Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 8196 (KLR) (Constitutional and Human Rights) (26 March 2021) (Ruling)

David Ndii & others v Attorney General & others [2021] eKLR

Neutral citation: [2021] KEHC 8196 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Law Courts)

Constitutional and Human Rights

Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & 2 of 2021 (Consolidated)

JM Ngugi, GV Odunga, J Ngaah, EC Mwita & TM Matheka, JJ

March 26, 2021

Between

David Ndii & others

Petitioner

and

Attorney General & others

Respondent

Ruling

1.In its ruling dated 08/02/2021, this Court, after due analysis of the applicable principles for the grant of conservatory orders to the facts of the instant case, fashioned a narrow conservatory order targeted at the Independent Electoral and Boundaries Commission (IEBC): It restrained the IEBC from facilitating and subjecting the Constitution (Amendment) Bill, 2020 (hereinafter referred to as "the Constitutional Amendment Bill") to a referendum, or taking any further action to advance the Bill, pending the hearing and determination of these Consolidated Petitions.

2.We then proceeded to hear the Consolidated Petitions on three consecutive days from 17th to 19th March, 2021 and reserved the delivery of the judgment therefrom on notice.

3.By a Motion on Notice dated 19th March, 2021, the Petitioners in Petition No. E400 of 2020 ("Applicants") have moved this Court for the following prayers:1.Spent.2.That this Court be pleased to vary, modify and/or enhance the conservatory orders issued on 8th February, 2021 to include an order against the 1st and 2nd Interested Parties herein i.e. the Speakers of joint Houses of Parliament restraining them, upon passing of the Constitution of Kenya Amendment Bill, 2020 from submitting to the President:(a)the Constitution of Kenya (Amendment) Bill, 2020 for assent and publication and(b)a certificate that the Bill has been passed by Parliament.3.Any other relief that this Honourable Court deems fit to grant.4.Costs of this Application.

4.The basis upon which the said orders are sought is that by the time the said interim orders were issued on 08/02/2021, the County Assemblies, were yet to debate the Constitutional Amendment Bill. However, the Applicants now argue that, by 1st of March, 2021, during the pendency of the Consolidated Petitions, over forty (40) County Assemblies debated and approved the impugned Constitutional Amendment Bill and subsequently forwarded certificates of approval to the joint houses of Parliament by dint of Article 257(6) of the Constitution. The Applicants contend that the Constitutional Amendment Bill has now been tabled before the joint houses of Parliament for debate and approval, and that Parliament has already started considering it and has called for public participation requiring submissions of memorandum to reach it by 5th of March, 2021, now past. According to the Applicants, following the conclusion of receiving public views, the only remaining task is for Parliament to debate and vote on the impugned Constitutional Amendment Bill.

5.The Applicants are, however, apprehensive that in the prevailing political climate, there is a high likelihood that the said Constitutional Amendment Bill will be approved and forwarded to the President for assent and publication by dint of Article 256(3) before judgment in the Consolidated Petitions is delivered. In the Applicants' view, whereas the said conservatory orders only anticipated a scenario where the Constitutional Amendment Bill would be subjected to a Referendum, there is a real threat, that by dint of Article 256(5), once the Constitutional Amendment Bill is presented to the President, he might assent to the same if he forms the opinion that the proposed amendments do not relate to the protected clauses under Article 255(1) of the Constitution. The Applicants note that there is no known criteria and/or legal framework to guide the President in making the determination under Article 256(5) on

whether the proposed amendments relate to Article 255(1). Hence, the Applicants worry that this is left purely to the President's discretion and opinion.

6.The Applicants are apprehensive that once the President assents to the Constitutional Amendment Bill, it shall become not only law, but also part and parcel of the Constitution whose validity and/or legality will automatically be excluded from challenge by or before any Court of law by dint of Article 2(3) of the Constitution. Should that happen, the Applicants contend, the Consolidated Petitions and the pending judgment shall have been rendered nugatory, moot, obsolete and an academic exercise. According to the Applicants, the impugned Constitutional Amendment Bill, having been tabled before the joint houses of Parliament and the people of Kenya not being in control of Parliament's calendar and schedule, the said Bill could be passed and forwarded to the President in a matter of days as there are no Standing Orders that provide the minimum period within which the Constitutional Amendment Bill must be considered, debated and passed.

7.The Applicants' view is that this Application does not in any way seek to interfere with the legislative role of Parliament but to avert a looming threat and/or contravention of the Constitution. Hence, they argue, it is in the interest of justice and public interest that the Application herein be allowed pending the delivery of judgment on the Consolidated Petitions and that no party at all in the Consolidated Petitions will likely suffer any prejudice if the orders sought are granted. According to the Applicants, the President, who has taken a lead role in the conception and promotion of the Constitutional Amendment Bill would not hesitate to assent to the same hence their apprehension.

8.The Application was supported by the Petitioner in Petition E416 of 2020. According to the Petitioner, given the hurried manner in which the promoters of the Constitutional Amendment Bill, led by the President, have pushed their quest to amend the Constitution, there is a likelihood that the President will hurriedly isolate the amendments which do not require a referendum and assent to them to frustrate the various Petitioners who have questioned the process in the Consolidated Petitions.

9.According to the said Petitioner, the President's non-compliance with Court orders is well documented thus making it totally necessary that the Court issues a conservatory order to seal any "loopholes" that the President may exploit to defeat the orders issued on 8th February, 2021. The Petitioner proceeded to set out instances which, in the Petitioner's view, exemplify disobedience of Court orders by the President and contended that by issuing the conservatory order sought, this Court will be sending an unequivocal message to the President that he is not above the law more so the Constitution which establishes the very office that he occupies.

10.The Petitioner in Petition E416 of 2020 is similarly of the view that no prejudice will be suffered by the promoters of the Constitutional Amendment Bill, if the orders sought are granted. It was this Petitioner's view that this Court is mandated by the Constitution to protect and promote constitutionalism and the Constitution itself and one of the tools of achieving this objective is by way of conservatory orders.

11.The Application was also supported by the Petitioner in Petition No. 2 of 2021 and Kenya Human Rights Commission, an amicus curiae.

12.The Application was, however, opposed by the Petitioner in Petition E426 of 2020. According to him, Article 256(4) of the Constitution provides that subject to Article 256(5), the President shall assent to a Constitutional Amendment Bill and cause it to be published within thirty days after the Bill is enacted by Parliament. This stipulated period, the Petitioner argues, starts running from the date of passage of the Constitutional Amendment Bill by Parliament and not when the Bill and the Certificate are formally submitted to him. Accordingly, restraining the Speakers of Parliament from submitting to the President

an enacted Constitutional Amendment Bill and its accompanying compliance certificate does not prevent the President from proceeding with his constitutionally-mandated duties under Article 256(4) of the Constitution. The Petitioner in Petition E426 of 2020, therefore, contended that in the prevailing circumstances, the Application dated 19th March, 2021 does not in any way achieve its intended objective, and is, quite literally, a waste of the precious time of both this Honourable Court and the Parties in the Consolidated Petitions.

13.According to the said Petitioner, since this Court has no power to extend the time within which the President is required to undertake his constitutional duties under Article 256(4), a variation of the existing conservatory order, with the effect of purporting to extend the 30-day period within which the President is to so act, would indeed be void to the extent of purporting to extend that 30-day period.

14.In the foregoing premises, Petitioner in Petition E426 of 2020, argued that the only recourse available to forestall the fears inherent in the instant Application is for the Court to arrive at its determination as soon as possible – preferably before Parliament approves the Constitutional Amendment Bill.

15.As regards the effect of Article 2(3) of the Constitution, the Petitioner in Petition E426 of 2020 contended that any President assenting to a constitutional amendment approved by Parliament, but not subjecting it to a referendum as required under Article 255(1) of the Constitution does not succeed in affording that amendment constitutional protection under Article 2(3). The Petitioner argues that in this scenario, such an assent would be in contravention of the Constitution and, therefore, invalid by dint of Article 2(4) of the Constitution.

16.Based on the foregoing, the said Petitioner argued that the Applicants' apprehension is misplaced as this Court is clothed with jurisdiction, via Article 165(3)(d) (ii) of the Constitution to hear and determine 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.Therefore, this Court upon finding that the President contravened Article 256(4), by failing to subject the Constitutional Amendment Bill to a national referendum, as required by Article 256(5), would invalidate the said presidential assent and publication, leaving the Constitutional Amendment Bill just that – a constitutional amendment bill -- and not part of the supreme law of Kenya.

17.The Application was opposed by the Attorney General on the following grounds:1)The Application offends the doctrine of Separation of Powers between the 3 arms of Government by interfering with matters properly regulated by Article 257 of the Constitution of Kenya, 2010.2)It's clear from a reading of Article 257 of the Constitution, a County Assembly is mandated to approve the draft Bill within 3 months after the date of receipt from IEBC. After the County Assemblies deliberate on the draft Bill, the speaker of the County assembly is required to deliver a copy of the draft Bill jointly to the speakers of the two Houses of Parliament, with a certificate that the County Assembly has approved it.3)Once a draft Bill has been approved by a majority of the County Assemblies it is introduced in Parliament without delay. If the Bill is voted for by a majority of members, it shall be submitted to the President for assent. Where either House of Parliament fails to pass the Bill, or if it relates to a matter mentioned in Article 255(1) the proposed amendment shall be submitted to the people in a Referendum.4)Where a legislative body is executing its mandate properly within the law, the court ought not, in all fairness interfere in the process.5)The Respondents are bound by law to perform their duties in a manner that protects the Constitution and promotes democratic governance in the Republic.6)The grounds upon which the Application is based on are speculative hence unjust and unenforceable.7)The Notice of Motion Application urges the court to extend time in which the President can undertake his Constitutional duties under Article 256(4) of the Constitution, powers which the court does not have.8)Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,

2013 also known as ‘the Mutunga’ Rules provides that the courts shall in exercise of its jurisdiction facilitate the just, expeditious, proportionate and affordable resolution of cases.9)The court already delivered its ruling in this matter on 18th February 2021 and therefore this Application is an afterthought meant to delay determination of the Petition.10)On 18th February 2021, the 1st Respondent filed a Notice of Appeal against the Ruling and decision of the court delivered on 18th February 2021 and therefore the current Application seeking to vary, modify/enhance the same Ruling and decision is untenable.11)The Petitioner’s Notice of Motion Application does not satisfy the threshold for grant of conservatory orders in Public Law matters as set out by the Supreme Court in Gatirau Munya vs Dickson Mwenda Githinji & 2 others [2014] eKLR.12)The applicant has not demonstrated any prejudice that could be suffered if the said orders were denied.13)The Motion is grossly misconceived in law, fatally defective and ought to be struck out.

18.In the Honourable Attorney General’s submissions dated 23/03/2021, he summarized his objections into four:a.First, that the Application offends the doctrine of separation of powers between the three arms of government because, he contends, granting the Application would require the Court to restrain Parliament from exercising its constitutional mandate textually granted by the Constitution. In this regard, the Hon. Attorney General relied on Jayne Mati & Another v the Attorney General & Another (Nairobi Petition 108 of 2011); Justus Kariuki Mate v Martin Nyaga Wambora [2017] eKLR.b.Second, that there are no constitutional violations demonstrated by the Applicants to warrant the variation of the conservatory orders; and further that the Application is merely speculative and does not meet the threshold of specificity required by the doctrine expounded in Annarita Karimi Njeru v Republic (1979) KLR 154. The Honourable Attorney General also relied on Stephen Kubai v Mikelina Amatu [2006] eKLR.c.Third, the Honourable General argued that the Court has no jurisdiction to grant the orders sought because they are res judicata by dint of the ruling of this Court dated 08/02/2021. The Honourable Attorney General also argued that the Court is functus officio. In this regard, he cited John Florence Maritime Services Ltd v Cabinet Secretary for Transport and Infrastructure [2015] eKLR and Nguruman Ltd v Shompole Group Ranch & Another [2014] eKLR.d.Fourth, the Honourable Attorney General argued that the Applicants are not entitled to the orders sought because, he argued, the Applicants have failed to prove their case on merit. The Honourable Attorney General relied on Peter Gatirau Munya v Dickson Mwenda Githinji [2014] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR to argue that the evidential threshold for the grant of conservatory orders has not been reached in this case.

19.In opposition to the Application, the Speaker of the National Assembly filed the following grounds of opposition:1.The Petitioner's Application dated 19th March, 2020 is premature and speculative because the Application is anticipating the processes that have to be undertaken by Parliament before a Bill is passed. The Application should therefore await the outcome of the legislative process.2.The Petitioner seeks to second-guess the mandate of the National Assembly with respect to the enactment of the Constitution of Kenya (Amendment) Bill, 2020. The Applicant herein calls upon this Honourable court to engage in abstract arguments contrary to the law.3.It is evident from the Application filed herein, that there is no new and important matter that had arisen, to warrant this Court, to interfere with the orders granted by this Honourable Court on 8th February, 2021.4.The issues being raised by the Applicant in the instant Application were issues well within its knowledge. The Application therefore fails to meet the threshold of exceptional circumstances established to enable this Court exercise its jurisdiction to vary its Orders made on 8th February, 2021.5.The Application is inviting this Honourable Court to substitute its clearly expressed intention in the Ruling dated 8th February, 2021 without any justifiable grounds.6.Further, the Petitioner's apprehensions have been addressed by the Court at paragraphs 56 and 60 of the Ruling delivered on 8th February, 2021.7.Although, Rule 25 of the Mutunga Rules provides that courts may vary, set aside or discharge orders issued under Rule 23 of the said Rules, this power must be exercised with great caution and is ordinarily only exercised to correct an error or oversight or to

effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties. The Applicant has not pointed out the error and/or oversight that needs to be corrected in the Ruling delivered by the Court on 8th February, 2021.8.Granting an order restraining the 1 st and 2nd Interested parties from submitting to the President upon passing of the Constitution of Kenya (Amendment) Bill, 2020, for assent and publication and a certificate that the Bill has been passed by Parliament may amount to usurping the powers of the 1st and 2nd Interested Parties.9.Under Article 257 (9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5). The word "shall" in the said Article imports a form of command or mandate. It is not permissive, it is mandatory.10.The Petitioner's Application is an affront to the Constitution of Kenya, the doctrine of separation of powers and an encroachment on the legislative mandate of Parliament.11.In view of the foregoing, the Petition herein is premature, frivolous, it is an outright abuse of the court process and is generally argumentative hence disentitling the Petitioner from the reliefs sought and should be struck out with costs.

20.The Speaker of the National Assembly also filed Submissions dated 24/03/2021. In it the Speaker argues that there are no cogent reasons to vary, modify or enhance the orders of the Court; and that the Application is premature and speculative since it is based on “the prevailing political climate” that the Bill will be approved. This, the Speaker argues, does not meet the high threshold required for the grant of conservatory orders. Like the Honourable Attorney General, the Speaker of the National Assembly has also raised objections based on the doctrine of res judicata and separation of powers.

21.The Application was similarly opposed by the Speaker of the Senate based on the following grounds:-1.That the Application infringes on the powers of Parliament under Article 94, 95, 96 and 257 of the Constitution.2.That the assent of the Constitution of Kenya (Amendment) Bill, 2020 by the President will not render this Honorable Court's judgement nugatory or obsolete as this Honorable Court has the power and reserves the right to determine the constitutionality of the entire constitutional amendment process that's ongoing.3.That the Application is res judicata as the issues raised and orders sought have already been determined by this Honorable court in its ruling of 8th February, 2021.4.That there is no change of circumstances to warrant this Court exercise of its discretionary powers to vary its orders of 8th February, 2021.5.That this Honorable Court lacks the jurisdiction to entertain the Application because the issues being raised and orders being sought have not been pleaded in the Petition nor was it submitted on.6.That the Application is an attempt to amend the Petition through the backdoor.7.That the substratum of the Application seeks to review the orders granted by this Honorable yet it is disguised as an Application for variation or modification of the conservatory orders issued on 8th February, 2020. Thus, Court lacks jurisdiction to entertain this Application.8.That this Application is based on assumption that Parliament shall pass the Constitution of Kenya (Amendment) Bill, 2020 and that the President shall assent to the Bill. The Bill is still under consideration by Parliament and there is no guarantee that the Bill will be passed by Parliament as contemplated by the Applicant.9.That the Application does not disclose any violation of the Constitution to warrant the intervention of this Honorable Court and there is no justiciable cause of action.10.That the Application is premature as there is no specific period or timelines within which Parliament shall consider and pass or reject Constitution of Kenya (Amendment) Bill, 2021. It is possible that this Honorable Court shall have determined issued raised in the consolidated Petitions and issued its judgement before Parliament finalizes consideration of the Bill before it.11.That based on the foregoing, the Application herein lacks merit, it is frivolous, generally argumentative and an outright abuse of the court process and ought to be dismissed with costs.

22.The Speaker of Senate also filed Submissions dated 23/03/2021 in which he argued that there has been no change of circumstances to warrant the modification or variation of the orders granted by the Court on 08/02/2021. The Speaker also objected to the Application based on the doctrine of res judicata.

23.The above position by the Honourable Attorney General and the two Speakers was similarly adopted by Building Bridges To A United Kenya Taskforce - National Secretariat; Steering Committee and Raila Amollo Odinga, who based their opposition thereto on the following grounds:1)That the Notice of Motion Application is a mere afterthought, an abuse of the Court process and merely meant to embarrass, drag and delay the hearing and determination of the Petitions herein on merit for reasons that:a.The Orders sought are resjudicata and the Court is being invited to reopen and second guess itself on its decision rendered on 8th February, 2021.b.The Conservatory Orders sought herein are not pegged on a violation or threatened violation of any specifically stated right in the Bill of Rightsc.The Orders sought herein are in vain and inconsequential in the context of this Petition and/or proceedings and the President has no role whatsoever in determining whether or not a referendum ought to be conducted.d.The conduct of a referendum in a popular initiative, under Article 257 (9) and (10) of the Constitution of Kenya, 2010 is neither dependent on the Parliamentary debate nor the Presidential assent. The same is also not dependent on communication from either Speakers.e.The conduct of a referendum under Article 256 of the Constitution is dependent on the Presidential assent.2)That this Court has already pronounced itself in its Ruling of 8th February, 2021, on its powers and affirmed that it has powers to annul the end process should any contravention of the Constitution be proven. The Application herein is a mere afterthought and the Court is being invited to express and pronounce its lack of confidence in its previous decision in its Ruling whereby it held that it has powers to annul the entire process, should it be demonstrated that there are violations of the Constitution.3)That issues raised in the present Application are res judicata, conservatory orders subsist herein and the Applicants herein were all along aware and alive to the provisions of Articles 257 of the Constitution and the powers of the President and the respective roles of the Speakers in the constitutional amendment process under a popular initiative.4)That it is an absurdity and cowardice for the Petitioners/ Applicants to seek to persuade the Court herein to accede to their requests by holding that it does not have any such powers over Parliamentary debate and processes and that it does not have any such power over the President to assent or reject a Bill presented to him.5)That the Court cannot injunct and/or interfere with the Parliamentary debate and/or the President under Article 257 of the Constitution of Kenya, 2010, and hence the Court ought to exercise judicial restraint and refrain from injuncting the Speakers of the Senate and the National Assembly from exercising and discharging their Constitutional administrative mandate in the legislative process. The Applicants are merely inviting the Honourable Court to subvert the sovereignty of the people by sabotaging the works of other State organs so as to avoid the provisions of Article 2 (3) of the Constitution of Kenya, 2010.6)That the Applicants have not demonstrated any violation and or contravention of any fundamental right and freedom and or basis founded on any such right in the Bill of Rights or any allegation based on their Petition in Petition E400 of 2020 to warrant the pegging of the instant Application on the provisions of Article 23 of the Constitution of Kenya, 2010.7)That the Applicants, a political party and its membership, are merely using this Court as a weapon and part of the Applicants' armoury in a political war.

24.The BBI Taskforce, Secretariat and Raila Odinga filed submissions dated 24/03/2020 in opposition to the Application. They argue that the orders sought in the Application are res judicata and that the orders sought are not pegged on a violation or threatened violation of any specifically-stated right in the Bill of Rights. In this regard, the three Respondents argued that the exhibits presented in support of the Application do not meet the requirements in Rule 9 of the Oaths and Statutory Declarations Rules because they are not authenticated on by a Commissioner for Oaths. The exhibits, the three Respondents argue, also violate sections 79-82 of the Evidence Act (Chapter 80 of the Laws of Kenya) on the production of public documents.

25.The BBI Taskforce, Secretariat and Raila Odinga also argue that the Applicant is using the Court “as a weapon and part of the Applicants’ armoury in a political war.” They relied on Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR; Kenya Commercial Bank Ltd v Muiri Coffee Ltd

[2016] eKLR; Francis Mbalanya v Cecilia Waema [2017] eKLR; Fredrick Mwangi Nyaga v Garam Investments [2013] eKLR; Cultivate Technologies Ltd v Siaya District Cotton Farmers Cooperative Union [2004] eKLR; Jeremiah Nyangwara Matoke v IEBC [2017] eKLR; In the Matter of the Speaker of Senate [2013] eKLR; Commission for the Implementation of the Constitution v National Assembly [2013] eKLR.

26.On their part, the Independent Electoral and Boundaries Commission (IEBC) adopted a neutral position. It, however, urged this Court to be mindful of the fact that the questions to which this Court is called upon to determine are weighty, unique and monumental in our nascent constitutional democracy.

27.We have considered the issues placed before us as set out hereinabove and the various submissions filed by the parties pursuant to our directions.

28.In our ruling of 8th February, 2021, we were of the view that based on the material placed before us we could not state with certainty that the County Assemblies and Parliament would, in arriving at their respective decisions, contravene the constitutional provisions. Accordingly, it would have been speculative to base our decision on the manner in which the said organs were likely to undertake their constitutional mandate. Whereas the train has now left the station in so far as the County Assemblies are concerned, as regards Parliament the position remains the same. Accordingly, we find no compelling reason to depart from our earlier findings in so far as Parliament is concerned.

29.We, however, found that if the Constitutional Amendment Bill was to be passed in a referendum, the substratum of these Petitions would be substantially altered and the reliefs that this Court is being called upon to grant, based on the instant Petitions, might well be merely academic. Therefore, while we declined to interfere with the legislative processes in the County Assemblies and Parliament we held that this Court has the power to intervene even at the tail end of the process.

30.Articles 255 and 256 of the Constitution provide as hereunder:255.(1)A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—(a)the supremacy of this Constitution;(b)the territory of Kenya;(c)the sovereignty of the people;(d)the national values and principles of governance referred to in Article 10(2)(a) to (d);(e)the Bill of Rights;(f)the term of office of the President;(g)the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;(h)the functions of Parliament;(i)the objects, principles and structure of devolved government; or (j) the provisions of this Chapter.(2)A proposed amendment shall be approved by a referendum under clause (1) if—(a)at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and(b)the amendment is supported by a simple majority of the citizens voting in the referendum.(3)An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—(a)by Parliament, in accordance with Article 256; or(b)by the people and Parliament, in accordance with Article 257.256.(1)A Bill to amend this Constitution—(a)may be introduced in either House of Parliament;(b)may not address any other matter apart from consequential amendments to legislation arising from the Bill;(c)shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House; and (d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two-thirds of all the members of that House.(2)Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill.(3)After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—(a)the Bill, for assent and publication; and(b)a certificate that the Bill has been passed by Parliament in accordance with this Article.(4)*Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.*(5)*If a Bill to amend this Constitution proposes an amendment relating to a matter specified in*

*Article 255(1)—*(a)*the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and*(b)within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255(2), the President shall assent to the Bill and cause it to be published.[Emphasis added].

31.It has been argued that the President does not have to wait for Parliament to comply with Article 256(3) of the Constitution in order for him to assent to and publish the Constitutional Amendment Bill. Article 256(3) enjoins the Speakers of the two Houses of Parliament, upon the passage of a constitutional Amendment Bill, to jointly submit to the President the Bill, for assent and publication and a certificate that the Bill has been passed by Parliament in accordance with the said Article. We are unaware of any other lawful means through which the President can be certain that Article 256 has been complied with other than through compliance with Article 256(3) of the Constitution, but we say no more on this issue.

32.It is urged that from a textual reading of Articles 255 and 256 of the Constitution, the decision as to whether the Constitutional Amendment Bill will go to the referendum depends on the President's view of the Bill vis-àvis the said Articles. While Article 256(5) of the Constitution does not expressly state so, since the issue is not properly before us, we wish not to delve further on it.

33.It is however argued that in the event that the President takes the view that the said Bill does not touch on the protected Articles of the Constitution that requires a referendum, he may well proceed to assent to the same thus triggering Article 2(3) of the Constitution. Article 2(3) provides that:The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

34.This constitutional provision has the effect of insulating the validity or legality of the Constitution from being questioned before a Court of law. As to whether questioning the process leading to the presidential assent to a Constitutional Amendment Bill once given is the same as challenging the validity or legality of the Constitution, is again a matter that is not properly before us in the Consolidated Petitions. While the parties herein are not all agreed as to the effect of the presidential assent, the Applicants' apprehensions are not unfounded: the Applicants are simply saying that the view that presidential assent might inoculate the new constitutional amendments from legal challenge is a reasonable one which may well prevail hence irrevocably defeating the core of their claims in the Consolidated Petitions before this Court. It is a risk, they essentially argue, that they are not willing to take given the implications for the Constitution and the prevailing Social Contract Kenyans have with the State.

35.The Respondents, however, contend that the Application is premature and speculative as there is no evidence that the President conducted himself in such a manner as to clearly indicate that he will not seek the constitutionally required approval of the people in a national referendum, when circumstances require that he so does. In other words, it is contended that no crystallised threat is, as yet, evident.

36.In our view, a relief based on a threat of contravention of the Constitution or violation of a fundamental right or freedom cannot be denied simply on the basis that the supplicant has not proved that the Respondent intends to violate the Constitution or fundamental rights and freedoms. As long as a person presents reasonable apprehension based on credible evidence of the likelihood of the impugned action and where the apprehended happening is likely to lead to irreparable or irrevocable consequences if they were to occur, this Court cannot overlook that apprehension that the Constitution is likely to be violated or that person's fundamental rights and freedoms are likely to be contravened. The Court ought not just twiddle its thumbs or wring its hands and mutter, perhaps breathlessly, that the Court is helpless as long as the Respondent has not given any indication that he intends to contravene

the Constitution or violate the fundamental rights or freedoms of that person. Where it is credibly demonstrated, as has been done in this Court, whether rightly or wrongly, that the Respondent has two options, one of which if taken is likely to lead to the apprehensions coming to reality, in our view, it would be better for the Court to err on the side of caution. The case for this course of action is strengthened where, as here, no serious prejudice – other than passage of time – is visited on the Respondent. We note that this prejudice can be substantially mitigated by the Court expeditiously pronouncing itself on the substantive issues before it – a course this Court has taken in order to forestall any constitutional anxieties. The Court has a solemn and sacred duty to preserve the subject matter of litigation and prevent it from being irrevocably altered in a manner over which there may be no adequate remedy at law – especially where the potential harm to Respondents can be minimized or mitigated by an expedited hearing schedule or delivery of judgment. In the present case, we note that a full-blown trial has already taken place and only a judgment on the merits is awaited.

37.We are also urged not to grant the orders sought in this Application based on the ground that the matters herein are res judicata. With due respect we disagree. In our view, conservatory orders may be applied for or varied at any stage of proceedings as long as the circumstances permit. This is our understanding of Rule 25 of The Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 which provides that:An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on Application by a party dissatisfied with the order.

38.In this case, it is submitted that the circumstances prevailing at the time we issued our decision of 8th February, 2021 are not the same as the present circumstances. We have also considered the submissions made particularly with respect to the effect of Article 255(1) as read with Article 256(4) and (5) of the Constitution in light of Article 2(3) of the Constitution. While we are unable to make conclusive findings and determinations either way, we cannot say that the submissions are frivolous.

39.It is further contended that since the timelines for the assent and the publication of the Bill are constitutionally mandated this Court has no power to either abridge or extend the same. Without necessarily deciding the issue, prima facie, Article 256(4) of the Constitution only expressly deals with the assent and publication of the Constitutional Amendment Bill. Unlike Article 116 of the Constitution which expressly provides for the coming into force of the amendment, Article 256(4) is silent on the issue. It may well be that the apparent lacuna was deliberate to give a window of opportunity for any aggrieved person to take the necessary steps to challenge a Constitutional Amendment Bill as assented to before Article 2(3) of the Constitution kicks in where, for example, the President purports to assent to a Constitutional Amendment Bill which has not been constitutionally enacted. We, however, wish to say no more on the matter.

40.In this case, the parties herein have submitted their dispute for determination by this Court and the matter is pending the delivery of judgment. In the Nigerian Court of Appeals decision of Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008], it was held that:It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore…parties who have submitted themselves to the…jurisdiction of courts must act within the dictates of equity.

41.It is generally agreed that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event, as opined by the Nigerian Court of Appeal in United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005], the Court ought to ensure that:appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any

judgment or order.

42.Article 23 of the Constitution provides that a court "may grant appropriate relief" when confronted with rights violations. Under the said Article, the Applicant is entitled to “appropriate relief” which means an effective remedy, for without effective remedies for breach or threatened breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in Fose vs. Minister of Safety & Security [1977] ZACC 6:Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

43.Having considered the rivalling contentions made by the parties herein, as we held in our ruling dated 8th February, 2021, this Court has the power to intervene at the tail end of the process under scrutiny. According to the Applicants, in this case there are two possible tail-ends. The first tail-end was considered by ourselves in our ruling dated 8th February, 2021: this is where the Constitutional Amendment Bill is subjected to a referendum. The invitation by the Applicants in the present Application is for the Court to consider the alternative tail-end: this is where the President determines that all the matters canvassed in the Constitutional Amendment Bill are not protected matters under Article 255 and that, therefore, they do not need to be sent for a referendum. The invitation is for the Court to fashion a conservatory order to cater for that tail-end rather than simply hope that the view taken by the President that no referendum is needed and that a presidential assent does not irrevocably inoculate any constitutional amendment from challenge under Article 2(3) would not find favour with the Court in a subsequent action.

44.Accordingly, the order which commends itself to us as the appropriate relief in the circumstances to preserve the subject matter of the Consolidated Petitions, and which we hereby grant, is that the assent contemplated under Article 256(4) of the Constitution, if it were to be given to the Constitutional Amendment Bill, 2020, shall not come into force until the determination of these Consolidated Petitions.

45.For avoidance of doubt, the orders issued on 8th February, 2021 remain in force.

46.The costs of this Application will be in the cause.

47.It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH, 2021.....JOEL M. NGUGIJUDGE.....G. V. ODUNGAJUDGE.....NGAAH JAIRUSJUDGE.....E.C. MWITAJUDGE.....MUMBUA T. MATHEKAJUDGE**