



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CONSTITUTIONAL PETITION NO. E004 OF 2022**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 24, 38, 101, 258 AND 259 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 14 OF THE POLITICAL PARTIES ACT**

**BETWEEN**

**PETER KIBE MBAE.....APPLICANT**

**VERSUS**

**SPEAKER, COUNTY ASSEMBLY OF NAKURU & ANOTHER .....RESPONDENTS**

**THE REGISTRAR OF POLITICAL PARTIES & 49 OTHERS ..... INTERESTED PARTIES**

**RULING**

1. In a Petition dated 25/02/2022, the Petitioner, a Member of County Assembly of Nakuru County, seeks the following prayers:

*(a) A declaration that to the extent that section 14 of the Elections Act requires a sitting Member of the County Assembly and the National Assembly to resign from their respective seats as a precondition to moving from one political party to another for purposes of an election within the timelines set by the law and the Independent Electoral and Boundaries Commission for such change of membership ahead of a General Election, the said section is unconstitutional null and void and of no effect for violating article 38(3)(c) as read with article 24(1) & (2) (c) of the Constitution.*

*(b) A reading in order in Section 14 of the Political Parties Act that a Member of Parliament or a County Assembly who resigns from one political party to the other on the last day of the times lines set by the law and the Independent Electoral and Boundaries Commission for purposes of participation in a general Election need not thereby resign from and/or lose his seat by reason of such change of party membership.*

*(c) A conservatory order directed to the 2<sup>nd</sup> to 50<sup>th</sup> Interested Parties from declaring as a vacant a seat of any member who moves from one political party to the other on the date set by the Independent Electoral and Boundaries Commission as the final date for verification and closure of party membership registers for purposes of the General Election scheduled for 09/08/2022.*

*(d) Costs of the incidental to this Petition.*

*(e) Such other or further order as the Court may deem just and expedient.*

2. Simultaneously, the Petitioner filed a Notice of Motion seeking the following interlocutory prayers:

1) *–Spent –.*

2) *That the Substantive Petition filed herewith a hearing date on priority basis and the directions towards that priority hearing be issued accordingly.*

3) *That in the meantime, pending the hearing and determination of the petition filed herein a Conservatory order be and is hereby issued directed at the 2<sup>nd</sup> to 50<sup>th</sup> Interested Parties from declaring as vacant a seat of any member who moves from one political party to the other on the date set by the Independent Electoral and Boundaries Commission as the final date for verification and closure of party membership registers for purposes of the general election scheduled for 9/08/2022.*

4) *That the Costs of this Application be in the cause.*

3. The matter was certified urgent on 25/02/2022 with the directions that the Petitioner serves the Respondents and Interested Parties and return for directions *inter partes* on 08/03/2022. The Petitioner duly served and counsel for the Petitioner and the Respondents appeared before me for directions on 08/03/2022. I directed the Respondents and Interested Parties to file their responses to the Petition and Application within two days; and for the Petitioner to file their Written Submissions to the Application within two days of service. The Respondents and Interested Parties were to file their Written Submissions within two days of service.

4. In addition to addressing the prayers for conservatory orders in the Notice of Motion, I directed the parties to address the question whether the Court should certify the matter as one raising a substantial question of law under Article 165(4) to warrant the empanelling of a multi-judge bench by the Honourable Chief Justice.

5. I set 15/03/2022 as the date to confirm compliance in order to reserve a date for a ruling. On that day, the parties appeared before me and confirmed as follows:

a. The Petitioner had, through his lawyers, filed Submissions as directed.

b. The 1<sup>st</sup> Respondent, through its lawyers, had filed a Notice of Preliminary Objection and a Replying Affidavit sworn by the Speaker of the Nakuru County Assembly. It had also filed Submissions.

c. The 2<sup>nd</sup> Respondent had filed his entry of appearance and Submissions.

d. The 2<sup>nd</sup> Interested Party, the IEBC, had filed its Submissions.

e. The 50<sup>th</sup> Interested Party had entered appearance through its lawyers but did not file any other documents.

f. Counsel for the 22<sup>nd</sup> Interested Party entered appearance and Mr. Mathea appeared and informed the Court that although they were yet to file any responses to the Petition and Application, the 22<sup>nd</sup> Interested Party will be supporting the Petitioner and supported the grant of the Conservatory Orders sought by the Petitioner.

6. After duly taking stock of the documents as filed as at 15/03/2022, and satisfying myself that service had been effected on all the Interested Parties as the Court had directed, I reserved a ruling for 18/03/2022 on the three preliminary issues that require urgent resolution. They are as follows:

a. *The Preliminary Objection raised by the 1<sup>st</sup> Respondent whether the Petition is fatally defective for misjoinder;*

b. *Whether the Petition raises a substantial question of law under Article 165(4) to warrant the empanelling of a multi-judge bench by the Honourable Chief Justice;*

c. *Whether to grant the Conservatory Orders as prayed by the Petitioner.*

7. This combined ruling will address the three questions.

**A. The Preliminary Objection: Is there a Fatal Misjoinder to Warrant the Striking Out of the Petition"**

8. The 1<sup>st</sup> Respondent states in his Notice of Preliminary Objection that there is a "misjoinder of the 1<sup>st</sup> Respondent in the suit as the Application and Petition does not disclose his culpability on alleged threat to a right and fundamental freedom in the Bill of Rights." It is a curious statement given that the 1<sup>st</sup> Respondent has announced his interpretation of the Constitution and Political Parties Act which the Petitioner reckons will lead to the violations of rights he alleges in the Petition. Perhaps on second thought, the 1<sup>st</sup> Respondent did not make any submissions on this point in his filed Written Submissions. The Court is, therefore, left to imagine what reasoning and argument to attach to the Preliminary Objection.

9. Only two short responses suffice to dispose of this Preliminary Objection. First, as pointed to above, the Petition is triggered by the *Communication From the Chair* (hereinafter, *Speaker's Communication*) dated 22/02/2022 which is available in the County Assembly of Nakuru Hansard, a copy of which is attached to the Petitioner's Supporting Affidavit. The Communication is entitled "Resignation of Members From Political Parties". In that *Speaker's Communication*, the Speaker takes a particular interpretation of Article 194 of the Constitution and section 14 of the Political Parties Act which the Petitioner argues in his Petition would lead to the infringement of the Bill of Rights alleged in his Petition. The 1<sup>st</sup> Respondent is, therefore, a necessary party to the Petition and it is, consequently, difficult to see why the 1<sup>st</sup> Respondent finds his inclusion in the suit as a misjoinder.

10. Second, in any event, Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 clearly states that:

*A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may, in every proceeding, deal with the matter in dispute.*

11. The Court of Appeal's decision in *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others [2019] eKLR* is in accord. In that case, the Court stated:

*Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or nonjoinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute.*

12. The upshot is that the Preliminary Objection raised by the 1<sup>st</sup> Respondent lacks merit and it is hereby dismissed.

**B. Should Conservatory Orders be Granted"**

13. The Petition is centred on an alleged incongruence between Article 194(1) of the Constitution on the one hand and Articles 38 and 101(4)-(5) of the Constitution as read together on the other hand. The Petitioner argues that when read in isolation, Article 194(1)(e) of the Constitution provides that any time a member of the County Assembly resigns from the Party that sponsored him or her, the office of the Member of the County Assembly falls vacant. However, the Petitioner argues, when read together with Articles 38 and 101(4)-(5) of the Constitution, three specific constitutional questions verging on the right to political representation enshrined in Article 38 of the Constitution arise. The three questions are as follows:

a. *First*, whether a "narrow" and textual interpretation of Article 194(1)(e) of the Constitution has the effect of negating the purpose of Article 101(4) namely to ensure that citizens or certain segments of it do not remain unrepresented for a longer period than necessary. The question, the Petitioner asks, is whether such a "narrow" and textual interpretation promotes the purpose of the constitutional provisions which would be, in turn, contrary to the requirement that the Constitution shall be interpreted in a manner that promotes its purposes.

b. *Second*, whether the purpose of Article 101(5) can be reconciled with the right of the people to representation.

c. *Third*, whether the impugned supposed "narrow" and textual interpretation of Article 194(1)(e) of the Constitution would likely result in a paralysis of legislative bodies all over the country for lack of quorum which would occur if members of County Assemblies were to resign in large numbers which would be constitutionally unacceptable in light of Article 259(1)(d) which requires that the Constitution be interpreted in a manner that contributes to good governance.

14. The 22<sup>nd</sup> Interested Party, the Speaker of the County Assembly of Nyandarua, supported the Petitioner's position.

15. The 1<sup>st</sup> Respondent; the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Interested Party are united in their position that the Petition does not present any serious or arguable constitutional points. The 50<sup>th</sup> Interested Party (Speaker of Nairobi County Assembly) through his counsel, Mr. Kirui, orally joined them in that position. Generally, those in opposition to the Petition and the prayers for conservatory orders argue that Article 94 of the Constitution and section 14 of the Political Parties Act should be given their textual and natural meaning; and that if one does that it does not present any conflict with the articles of the Constitution the Petitioner claims create incongruence. They all do not find any violation of the rights of the Petitioner in the straightforward application of Article 94 of the Constitution and section 14 of the Political Parties Act. To them, any Member of County Assembly who resigns from the Political Party that sponsored them to the Assembly loses their seat. If, as now, the period between the time they so resign and the next General Elections is less than three months, then it follows, by dint of Article 105(5) of the Constitution, no by-election would be held.

16. The 2<sup>nd</sup> Interested Party argues that it is "inconceivable how the provision of Article 101(5) of the Constitution limits [the Petitioner's] rights to exercise his political choices." The 1<sup>st</sup> Interested Party argues, in similar vein, that section 14 of the Political Parties Act "only embosses, in textual terms, the natural consequences or effects of Article 194(1)(e) of the Constitution to the effect that a vacancy will arise if you resign or you are deemed to have resigned from the Political Party that sponsored you to the County Assembly."

17. Additionally, all the parties opposing the Petition and the prayers for conservatory orders posit that the argument that the house business would be crippled if there are multiple resignations of members from their respective sponsor parties is merely speculative and does not warrant the issuance of a conservatory order. The 1<sup>st</sup> Respondent adds that the Constitution "actually foresees vacancies arising within three months to a general election, including due to resignation of a member from one party to another or due to an independent candidate joining a Political Party, and in that case, the Constitution does not require a by-election. The affected ward or constituency for that matter, would have to remain unrepresented till after the General Election."

18. The Supreme Court has described the nature of Conservatory Orders and delineated the principles that Courts should use in adjudicating cases where a Conservatory Order is prayed for at the interlocutory stage. This was in ***Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR*** where the highest Court in the land held:

*Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:*

(i) *the appeal or intended appeal is arguable and not frivolous; and that*

(ii) *unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.*

*These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:*

(iii) *That it is in the public interest that the order of stay be granted.*

*This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.*

19. Earlier, in a decision which is in consonance with the Supreme Court's reasoning, the Court of Appeal held by a Majority in ***The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret***

**Petition No. 11 of 2012**, 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.*

20. Similarly, in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

*Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.*

21. However, it was Onguto J. who, in my opinion, laid down, most perspicaciously, the principles which guide the decision whether or not to grant conservatory orders. In **Board of Management of Uhuru Secondary School vs. City County Director of Education and 2 Others (2015) eKLR**, the Learned Judge set out the principles as hereunder:

i *The Applicant ought to demonstrate an arguable Prima facie case with a likelihood of success, and that in the absence of the Conservatory Orders sought, he is likely to suffer prejudice as a result of the violation or threatened violation of the Constitution;*

ii *Once the Applicant has established to the Court's satisfaction a prima facie case with a likelihood of success, the Court is then to decide whether a grant or denial of the Conservatory relief will enhance the constitutional values and objects of the specific right or freedom of the Bill of Rights;*

iii *Thirdly, flowing from the first two principles is whether if an interim Conservatory Order is not granted, the Petition or its substratum will be rendered nugatory. It is indeed the business of the Court to ensure and secure as far as possible that any transitional motions before the Court do not render nugatory the ultimate end of justice;*

iv *The Court must consider Conservatory Orders also in the face of public interest dogma; and*

v *Finally, the Court is to exercise its discretion in deciding whether to grant or deny a Conservatory Order. The Court must consequently consider all relevant material facts and avoid immaterial matters. The Court will consider the applicant's credentials, the prima facie correctness of the availed information, whether the grievances are genuine, legitimate, and deserving, and finally, whether the grievances and allegations are grave and serious or merely vague and reckless.*

22. In applying these principles to the case at hand, it is imperative to recall the procedural posture of the suit, as was counselled by Musinga J. (as he then was) in **Petition No. 16 of 2011, Nairobi – Centre for Rights Education and Awareness (CREAW) & 7 Others**. The Learned Judge in the case reminded judges to recall that in determining the issues before them at the stage in which a Conservatory Order in a constitutional petition has been requested, they must remember that at that stage they are not required, indeed they are forbidden, from making definite and conclusive findings of either fact or law as to do so would prejudice the hearing of the main Petitions. The Judge stated thus:

*...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.*

23. In deciding whether Conservatory Orders are merited here or not, therefore, I remain acutely conscious of the temptation to stray into the zone where substantive issues raised in the Petition are determined.

24. So, in the first place, I am required to answer the question whether the Petition, as framed, raises any *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, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable Constitutional issues.

25. Can we say that the issues raised by the Petition are in-arguable" Is there a penumbral and apparent conflict capable of judicial interpretive resolution between Article 38 of the Constitution (on political rights of citizens) on the one hand and Article 194 of the Constitution as read together with section 14 of the Political Parties Act (aimed at achieving Political Parties' discipline and overall good governance through a vibrant multi-party system) on the other hand" This is the singular question presented in the instant Constitutional Petition.

26. The Petitioners argue that the penumbral and apparent conflict has crystallized in Nakuru County Assembly in the form of the interpretation given by the Honourable Speaker of the County Assembly to Article 194 of the Constitution as read with section 14 of the Political Parties Act in his Communication to the Members of the County Assembly vide the Speaker's Communication. As aforesaid, the Honourable Speaker of the County Assembly has taken the position that Article 194 as read together with section 14 of the Political Parties Act yield the position that a member who resigns from the Political Party which sponsored him or her to the County Assembly automatically loses their seat even if the period in which the member resigns is within the 3 months period before the General Elections which means that no by-election can be held.

27. The Petitioner, a Member of the Nakuru County Assembly, is of the view that the interpretation given by the Speaker on the issue is without due regard to the rights of citizens in Article 38 of the Constitution in two distinct ways:

a. *First*, it ignores the fact that at the tail end of the term, there can be no by-elections meaning that the citizens represented by that member will remain unrepresented for the remainder of the term.

b. *Second*, it ignores the fact that forced resignations by operation of the law could lead, at the tail end of the term, to mass exits by MCAs from the County Assembly hence crippling the operations of Committees of the County Assembly for the remainder of the term.

28. The Petitioner argues that it is not possible that the framers of the Constitution intended these drastic but avoidable adverse consequences on the voters and urges the Court to interpret Article 38 of the Constitution to be in harmony with Articles 194 and 101 of the Constitution and declare that the Speaker's interpretation is not the most optimal one in line with Articles 19, 20, 22 and 259.

29. The argument presented by the Petitioner is, in my view, eminently arguable. It is, to be sure, not guaranteed to prevail upon final disposition of the Petition. However, one cannot argue that the question raised in this Petition is frivolous, niggling or trivial. There is, to say the least, a serious question to be tried.

30. In my view, the Petitioner has also demonstrated that irremediable injury could occur if the Conservatory orders are not granted. This would be in the form of the very injury to the political rights of citizens that the Petitioner alleges would occur if the Court does not grant the orders he ultimately seeks. Once the relevant functionaries give Article 194 of the Constitution and section 14 of the Political Parties Act the "textual" interpretation the 1<sup>st</sup> Respondent has adopted, the "parade of horrors" the Petitioner fears would occur: Many Members of the County Assembly could have their seats declared vacant; no by-elections would ensue; and the Assembly business could be crippled. Since a final determination on merits, even if successful is unlikely to return the parties to the *status quo ante*, it would follow, then, that the very substratum of the Petition would have been defeated.

31. Finally, I do think also that public interest concerns militate in favour of granting the Conservatory Orders so as to ensure that Assembly business is not disrupted during the pendency of the Petition; and further that citizens from the affected wards are not needlessly left without representation. In considering the public interests involved, it is important to recall that, as framed, the Petition is not merely about the political rights of the Petitioner. Instead, the Petition raises questions of how the political rights of citizens affected by the anticipated resignations could, potentially, be injured. Hence, while no public interests would be harmed by the grant of the Conservatory Orders, there is at least some demonstrable injury that would be suffered if the Conservatory Orders are not granted and then the Petition eventually succeeds on merits.

32. It is important to address one concern raised by the 1<sup>st</sup> Respondent before leaving this question: granting Conservatory Orders is *not* staying the operation of the Constitution as the 1<sup>st</sup> Respondent argues. It is, instead, to truly treat as a verifiable question what the correct interpretation of Article 194 of the Constitution is in view of Articles 19, 20, 22 and 259 of the Constitution. It is to take a provisional view that the interpretive position being urged by the Petitioner is plausible even if not necessarily probable. It is to simply say that the Petitioner's preferred interpretation of the Constitution is sufficient to raise a right to ephemeral relief above the speculative level.

**C. Does the Petition Raise a Substantial Question of Law to Warrant the Empanelment of a Multi-Judge Bench Under Article 165(4) of the Constitution"**

33. Article 165 (4) of the Constitution states as follows:

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

34. Our decisional law has now stably established the factors the Court considers in deciding whether to certify that a Petition raises a substantial question of law to warrant it to be heard by an uneven number of judges appointed by the Honourable Chief Justice. The criterion developed by our Courts traces its roots from the Indian Supreme Court in ***Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314***. This criterion can be summarised as public importance, novelty, and complexity.

35. Majanja J. in ***J. Harrison Kinyanjui v. Attorney General & Another [2012] eKLR*** reasoned that the principles must be applied in a way that would not burden judicial resources to the extent of jeopardising the value of obtaining justice without delay under Article 159(2)(b). Instead, he was of the view that whether a matter raised a "substantial question" must consider the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given a specific situation.

36. The ***J. Harrison Kinyanjui Case*** has been one of the guiding authorities in subsequent similar applications, the subject matter of the cases notwithstanding. For instance, it was relied on in ***Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 3 others [2016] eKLR***, where the Court accepted the interpretation of Article 86 and 140 of the Constitution to be a substantial question of law since it touched on the issue of elections.

37. After analysing previous decisions of the High Court on the subject and those of the Supreme Court on Article 163(4)(b) of the Constitution, the Court of Appeal in ***Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR*** adopted the following principles for the certification of a matter under Article 165 (4)

*i. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;*

*ii. The applicant must show that there is a state of uncertainty in the law;*

*iii. The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;*

*iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."*

38. More recently in ***Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association (KPSA) & 4 others (Interested Parties) [2021] eKLR*** Mrima J expanded the criterion as follows:

*i. The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of the Constitution.*

*ii. The matter must raise substantial question(s) of law.*

iii. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest.

iv. The applicant must show that there is a state of uncertainty in the law.

v. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.

vi. The matter is of immense public importance and has unique significance in our constitutional democracy.

vii. Whether the matter is complex.

viii. Whether the matter raises novel points of law.

ix. Whether the matter by itself requires a substantial amount of time to be disposed of.

x. The effect of the prayers sought in the Petition.

39. Applying these factors to the case at hand, it is readily obvious, despite the Respondent's and 1<sup>st</sup> interested Party's objections, that this Petition raises substantial questions of constitutional law that would benefit from consideration by a multi-judge bench. I say so for the following reasons:

a. *First*, this ruling has demonstrated above that the Petition presents a serious question of constitutional interpretation.

b. *Second*, again, as alluded to above, the outcome of the Petition either way would have serious legal and constitutional consequences for many current Members of County Assemblies and the citizens of wards that they represent.

c. *Third*, it is readily obvious that the determination of this Petition traverses and transcends the parties that are before the Court.

d. *Fourth*, as demonstrated by the radically different interpretations taken by the 1<sup>st</sup> Respondent herein (who is the Speaker of the Nakuru County Assembly) and the 22<sup>nd</sup> Interested Party (who is the Speaker of the Nyandarua County Assembly), different Speakers of the 47 County Assemblies are likely to come up with disparate interpretations of the Constitution. For example, the 1<sup>st</sup> Respondent believes that the "textual" interpretation of Article 194 of the Constitution is "unproblematic" and yields the conclusion that any Member of the County Assembly who resigns from his or her sponsoring Political Party will lose their seat but the 22<sup>nd</sup> Interested Party supports the position taken by the Petition and argues for Conservatory Orders meaning that he believes that the "textual" interpretation is, at best, problematic requiring a definitive rendering by the High Court to avoid conflict with Article 38 of the Constitution.

40. The upshot is that I make the finding that this Petition meets the threshold in Article 165(4) and I hereby certify it so.

#### **D. Disposition**

41. In the end, then, I make the following orders:

**a. The Preliminary Objection dated 09/03/2022 is hereby dismissed.**

**b. Pending the hearing and determination of the Petition filed herein, a Conservatory Order be and is hereby issued directed at the 2<sup>nd</sup> to 50<sup>th</sup> Interested Parties restraining them from declaring as vacant a seat of any member of the County Assembly who moves from one political party to another on the date set by the Independent Electoral and Boundaries Commission as the final date for verification and closure of party membership registers for purposes of the general election scheduled for 9/08/2022.**



c. This matter is hereby certified as one raising a substantial question of law in terms of Article 165(4) of the Constitution and it is hereby referred to the Honourable the Chief Justice of the Republic of Kenya to assign an uneven number of Judges to hear and determine it.

d. In view of the urgency of the matter and the public interest in the case, the Deputy Registrar is hereby directed to forward the file to the Honourable Chief Justice on a priority basis and to follow up with the Office of the Honourable Chief Justice to point out the urgency of the case so as to prompt the Honourable Chief Justice to act on it with all due dispatch.

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

42. Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF MARCH, 2022**

.....

**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.



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