REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E004 OF 2022

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

1. THE HON. ATTORNEY GENERAL

2. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....RESPONDENTS

RULING NO. 1

Introduction:

1. The Petition in this matter seeks to challenge *Regulation 37* of the *Elections (Registration of Voters) Regulations, 2012* (hereinafter referred to as '***the impugned regulation'***) on the basis that it infringes various constitutional and statutory provisions.

2. The impugned regulation limits the registration of Kenyans living in the diaspora as voters in elections and referenda to only those with valid Kenyan Passports save those within the East African Community. The Petition herein fronts for the rights of the Kenyans living in the outer parts of the diaspora who for one reason or the other have no valid Passports, but have other legal modes of identification.

3. In the interim, the Petitioner herein, *vide* an application by way of a Notice of Motion dated 5th January, 2022, sought conservatory orders suspending the operation of the impugned regulation so as to accord an opportunity to the targeted Kenyans to register as voters using other legal modes of identification since the registration of the diaspora voters is on-going until 4th February, 2022.

4. The Petition and the application are opposed.

The Application:

5. The application seeks the following orders: -

a. THAT this application should be certified urgent and service hereof be dispensed with in the first instance as the object of this Application will be defeated unless the application is heard expeditiously.

b. THAT pending the hearing and determination of this application inter partes, a conservatory order does issue staying and or suspending Regulation 37 of the Elections (Registration of Voters) Regulations, 2012.

c. THAT pending the hearing and determination of this application inter partes, an injunction order does issue restraining the Respondents from in anyway howsoever enforcing Regulation 37 of the Elections (Registration of Voters) Regulations, 2012.

d. THAT following the hearing and determination of this application inter partes but pending the hearing of the Petition, a conservatory order does issue staying and or suspending Regulation 37 of the Elections (Registration of Voters) Regulations, 2012.

e. THAT following the hearing and determination of this application inter partes but pending the hearing of the Petition, an injunction order does issue restraining the Respondents from in anyway howsoever enforcing Regulation 37 of the Elections (Registration of Voters) Regulations, 2012.

f. That consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders.

g. The Cost of the application be in the cause.

6. In support of the application are two affidavits sworn by the Petitioner on 5th January, 2022 and 24th January, 2022 respectively. They are a Supporting Affidavit and a Supplementary Affidavit. The Petitioner also filed written submissions in further support to the application.

7. The 1st Respondent filed Grounds of opposition dated 10th January, 2022 and written submissions in opposition to the application.

8. The 2nd Respondent filed a Replying Affidavit sworn by one *Chrispine Owiye*, the 2nd Respondent's Acting Director, Legal and Public Affair in opposing the application.

Analysis and Determination:

9. Having read and understood the application, pleadings and submissions, I will undertake a discussion on the following areas:

i. Whether this Court is barred from exercising jurisdiction by dint of the doctrine of *res judicata*.

ii. If the answer to (i) above is in the negative, the nature of conservatory orders.

iii. The guiding principles in conservatory applications.

iv. The applicability of the principles to the application.

10. I will begin with the first issue.

(i) Whether this Court is barred from exercising jurisdiction by dint of the doctrine of *res judicata*:

11. The contention revolving the doctrine of *res judicata* was raised by the 1st Respondent through its Grounds of opposition.

12. The 1st Respondent contended that the matters raised in the Petition relating to the impugned regulation were similar to those raised and determined in Nairobi High Court Constitutional Petition No. 71 of 2007 *Kenya Diaspora Alliance & 2 Others vs. Independent Electoral and Boundaries Commission & Hon. Attorney General* (2018) eKLR (hereinafter referred to as ***'the***

Diaspora case').

13. Citing Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, the 1st Respondent submitted that the current Petition is barred by the doctrine of *res judicata* and urged the Court to dismiss both the application and the Petition.

14. The 2nd Respondent did not address itself to the issue of *res judicata*.

15. The Petitioner vehemently opposed the contention that the Petition was *res judicata*. He pointed out that he had pleaded that the Petition was not *res judicata* the Diaspora case in paragraph 88 of the Petition and availed a copy of the decision in the Diaspora case as one of the annextures in his supporting affidavit.

16. It was submitted that the Diaspora case was different from the current Petition since the issues in the Petition were not directly and substantially the same as those in the Diaspora case.

17. The Petitioner argued that the current Petition presents special circumstances warranting this Court to make an exception to the bar of *res judicata*. He cited *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR, where the Supreme Court of Kenya dealt with the exceptions to the doctrine of res judicata.

18. Of importance, the Petitioner further argued that the violations of the Constitution and the law in the current proceedings were not in issue in the Diaspora case, hence the two cases are distinguishable.

19. I recently endeavoured a comprehensive consideration of the doctrine of *res judicata* in Nairobi High Court Petition No. E536 of 2021 ***Eric Omar Wanyamah* vs. *Independent Electoral and Boundaries Commission***. This is what I rendered: -

31. *The doctrine of res judicata is not novel. Its genesis is in Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya which provides that: -*

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

32. *The Supreme Court in a decision rendered on 6th August, 2021 in* ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR*** *comprehensively dealt with the different facets making up the doctrine of res judicata.*

33. *In the first instance, the Apex Court framed the issues for determination as follows: -*

a) *Did the High Court procedurally consider the plea of res judicata"*

b) Did the finding by the High Court on res judicata infringe on the Petitioner's right to fair hearing condemning them unheard"

c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of res judicata applied to the current case; was the Paluku case the same as the Appellants' herein"

d) Is this doctrine of res judicata applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation"

e) If the doctrine of res judicata is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases"

f) What constitutes such "rarest and clearest" of cases"

g) Who bears the costs of the suit.

34. *On the procedure for raising the plea of res judicata, the Supreme Court alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of res judicata had been raised by way of Grounds of opposition and in the Replying Affidavit.*

35. *The Court, in dismissing the argument that the issue was improperly raised before Court, stated as follows: -*

[53] Instead, and contrary to the Appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of res judicata.

[54] It is further evident that the Appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the Court accorded the Appellants the two justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.

[55] This ground of appeal must therefore fail.

36. *Applying the foregoing to this case, this Court finds that the plea of res judicata was properly raised by way of a Notice of Motion. The application was heard inter partes by way reliance on the application, affidavits, written submissions and oral highlights on the submissions.*

37. *On whether the doctrine of res judicata applies to constitutional Petitions, the Supreme Court endeavoured an extensive discussion and comparative analysis in various jurisdictions. It also captured the various opposing schools of thought on the issue.*

38. *In the end, the Court found that the doctrine, rightly so, applies to constitutional Petitions. This is what the Court partly stated: -*

81. We reaffirm our position as in the **Muiri Coffee case** *that the doctrine of* res judicata *is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of* res judicata *prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively……*

[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

39. The Apex Court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The Court stated as follows: -

[86] We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.

40. *On the commonality of the parties, the Court noted as follows: -*

[93] The commonality is that the Appellants herein and the Applicants in Jr 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.

41. *In dealing with the contention as to whether the issues raised in the two suits therein were directly and substantially the same, the Supreme Court noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional Petition. The Court also noted that the issues raised in the constitutional Petition were more than those decided in the judicial review application.*

42. *The Supreme Court disagreed with the Court of Appeal and found that the doctrine was not applicable in the matter. The Court held that: -*

[97] From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. ***However****, the Appellants herein predicated their petition on* inter alia *grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the Respondents contravened Article 2. They further alleged that the Respondents herein purported to usurp to the role of Parliament and in doing so contravened Articles 94(5) and (6) of the Constitution. They further alleged that the FERI and COD certificates threatened to infringe their right to property under Articles 40(1)(a) and (2)(a) when the Respondents threatened to arbitrarily deprive them of their property.* ***The Court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues.*** *We therefore find that the principle of* res judicata *was wrongly invoked on this ground.* (emphasis added).

43. *On the competency of the Court deciding the matters in issue, the Supreme Court noted the close relationship between the issue as to whether the current suit had been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.*

44. *The Apex Court had a lengthy discussion on the matter. It made reference to several decisions and in the end rendered itself as follows: -*

[107] The Court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the Court can do when determining a constitutional petition. Further the Court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This Court in its decision in ***Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa*** *(Amicus Curiae) [2021] eKLR went ahead to reaffirm use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.*

[108] We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.

[109] The Court in hearing a constitutional petition may very well arrive at the same conclusion as the Court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the Court will be playing fairly different roles.

[110] We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of res judicata applied to the current case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion.

45. *The Supreme Court also discussed two **exceptions** to the doctrine of res judicata. The Court stated as follows: -*

[84] Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

[85] In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.

46. *The Supreme Court had earlier expressed itself on the doctrine of res judicata in **Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others** [2014] eKLR where it delimited the operation of the doctrine of res-judicata in the following terms;*

[317] The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice" all in the cause of fairness in the settlement of disputes.

[318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.

*[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. **Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route"** (Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).*

[334] Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."

[352] The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago, [1991] LRC

(Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, Daryao & Others v. The State of UP & Others, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of res judicata. The Indian Court also rejected the notion that res judicata could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

But is the rule of res judicata merely a technical rule or is it based on high public policy" If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of res judicata…has no doubt some technical aspects…but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

[353] Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In ***Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others,*** *High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:*

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

[354] On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

47. *The Court of Appeal in* ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** *(which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of res judicata at length. The Court stated in part as follows: -*

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

20. I will be guided by the foregoing going forward.

21. One of the matters which this Court ought to settle is the manner in which the plea of *res judicata* was raised. As said, the 1st Respondent raised it by way of Grounds of opposition. Had it not been the fact that the decision in issue is reported in the *KenyaLaw* website and has also been provided by the Petitioner, I would have declined to consider the matter since grounds of opposition are in essence supposed to be limited to points of law.

22. In dealing with the applicability or otherwise of the doctrine of *res judicata*, a Court is called upon to interrogate the two matters in issue. In doing so, the pleadings in both cases and the decision already rendered must be availed before Court. Can that be done through Grounds of opposition or a preliminary objection" Clearly not.

23. A party, therefore, wishing to rely on the doctrine of *res judicata* must ensure that the two cases in issue and the decision already rendered are properly availed before Court. In this case, although the pleadings in the Diaspora case are not on record, I have noted that the decision in that case contains a good summary of the pleadings and the prayers sought in that Petition as well as the Courts analysis and determination. Such a decision suffices for the purposes of considering the plea of *res judicata*.

24. Having said so, I will now endeavour to ascertain whether the doctrine of *res judicata* is applicable in this matter.

25. The Supreme Court in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others*** case (supra) enumerated the following four principles for consideration: -

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.

26. One of the central considerations is whether the subject matter and the causes of action in the Diaspora case and the current Petition were identical. It must be clearly put that both cases had a bearing on the registration of voters within the diaspora. On the

basis of the subject matter and the causes of action, the Petitioners sought for various remedies.

27. In respect to the Diaspora case, the following prayers were sought: -

(a) A declaration that Kenyan citizens in the Diaspora possess a fundamental and an inalienable right to be registered as voters whether passport or valid Kenyan National Identity Cards Holders and to vote pursuant to article 38 of the Constitution of Kenya.

(b) A declaration that the failure by the 1st Respondent to register Kenyans living in the Diaspora who have their Kenyan National Identity cards and temporary passports is a violation to the fundamental rights of Kenyans in the Diaspora to vote thereby contravening Article 38, 82(1) (c) and (e) of the Constitution and Section 3 and 5 of the election Act 2011 which proves for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote.

(c) An order that the 1st Respondent enlarges the time allocated for registration to allow for maximum number of Kenyan citizens living in the Diaspora register as voters and participate in upcoming general on a cost-effective basis.

(d) An order of certiorari quashing the gazette notice number 1813 issued on 27th February, 2017.

(e) An order of mandamus compelling the 1st Respondent to file periodic reports annually in such registration, for review by the national Assembly and the Senate, through the offices of the respective speakers of the two Parliamentary Chambers.

(f) An order of mandamus compelling the 1st respondent to place infrastructures for the comprehensive registration of Kenyan Citizens in the Diaspora as voters, to the intent that the numbers of such Kenyan Citizens participating in general elections shall increase progressively over time.

(g) Costs of this petition.

(h) Any other relief or orders that this Honourable court shall deem just and fit to grant.

28. On the other hand, the current Petition prayed for the following orders: -

a) A declaration be and is hereby issued that Regulation 37 of the, the Elections (Registration of Voters) Regulations, 2012 is unlawful and unconstitutional and, therefore, invalid, null and void.

b) A declaration be and is hereby issued that by enacting Regulation 37 of the Elections (Registration of Voters) Regulations, 2012 the Commission failed to exercise its powers and perform its functions in accordance with this Constitution and national legislation as provided for under Article 88(5) of the Constitution.

c) A declaration be and is hereby issued that the Respondents should be condemned to pay the costs of this motion.

d) An Order be and is hereby issued quashing Regulation 37 of the, the Elections (Registration of Voters) Regulations, 2012.

e) An order be and is hereby issued compelling the Respondents to bear the costs of this Petition.

f) Consequent to the grant of the prayers above the Honourable Court be pleased to issue any other or further remedy (directions and orders) that the Honourable court shall deem necessary to give effect to the foregoing orders and/or favour the cause of justice.

29. From the record, the two causes of action and subject matters appear to be distinct although they both dealt with the rights of the Kenyans in the diaspora to be registered as voters. For instance, the Diaspora case did not deal with the question as to whether the Regulations violated the Statutory Instruments Act, whether the impugned rule infringed Articles 10, 12, 24, 27, 47 and 249 of the Constitution or whether a subsidiary legislation can override the Constitution and the law.

30. Further, the Diaspora case found no fault with the impugned regulation on the ground that it was the Passport, and not any other

mode of identification, which was a universally recognized document of international travel. That status is completely different from the trajectory taken in the current Petition.

31. The foregoing observation, therefore, dislodges the applicability of the doctrine of *res judicata* in that the subject matters and causes of action in the Diaspora case and the Petition herein are different. Without much ado, this Court finds and hold that the current Petition is not *res judicata* the Diaspora case.

32. With that finding, I will now consider the rest of the issues.

i. <u>The nature of conservatory orders:</u>

33. In Petition E408 of 2020, ***Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)*** [2021] eKLR**,** this Court, in reference to various authorities of superior Courts, discussed the nature of conservatory orders in the following way;

16. In ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR,*** *the Supreme Court* discussed, at paragraph 86, the nature of conservatory orders as follows: -

[86] Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

17. The Court in ***Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR*** *defined a conservatory order as follows: -*

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

18. In ***Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR*** *the Court had the following to say about the nature of conservatory orders: -*

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.

19. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

20. The foregoing was fittingly captured by Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR. The Learned Judge, correctly so, stated as follows: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

21. The decisions in Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR and Kenya Association of Manufacturers & 2 Others vs. Cabinet

Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR also variously vouch the cautionary approach.

22. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

34. The foregoing elaborately defines and sets out the parameters for the operation of conservatory orders. A Court must exercise caution not to wade into the substance of the dispute but at the same time preserve its adjudicatory authority and the subject matter of the dispute.

ii. The guiding principles in conservatory applications:

35. In Civil Application No. 5 of 2014 ***Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others*** (2014) eKLR the Supreme Court discussed the guiding principle in the grant of conservatory orders as follows: -

[86] …… Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

36. The principles which Courts ought to consider when dealing with applications for conservatory orders were set out in ***Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others*** Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR. The Court observed as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

37. In Nairobi High Court Constitutional Petition No. E243 of 2020 ***Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega)*** it was also established that a Court has the obligation to ascertain whether the grant of conservatory orders will delay the early determination of the dispute.

38. With the above, this Court will now apply the principles to the application.

iii. The applicability of the principles to the application:

A prima-facie case:

39. In Petition E005 & E009 of 2021, **Okiya Omtatah Okoiti & Another v Nairobi City County Assembly & 5 others; Mike Sonko Mbuvi Gideon Kioko & Another (Interested Parties)** [2021] eKLR this Court discussed this limb as follows: -

*A prima facie case was defined in **Mrao vs. First American Bank of Kenya Limited & 2 Others** (2003) KLR 125 to mean:*

…. In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR while dealing with what a prima facie case is made reference to Lord Diplock in American Cyanamid vs. Ethicon Limited (1975) AC 396 where the Judge stated thus: -

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

What constitutes a prima-facie case was further dealt with by the Court of Appeal in Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court in allowing an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint…... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.

40. I have already captured the cause of action and the subject matter in this case. The Petition raises pertinent constitutional questions for determination. As said, they include whether the Regulations violated the Statutory Instruments Act, whether the impugned rule infringed Articles 10, 12, 24, 27, 47 and 249 of the Constitution or whether a subsidiary legislation can override the Constitution and the law.

41. At the heart of the matter are the constitutionally-guaranteed political rights under Article 38 of the Constitution and the manner in which such rights were limited by the impugned regulation. A question of limitation of rights and fundamentals freedoms is such a germane one that cannot be taken lightly. Such a question, without doubt, establish a *prima-facie* case.

42. This Court, therefore, returns the finding that the Petition establishes a *prima-facie* case.

Whether irreparable loss will occasion if orders are not granted:

43. The *Black's Law Dictionary 10th Edition Thomson Reuters* at page 1370 defines '***prejudice'*** as follows: -

Damage or detriment to one's legal rights or claims.

44. The grant of conservatory orders also depends on the demonstration that an Applicant will suffer irreparable loss if the Court fails to grant them.

45. Through dispositions, the Petitioner has narrated how some Kenyans living in the United States of America will not be able to register as voters if the sole document of identification for registration remain a valid Kenyan Passport and not any other legal document.

46. *Patrick Gitau* and *James Gitau* are some of the Kenyans living in the United States of America. Both filed affidavits. They deponed that they are holders of non-biometric Kenyan Passports and national identity cards. They further deponed that arising from the transition from the non-biometric Passports to the e-Biometric Passports as directed by the Kenyan Government through a Press Statement dated 4th February, 2021, all non-biometric Passports are no longer valid as from 1st January, 2022.

47. The two Kenyans deponed that in their bid to acquire the e-Biometric Passports, they have attempted to book appointments at the Kenyan Embassy in Washington for purposes of applying for the e-Biometric Passports and have since then been unsuccessful. The earliest they can secure such appointments is January 2023. Relevant evidence thereto was adduced.

48. The said Kenyans, among many others in the United States of America, are, therefore, apprehensive that they cannot register as voters given that the non-biometric Kenyan Passports they hold are invalid since 1st January, 2022 and that their national identity

cards are not valid documents for registration as voters. To them, the only other way to register and vote is by the use of the national identity cards.

49. They contended that if not allowed to register using their national identity cards, they stand to be prejudiced and will not be able to take part in the forthcoming elections through no fault of their own.

50. The dispositions by the said two Kenyans were not opposed.

51. The 1st Respondent through Counsel while responding to the issue of the invalidity of the non-biometric passports as from 1st January, 2022 from the bar, only submitted that the notice of invalidity of the non-biometric Passports issued by the Government in February 2021 was varied and will take effect sometimes in November, 2022. However, Counsel did not adduce any proof thereof. The non-availability of appointments at the Kenyan embassy in the United States of America for purposes of Kenyans applying for the e-biometric Passports until January 2023 was never responded to, controverted or at all.

52. The 1st Respondent chose not to file any disposition and introduce such evidence to the Court. As such, the submission remain heresay and has no probative value. The same cannot override the Government Press Statement dated 4th February, 2021. This Court, hence, holds that pursuant to the Press Statement aforesaid and until proved otherwise, the non-biometric Kenyan Passports are no longer valid Kenyan Passports as from the 1st January, 2022.

53. Deriving from that holding, it, therefore, means that the Kenyans who live in the diaspora, save those living within the East African Community, without the e-biometric Passports cannot register as voters through no fault of their own since the non-biometric Passports are no longer valid.

54. With such state of affairs, even without considering any other matter, there is no doubt that those Kenyans living in the outer parts of the diaspora without the e-biometric Passports cannot register as voters. There is no doubt that such Kenyans stand to suffer prejudice in being denied an opportunity to register as voters and to take part in elections and referenda.

55. On the basis of the foregoing, this Court finds that the Kenyans living in the diaspora save those in East Africa Community who have no e-biometric Passports stand to suffer prejudice if the orders sought are not granted.

Public Interest policy:

56. Finally, on whether the case meets the public interest threshold, I will make recourse to the *Black's Law Dictionary 10th Edition* at page 1425. It defines *Public interest* as;

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

57. It is in public interest that Kenyans living in the diaspora be facilitated to register as voters and to participate in elections and referenda in Kenya. Infact, that was the finding and command of the Supreme Court in ***Independent Electoral and Boundaries Commission (IEBC) vs. New Vision Kenyan (NVK) & 4 Others*** (2015) eKLR.

58. In this case, the right to register as voters is, among other reasons, curtailed by the Government's directive of invalidity of the non-biometric Passports from January 2022 and the inability by the Kenyan Embassies to issue the e-biometric Kenyan Passports upto 2023.

59. This Court is alive to ***Republic vs. National Assembly & 6 Others exparte George Wang'ung'u*** (2018) eKLR where the Court dealt with the doctrine of presumption of constitutionality of statutes and held that the power to suspend a legislation during peace time ought to be exercised with care and caution and ought to be allowed only when it is shown that the legislative provision is a danger to life and limb at the very moment or where there is imminent danger to the Bill of Rights, and where there are strong and congent reasons for grant of the conservatory orders.

60. This case has demonstrated how the political rights of some Kenyans under Article 38 of the Constitution stand to be infringed

by the impugned regulation and the actions of the Government, taken together. The case squarely falls within the exception to the doctrine of the doctrine of presumption of constitutionality of statutes as it demonstrates an imminent danger to the Bill of Rights.

61. On the contention by the 2nd Respondent that the grant of the prayers sought will disrupt its calendar of events and possibly interfere with the proper planning of the general elections, this Court takes note of the fact that the application under consideration is not seeking to stop the exercise of registration of the voters in the diaspora, but is rather aimed at facilitating more voters to be registered. The fear is, hence, non-existent.

62. On the argument that if the impugned regulation is suspended then there shall be no legislation to guide the registration of voters in the diaspora, this Court hold the position that it is always within the duty of a Court to ensure that it does not create a constitutional or legislative lacuna. A Court has powers to grant any appropriate remedies in taking such considerations into account.

63. It was also argued by the 2nd Respondent that the use of national identity cards in the registration and voting by the Kenyans living in the diaspora poses a threat to the integrity of the elections since an identity card has no expiry date and those Kenyans who relinquished their Kenyan citizenship will be freely allowed to register and vote.

64. In a quick rejoinder and without finally rendering itself on the issue, this Court believes that Kenya as a country has the requisite machinery and ability to ascertain whether any of its citizens ever relinquished their citizenship. Further, if this Court allows the Kenyans lawfully living in the diaspora to register as voters using their national identity cards and the Petition is eventually unsuccessful, such Kenyans will not take part in the general elections and the concern will be rested. There is no doubt that at the main hearing parties will address the challenges caused by the use of national identity cards in detail for the Court to render itself further on the issue.

65. In the end, it is the finding of this Court that public interest considerations tilt in favour of the Petitioner in this matter.

Disposition:

66. This Court has not lost focus that it is dealing with an interlocutory application. The Court has carefully considered this matter at this stage.

67. Given the nature of the allegations of infringement of the political rights and the use of subsidiary legislation to override the Constitution and the law and the evidence on record, which evidence this Court believes will be enriched going forward, coupled with the unique circumstances of the case, and in a bid to accord justice to the concerned Kenyans, this Court is convinced that it is fair for the Kenyans living in the diaspora to be registered as voters pending the determination of the Petition.

68. The Court will, as well, expedite the hearing of the main Petition.

69. In the end, the Notice of Motion dated 5th January, 2022 is hereby determined as follows: -

(a) Pending the hearing and determination of the Petition herein, a Kenyan citizen residing outside Kenya shall apply for registration as a voter upon production of a valid Kenyan Passport or upon production of an original national identity card.

(b) The Independent Electoral and Boundaries Commission shall forthwith accord an opportunity to the Kenyan citizens residing outside Kenya to apply for registration as voters upon production of valid Kenyan Passports or upon production of original national identity cards.

(c) The Petition shall be heard by way of reliance on the pleadings, the Affidavit evidence and written submissions.

(d) The Respondents shall file and serve their respective responses to the Petition within 14 days of today.

(e) The Petitioner shall, upon receipt of the responses in compliance with (d) above, file and serve any supplementary responses, if need be, together with written submissions within 14 days.

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

(g) Highlighting of submissions on a date to issue.

(h) Time is of essence. Any defaulting party shall suffer the consequences.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JANUARY, 2022.

A. C. MRIMA

JUDGE

RULING NO. 1 VIRTUALLY DELIVERED IN THE PRESENCE OF:

OKIYA OMTATAH OKOITI, THE PETITIONER.

MISS. KERAMANA, LEARNED STATE COUNSEL INSTRUCTED BY THE HON. ATTORNEY GENERAL FOR THE 1ST RESPONDENT.

MR. MALONZA, LEARNED COUNSEL FOR THE 2ND RESPONDENT.

ELIZABETH WANJOHI – COURT ASSISTANT.