draft presented to it hence the Bill for amendment does not come to the people unless Parliament fails to enact hence the procedure by of amendment by a referendum is a default mechanism. In learned counsel's view therefore Parliament or a section of it cannot initiate the process of amendment under Article 257 since Article 256 provides the procedure for doing so. Since the 2nd to 4th Respondents are not the people already in the popular initiative, they cannot initiate the process of Constitutional amendment. Similarly, the 1st Respondent, Okoa Movement, being an association of political parties is not an entity that can exercise the Constituent power. It was therefore contended that the promoters of this initiative have no locus under Article 1 of the Constitution to initiate the process.

101. What in effect the petitioner is contending is that since there are two modes of initiating a Constitutional amendment one of which the promoters of the initiative are purporting to exercise and which can only be exercised if the other initiative by Parliament fails, the promoters of the initiative being part of the Parliamentary initiative have no locus to initiate an amendment which ought to be a preserve of the people.

102. I have considered the relevant provisions of the Constitution and I am not prepared to find that this argument though fraught with difficulties in light of the provisions of Article 1(2) of the Constitution which provides that the people may exercise their sovereign power

either directly or through their democratically elected representatives, and may on the face of it appear rather convoluted is by no means unarguable at this stage.

103. The second issue is the collection of signatures in the absence of a draft Bill. It was contended that a reading of Article 257(4) clearly shows that the promoters of a popular initiative are to deliver the Bill and Signatures for verification. However under Article 257(2) and (3) the first step is the draft Bill or a general suggestion formulated into a Bill which step is followed by the collection of 1 million signatures of Kenyan voters. Thereafter is the delivery of the Bill and the Signatures to the Independent Electoral and Boundaries Commission (IEBC) for verification and eventual remission to the County Assemblies. It was therefore contended that the signature collection cannot be commenced in the absence of a Bill since an amendment cannot be effected without a Bill and the promoters are in the same position as a Member of Parliament seeking to amend the Constitution. Since the Bill in question must be Constitutional, it was submitted that the issues for amendment must be contained in a Bill.

104. The Respondents, on the other hand were of the view that the signature collection, is merely a process to demonstrate its popularity and trigger IEBC to become formally seised of the matter. It was urged that this is a process contemplated under the Constitution and there is no requirement to generate the Bill before the collection of the signatures

105. I have looked at Article 257(1), (2) and (3) of the Constitution and what they state on their face is that an amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters which initiative may be in the form of a general suggestion or a formulated draft Bill and where the said initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill. Whereas it is clear that a general suggestion is at some time required to be in the form of a Bill the parties are unable to agree on the stage at which the Bill is to be formulated. At this stage it cannot be said that the contention by the Petitioner that the signatures of the voters cannot be collected without a Bill being in existence is wholly unarguable. In fact the protagonists in this application have put forward strong arguments in support of their respective positions.

106. The third issue was whether during the transition period the Constitution can be amended. It was contended that since there is a clear framework in Schedule 5 of the Constitution for the implementation of the Constitution, the current Parliament being a transition parliament, all organs of the State must ensure the Constitution is implement at least during the transition period.

107. This argument, though attractive, was not hinged on any readily identifiable provision in the Constitution. To the contrary the Respondents were able to point out that the Constitution has in fact been amended. Whereas the Petitioner may at the hearing of the Petition be able to prove their point, at this stage no sufficient material has been placed before this Court on the basis of which the Court can find that this issue is arguable.

108. The fourth issue was the time at which the referendum should be held. It was contended that pursuant to Article 251(d) of the Constitution which provides that public funds be used prudently and responsibly, the referendum being for all practical purposes a general election

and since the Constitution does not provide for when it ought to be held but left the issue to Parliament, Parliament ought to consider the public interest and introduce a Constitutional amendment so that the referendum be held at the same time as the general election.

109. To the applicant an interpretation ought to be adopted in which the issues for a referendum may be prepared but the actual decision taken during the general election otherwise the probability of the country being permanently on election mode cannot be avoided.

110. Whereas this argument is equally attractive and may in some quarters be considered a prudent way of conducting affairs of the Country, no specific provision was cited in support thereof. The position seems to be more of an interpretation of the spirit of the Constitution and whereas the issue may not totally be wishful thinking, I am not convinced that at this stage the argument raise the issue to the level of a *prima facie* case.

111. It was further contended that there is an issue of the Constitutionality of Part V of the ***Elections Act***. This argument was not adequately developed to enable me make a determination whether or not a prima facie case has been established. Accordingly, I will say no more in respect thereof.

112. Having considered the foregoing, it is my finding that considering the totality of the issues raised, this petition raises *prima facie* arguable issues for trial. In other words it cannot be said that the petition is wholly frivolous or unarguable at this stage.

113. Having passed the first hurdle the second issue is whether the petitioner has satisfied the provisions of Article 23(3)(c) of the Constitution.

114. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.

115. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. From the petition, and this view was borne out by the submissions of **Mr Kibe Mungai** in his rejoinder, the Petitioner's *locus* seems to be derived from the provisions of Article 258 of the Constitution which provides for the right to institute court proceedings, where it is alleged that the Constitution has been contravened, or is threatened with contravention. The petitioner has not pointed out with reasonable exactitude the rights and fundamental freedoms in the Bill of Rights which he alleges to have been denied, violated or infringed or is threatened apart from the issue of public participation. In my view, an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

116. As was held in **Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago [1979] 3 WLR 63**:

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicants to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

117. Whereas the Petition may well succeed on the issue whether the actions being undertaken by the Respondents are Constitutional, that *per se* does not necessarily merit the grant of the conservatory orders under Article 23(3)(c) of the Constitution.

118. This is not to say that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is necessarily undeserving of the conservatory orders under Article 23(2)(c) of the Constitution. What I am saying is that the applicant must go further and show that his allegations bring him within the provisions of Article 22 as well. This Court has of course held that in general conservatory orders are orders in rem and not in personam. However the Constitution itself gives an indicator as to when conservatory orders may be granted.

119. Apart from that it is clear that at this stage the initiative is undergoing a process which if fulfilled will culminate into the referendum. Between now and the time the referendum is called by the IEBC, assuming we reach that stage, one cannot state with certainty that this petition shall not have been concluded. As was held in **CREAW Case** (supra), the applicant in these kinds of cases has to show that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. In order to satisfy the Court that the failure to grant the conservatory orders sought would prejudice him, the Petitioner ought to have shown that in all probability as opposed to mere possibility, by the time the petition is heard and determined the initiative would have gone beyond the reach of this Court. This, unfortunately the Petitioner has not satisfactorily evinced.

120. I also agree that a party seeking the conservatory orders must also do so as soon as the threat of violation to his rights is brought home to him. Where a party waits until the last

minute to bring the application, the Court may frown upon such conduct and may decline to grant such an applicant the reliefs he or she seeks.

121. In matters where there appears to be apparent competing interests and rights, the Court ought to invoke the principle of proportionality so as to balance the same in order to secure the rights and freedoms in question. The basis upon which conservatory orders/or interim relief are granted are requirements of balancing the interests of the parties and the need to preserve the subject matter of the claim. Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations. See **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743**.

122. In this case since what is going on is a process whose hour of reckoning is unknown, assuming that hour will come to pass, and may well take a considerable length of time to be realised taking into account such processes as the verification of signatures appended by the purported registered voters and approval by the requisite number of counties, the lesser evil would be not to interfere with the process at this stage. In fact **Mr Kibe Mungai**, appreciated that since the responses to the petition have been filed, the Petition itself may be heard and determined either in the course of this month or in early October. It is highly unlikely that the said process can be determined in the next three or so weeks. Even if the process were to be completed the Court would not be handicapped in granting appropriate relief to protect the Constitution of this country. There is nothing in my view that would bar this Court from carrying out its constitutional mandate when called upon to do so and where the circumstances warrant and justify such action. The courts, it has been held, must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to endanger serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience and that would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law. See **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146.**

123. Before concluding this ruling I wish to express my gratitude to counsel for the well-researched submissions which I have considered and if I have not expressly referred to each and every authority cited it may be due to the fact that the same may not be necessary for the determination of this application and not out of disrespect or lack of appreciation for their industry

124. It follows that the application dated 27th August, 2014 is unmerited.

125. Accordingly, the application is dismissed. The costs will be in the petition.

126. It is so ordered

Dated at Nairobi this 19th day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kibe Mungai for the Petitioner

Mr Oluoch for the 1st and 2nd Respondents

Hon Sijeny for the 3rd Respondent

Mr Ndubi for the 4th Respondent

Mr Mohamed for the 5th Respondent

Mr Kiprop for Miss Onsare for the 6th Respondent

Cc Patricia