REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NOS. 628 & 630 OF 2014

COALITION FOR REFORM AND DEMOCRACY (CORD)……..……1ST PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)……..……...……2ND PETITIONER

VERSUS

REPUBLIC OF KENYA……..……..…….....1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL....…..……...2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS…….…....….....1ST INTERESTED PARTY

THE JUBILEE COALITION.....2ND INTERESTED PARTY

KITUO CHA SHERIA.....3RD INTERESTED PARTY

KATIBA INSTITUTE.....4TH INTERESTED PARTY

LAW SOCIETY OF KENYA.....1ST AMICUS CURIAE

COMMISSION ON THE IMPLEMENTATION OF THE CONSTITUTION.....2ND AMICUS CURIAE

RULING

Introduction

1. This ruling is in respect of two applications filed by Coalition for Reform and Democracy, a coalition of political parties, (hereinafter referred to as CORD) on one hand and Kenya National Commission of Human Rights, a Constitutional Commission (hereinafter referred to as KNCHR).

2. The Respondent in the consolidated petitions is principally the **Hon. Attorney General** of the Republic of Kenya sued in capacity as the principal legal adviser to the Government of the Republic of Kenya though in petition no. 628 of 2014, the Republic of Kenya was for some reasons unknown to the Court joined as a respondent.

3. The first interested party is the **Director of Public Prosecutions** an office established under Article 157 of the Constitution (hereinafter referred to as the DPP)

4. The 2nd interested party, **Jubilee Coalition Party** (hereinafter referred to as Jubilee) is, just as CORD, is a coalition of Political Parties in this country.

5. The 3rd interested party was **Kituo Cha Sheria** (hereinafter referred to as Kituo).

6. The 4th interested party is **Katiba Institute** (hereinafter referred to as Katiba).

7. The 1st *amicus curiae* is the **Law Society of Kenya** (hereinafter referred to as the LSK); the 2nd amicus curiae is the **Commission on the Implementation of the Constitution**, similarly a Constitutional Commission (hereinafter referred to as the CIC).

8. What provoked these proceedings was the enactment by the National Assembly of the ***Security Laws (Amendment) Act, No. 19 of 2014*** (hereinafter referred to as the Act) which was assented to by H E the President of the Republic of Kenya on 19th December, 2014.

9. Aggrieved by the said enactment, the Petitioners herein filed the instant petitions in which they seek various orders which in principle seek to have the said Act declared as unconstitutional.

10. On its part the 1st petitioner seeks the following orders:

> **1. The application be certified as urgent and heard ex parte in the 1st instance.**
>
> **2. Pending the hearing and determination of this application *inter partes* a conservatory order does issue staying and or to stay/suspend the coming into force or implementation and or operation of the Security Law (Amendment) Act, 2014 published on the website of the Presidency on the 19th of December 2014 and in particular to stay and or suspend the operation or coming into force of following provisions:**
>
> > **i. Section 4, 5, 12, 16, 25, 26, 29, 34, 48, 56, 58 and 64 and 86 of the Security Law (Amendment), Act 2014.**
> >
> > **ii. Sections 8, 9 of the Public Order Act.**
> >
> > **iii. Section 66A (1) and (2) of the Penal Code.**
> >
> > **iv. Section 42A and 344(a) of the Criminal Procedure Code.**
> >
> > **v. Section 18A of the Registration of Persons Act**

vi. Sections 20A and 59(a) of the Evidence Act.

vii. Section 2 and 4 of the Firearms Act

viii. Section 16A of the Refugees Act

ix. Section 12. 42 and 58 of the National Intelligence Act.

x. Section 30 and 30F (1) and (2) of the Prevention of Terrorism Act.

3. Pending the hearing and determination of the Petition a Conservatory order does issue staying and or to stay/suspend the coming info force or implementation and or operation of the Security Law (Amendment) Act, 2014 and in particular to stay and or suspend the operation of coming into force of the following provisions:

i. Section 4, 5, 12, 16, 25, 26, 29, 34, 48, 56, 58, and 64 and 86 of the Security Law (Amendment), Act 2014.

ii. Sections 8, 9 of the Public Order Act.

iii. Section 66A (1) and (2) of the Penal Code.

iv. Section 42A and 344 (a) of the Criminal Procedure Code.

v. Section 18A of the Registration of Persons Act

vi. Sections 20A and 59(A) of the Evidence Act

vii. Section 2 and 4 of the Firearms Act

viii.Section 16A of the Refugees Act.

ix. Section 12. 42 and 58 of the National Intelligence Act.

x. Section 30 and 30F (1) and (2) of the Prevention of Terrorism Act

4. Costs of the application be provided for.

11. The 2nd petitioner, on its part seeks that pending the hearing and determination of the petitions, there be a conservatory order suspending the operationalization of whole Act. It is further sought that the appointment of the Inspector General of Police be shelved pending the hearing and determination of the petitions. It is those applications which are the subject of this ruling.

12.Apart from the said application for conservatory orders, the Respondents and Jubilee have also sought for a certification under Article 165(4) of the Constitution to the effect that these petitions raise substantial questions of law as envisaged under clause (3)(b) or (d) of the Constitution and therefore ought to be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

CORD's Case

13.In support of its case CORD filed an affidavit sworn by **Hon Francis Nyenze**, the Minority Leader in the National Assembly on 23rd December, 2014.

14.According to the deponent, on 8th December, 2014 the ***Security Laws (Amendment) Bill 2014*** was published in a special Issue of the Kenya Gazette Supplement, Kenya Gazette Supplement No. 163 (National Assembly Bill No. 309) under the hand of **Hon. Asman Kamama**, Chairman of the Administration and national Security Committee of the National Assembly. Between 8th December, 2014 and 19th December, 2014 after its publication the Bill was introduced to parliament, went through the first and second reading, considered by the Committee of the Whole House, read a third time, passed and assented to by the President on 19th December, 2014.

15. It was deposed that on the 9th December, 2014 the bill was introduced for the 1st reading in the National Assembly and the period for publication was reduced from 14 days to 1 day which deprived the public of their right to public participation, a right enshrined under the Constitution under Article 118. According to the deponent, the Nation ***Newspaper*** on 10th December, 2014 published the days for public participation to be 10th, 11th and 15th December, 2014 on the bill. In his view, contrary to the spirit of public participation that would require the public to be given time to read and understand the proposed amendments, the pubic was expected to have been informed and engage on the debate on the same day of the publication, 10th December, 2014. Further public participation was not done on the 11th December, as proposed and hence it was inadequate, hurried and manipulated to fail.

16.Despite this on the 11th December, 2014 the bill was tabled for the 2nd reading without a completion of the public participation phase contrary to the Standing Orders of the National Assembly No. 127 which places a requirement under the law that a bill after its first reading shall be committed to a committee who shall then conduct public participation and the views and recommendations of the public incorporated in their report. However, no such report was presented and hence the procedure was flaunted. Despite the fact that Members of Parliament **Hon. John Mbadi**, **Hon. Ababu Namwamba** and **Hon. Junet Mohamed** raised the omission of the public participation phase during the debate on the 11th December, 2014, the Speaker **Hon. Justine Muturi** ruled that public participation would continue after the reading which was unprocedural.

17. It was averred that the memorandum of Objects and Reasons of the ***Security Laws (Amendment) Bill 2014*** stated that the Bill was in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill. To the contrary the Bill contained extensive controversial and substantial amendments affecting the ***Public Order Act***, ***the Penal Code***, ***the Extradition (Contagious and Foreign Countries) Act***, ***the Criminal Procedure Code***, ***the Registration of Persons Act***, ***the Evidence Act***, ***the prisons Act***, ***the Firearms Act***, ***the Radiation protection Act***, ***the Rent Restriction Act***, ***the Kenya Airports Authority Act***, ***the Traffic Act***, ***the Investment promotion Act***, ***the Labour Institutions Act***, ***the national Transport Safety Authority Act***, ***the Refugees Act***, ***the National Intelligence Service Act***, ***the***

Prevention of Terrorism Act, ***the Kenya Citizenship and Immigration Act***, ***the national Police Service Act*** and ***the Civil Aviation Act***.

18.It was reiterated that the time allocated to the public for participation was grossly inadequate considering the nature and content of the Bill and that on Wednesday 18th December, 2014 the relevant committees considering the Bill held meetings at night way past 10.00 p.m. making it impossible for the conduct of business in an open manner or in public as required under Article 118 (1) of the Constitution of Kenya. Further, before the commencement of debate on the Bill on Thursday, 18th December, 2014 the Speaker of the National Assembly set the tone of intolerance and bias on his part in presiding over the proceedings of the National Assembly.

19.The deponent deposed further that the Supplementary Order Paper tabled on the 18th December, 2014 to present the bill for the 3rd reading was unprocedurally before the house as the order paper was distributed when the house had already sat contrary to Order Paper No. 38(2) that requires that it shall be made available to the members at least one hour before the House meets. To the deponent, the sitting or sittings of the National Assembly on 18th December, 2014 was a special sitting convened by the Speaker of the national Assembly following a request of the Leader of the Majority in the National Assembly in accordance with Standing Order No. 29 of the Standing Orders of the National Assembly. This according to him was unfair and oppressive since it limited the special sitting of the National Assembly to one calendar day thus making it impossible for the House to ensure that there was freedom of speech and debate in the national Assembly as required under Article 117 (1) of the Constitution of Kenya.

20. As a result on 18th December, 2014 the opposition and some members of the Jubilee Coalition on various instances drew the attention of the Speaker of the National Assembly to several provisions of the Bill that were either unconstitutional or violative of the Bill of Rights and advocated the need for consultation amongst the members of the national Assembly and the two coalitions of CORD and Jubilee in the House and the necessity to conduct the proceedings and the debate in a bipartisan manner. The Speaker of the national Assembly was also urged that there were communities in Kenya especially of the Islamic faith that were concerned with the provisions of the Bill that may be used against them in an unfair and oppressive manner and since terrorism affected them adversely in a very direct way safeguards were required to enrich the Bill and to deal with security as a national problem of concern to every citizen and persons living in Kenya. However, it was clear from the rulings and directions of the Speaker that he was more concerned with the passage of the Bill without a proper debate and consideration of the Bill and the proposed amendments.

21.The deponent disclosed that the relevant committees of the House and several members had proposed what turned out to be more than one hundred amendments which could not be dealt with speedily or in haste or state of subjugation since in proposing amendments any member doing so must convince and persuade the committee of the Whole House and give justification for the proposed amendments

and the members of the national Assembly must be given time to support or oppose the amendments. It was deposed that the members of the National Assembly did not receive the amendments until they were confronted with them in the House or the Chamber on 18th December, 2014 when proceedings commenced besides the fact the Order paper was changed or replaced during the special sitting. As a result, the proceedings on 18th December, 2014 were therefore held in an acrimonious environment and although the majority was destined to have its way, the minority did not have its say. The Constitution, the Standing Orders and the customs and traditions of parliament were not invoked for the purpose of the orderly and effective discharge of the business of the national Assembly while at the same time guaranteeing the freedom of speech and debate. It was further averred that during the vote there were strangers in the House and persons unauthorized to vote who participated in a voice vote contrary to Article 122(1) and (2) of the Constitution of Kenya.

22. According to the deponent, during the proceedings the committee of the Whole House there were chaos and bedlam in the chamber and the debate could not be conducted in accordance with the Rules of Debate contained in the Standing Orders and it was incumbent upon the Speaker to ensure that debate was held with dignity, respect and decorum as is the practice and tradition of parliaments all over the world. In his view, the Speaker has adequate instruments, power and authority to protect the dignity of the National Assembly as vested in his office by the Constitution, the Standing Orders, the role of the office of the Sergeant-at Arms, the law and tradition and practice of Parliament yet he surrendered the legislative authority and independence of Parliament as a separate and distant arm of government and was during the entire episode in consideration of the ***Security Laws (Amendment) Bill 2014*** directed by the decisions, direction and demands of the national Executive.

23. It was deposed that the Speaker of the National Assembly did not abide by the Mandatory provisions of Article 110(3) (4) and (5) of the Constitution and did not involve the Speaker of the Senate in resolving the question as to whether the ***Security Laws (Amendment) Bill*** is a Bill concerning counties. It was contended that the bill that was tabled on the 10th December, 2014 required that it should be discussed in Parliament implying both houses, the National Assembly and Senate. In contrast to that requirement, the bill was only debated in the National Assembly on the 10th December and an amendment introduced on 11th December, 2014 replacing parliament with national Assembly in a deliberate violation of the process. This prompted the leader of the Minority in the Senate to request the Speaker of the Senate to convene a special sitting of the Senate out of concern that the Senate was not being involved in consideration of the Bill which contained provisions that concern counties or affect the functions of county governments such as security.

24. According to him, in pursuance of the objects and purposes of the constitution and in consideration of underlying constitutional values and principles including national unity, rule of law, democracy, participation of the people, good governance, integrity, transparency and accountability, state organs and officers including Parliament and the Presidency must always seek to promote and enhance the

unity of the nation. As the Head State and Government and as a symbol of National Unity the presidency must promote and enhance the unity of the nation by respecting, upholding and safeguarding the constitution and in the exercise of the authority and functions of his office demonstrate fidelity to the constitution and seek to establish harmony, understanding and tolerance and strive to seek consensus in the management of public affairs. Since the ***Security Laws (Amendment) Bill 2014*** was not passed in accordance with the procedures for enacting legislation and the bill, it was the deponent's view that it was not amenable to presidential assent.

25. It was further contended that the ***Security Laws (Amendment) Act*** contravenes the Bill of Rights as well as the provisions of the constitution of Kenya and that it is inconsistent with the Constitution of Kenya and is therefore null and void to the extent of the inconsistency. It was reiterated that as the ***Security Laws (Amendment) Bill 2014*** was passed and/or enacted in contravention of the Constitution, the said Act is therefore invalid, null and void.

26. CORD's case was presented principally by **Hon. James Orengo**, **Senior Counsel** assisted by **Mr Antony Oluoch**. In CORD's legal team were **Hon. Amos Wako**, **Senior Counsel**, **Hon Moses Wetangula**, **Hon. Kalonzo Musyoka** and **Hon. Judith Sijeny**.

27. It was submitted by learned counsel for CORD while reiterating the contents of the affidavit in support that the Act is unconstitutional since its passage was not in accordance with the Constitution; that the Bill which gave birth to the Act was a Bill concerning the Counties yet it was not subjected to approval by the Senate; that the Act is a violation of the Constitution and contravenes the Bill of Rights; and that the Act was passed without public participation.

28. It was submitted that Kenya being a Constitutional democracy pursuant to Articles 1 and 2 of the Constitution, parliament is not supreme but is subject to the Constitution. It was therefore submitted that under Articles 93, 94 and 95 of the Constitution, Parliament must enact laws in accordance with the Constitution. It was submitted that Article 110(1) of the Constitution defines what a Bill concerning County Governments is and sub-article thereof deals with Bills affective the functions of County Governments which Bills must be referred to the Senate if they originate from the National Assembly.

29. The issue of whether or not a Bill concerns County Governments, it was submitted, is not left for the determination of the Speaker alone. To learned counsel, clauses, 2, 8, 128, 69 and 70 of the Bill on their face concerned County Governments and in particular clause 69 dealt with the deletion of Parliament and instead substitution with National Assembly which deletion meant that the Senate's role in oversight was removed. Since under Article 60 State Officers include Members of the County Assemblies, it was submitted that clause 70 was dealing with County Governments and ought to have been referred to the Senate. It was contended that from the correspondences exchanged between the Speakers of the two houses, it was clear that they knew that the Bill required concurrence of the Senate hence the use of

the word **may not** by the Speaker of the Senate which according to learned counsel did not amount to concurrence.

30. It was in any case submitted that a Bill cannot be expunged but can only be withdrawn hence the actions of the Speakers was contrary to Standing Orders which Standing Orders are recognised under Article 109(3) of the Constitution. It was averred that Article 114(2) of the Constitution makes reference to the Clerk of the House.

31. It was submitted that whereas Standing Order 120 requires publication which can be reduced, Standing Order 122 requires that a determination on the issue whether the Bill concerns County Governments be made before the 1st reading. In this case an attempt to make that determination was made between 15th and 18th December, 2014 by which time the Bill had already been read for the second time. Although the requirements of Article 110 of the Constitution was brought to the attention of the Speaker, it was submitted that the Speaker did not deal with the issue though he dealt with all the other issues raised despite the fact that the Supreme Court in Advisory Opinion No. 2 of 2013 between **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR** held that Article 110(3) is mandatory and the National Assembly has no power to circumvent a mandatory step as the provision is obligatory. That authority, it was submitted held that security Bills are Bills affecting counties. It was therefore contended that on this core the impugned legislation is not a law at all and ought not to be implemented as it is null and void. Citing Uganda Constitutional Court Constitutional Petition No. 08 OF 2014 [2014] UGCC 14 - **Oloka-Onyango & 9 Others vs. The Attorney General**, it was submitted that just like in the instant case it was held that if the process of enacting legislation is flawed the law in question is vitiated hence the Act is invalidated.

32. According to CORD, there was no public participation as envisaged under Article 127(3) of the Constitution since public participation cannot be perfunctory or ritualistic and that the Standing Orders require that the Bill be brought before the House before the second reading. In this case the Committee reported between the 2nd Reading and the Committee of the whole house which means that the participation of the public was not considered since the amendments were effected before the Committee of the Whole House. In support of this submission the case of **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors [2014] eKLR** was relied upon.

33. It was submitted that from the affidavit in support there are provisions which amount to violation of human rights.

34. According to learned counsel, it is clear that the Bill and the Act are unconstitutional and no invalid law ought to see the light of the day. To learned counsel, the principle of Constitutionality of legislation applies more to England that in this country. It was submitted that based of **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** the conservatory orders sought herein ought to be granted and that the grant thereof will not prejudice the matter before the

Court. Citing the case of CCK, it was submitted that this Court has the power to grant the orders sought herein.

35. On the application for empanelling a bench under Article 165(4) aforesaid, **Hon. Orengo** was of the view that such an application was merited.

KNCHR's Case

36. The KNCHR's case was based substantially on affidavit sworn by **Jedidah Wakonyo Waruhiu,** a Commissioner to the KNCHR on 28th December, 2014.

37. According to the deponent, the 2nd Petitioner herein was aggrieved by the manner in which the ***Security Laws (Amendment) Act*** was published, considered and passed by the national assembly, and assented to by His Excellency the President of the Republic of Kenya into law. In his view, the integrity of the entire process leading to the passing of the legislation was wanting and the final product thereof completely lacking any legitimacy and legality whatsoever. He deposed that the National Assembly did not facilitate any meaningful and effective engagement of the public with the ***Security Laws (amendment) Bill*** and when the Bill was published on 8th December, 2014 the same was only made available to the public on 9th December, 2014 through the limited use of digital technology only.

38. He averred that on 10th December, 2014 a public notice in the national newspapers was issued for participation to take effect on the same day from 10th, 11thand 15th December, 2014 and on 11th December, 2014 the KNCHR urgently organized a press conference highlighting that the proposed ***Security Laws (amendment) Bill*** changes were not minor as indicated in the Bills Memorandum but were substantively a claw back to the 2010 constitutional separation of power, human rights and freedoms. Again on 12th December, 2014 which was a public holiday, a summary of the key constitutional concerns; including the public participation process, right to privacy, access to justice and freedom of assembly and information, among others was published in the local dailies jointly together with 9 organisations. Apart from that on 15th December, 2014 on behalf of the Kenya National Commission of Human rights, together with Commissioner **George Morara Monyoncho** submitted a joint memorandum to the parliamentary committee on Administration and National Security which focused on 38 clauses. Although the Public meeting with the Parliamentary Committee was supposed to start at 9.a.m. it only began at 11.30 a.m. due to lack of quorum from members of the committee which included the Chair **Hon. Kamama**. However when the session finally began, the **Hon. Chair. Hon. Kamama** indicated that due to this delay there was need to manage time and they had to concede to at least 30 minutes to canvas all the issues and thereby focused on 6 issues on access to justice (rights of an arrested person and fair trail), freedom of assembly and media, refugee and asylum seekers and national security organs.

39. According to the deponent, during our submission to the committee on clause 58 regarding the limitation on the number of refugees and the complexity of asylum seekers being able to submit themselves to the Director of Refugee Affairs, the committee sought the National Commission advise on whether there was any law

limiting the number of refugees in other jurisdictions and the KNCHR responded that numbers could only be dealt with administratively and politically in respect to burden sharing. KNCHR further sought the understanding of UNHCR who submitted a Memorandum under the Urban Refugee protection Network of which the national Commission is a member.

40. It was averred that the refugee population stood at 583,278 as at 30th November, 2014 and it would be difficult to implement Clause 58 without breaching International Human Rights Law and Refugee Law on the principle of non refoulement. According to him, the application of setting a ceiling has never been applied in the African region and would constitute a bad practice in refugee setting and was also not reflective of an open and democratic Republic according to the constitution.

41.It was contended that the tight timeline given by the Departmental committee on Administration and National Security for making submissions, the sheer volume of the bill and the difficulty in accessing the Bill seriously limited public participation and made it impossible for any meaningful public participation and engagement with the Bill.

42. Despite that on 18th December, 2014 the National Assembly subsequently passed the Bill in a process fraught with chaos and dishonourable conduct that did not inspire public confidence in the legislative process and personal dignity among the members of the National Assembly in Violation to Article 2 and 28 of the Constitution.

43. Subsequently, on 19th December, 2014 a mere 11 days from the publication to the passing of the legislation, His Excellency the President of the Republic of Kenya, **Uhuru Kenyatta** gave the legislation his assent, thereby bringing into law into effect on 22nd December, 2014 thereby precipitating the Petition herein.

44. According to KNCHR the ***Security Laws (Amendment) Act*** as assented to by the President on the 19th of December, 2014 is unconstitutional and that the amendments made to the various pieces of legislation have directly and through effect negate certain provisions within the Bill of Rights. Further, the Amendments made to the various pieces of Legislations by the legislation are major amendments that have had the cumulative effect of eroding the Bill of Rights and other Articles in violation of the Constitution Article 256 (1) (c) and 2.

45. In the deponent's opinion, the process leading to the enactment of the subject legislation was nothing less than a farce to which the people of Kenya were not party.

46. The deponent was of the view that the crisis of insecurity afflicting in our country is not due to a dearth of relevant laws to combat insecurity but rather due to a lack of the effective implementation of the law by the relevant security actors and agencies mostly due to other factors like endemic corruption prevalent within the security agencies. Having conducted extensive research on various aspects of

insecurity in the country and also participated in committees set up by the Government of Kenya, key among them being the Ransely Taskforce on Police Reforms and Police Reforms Implementation Committee, to address matters of security sector reforms and security management, it was the position of KNCHR that the newly enacted security law will not in themselves lead to security and personal safety in the country due to the lack of adequate equipping and tooling of the security agents, corruption and poor implementation of existing legislation. According to the deponent, the implementation of the new legislation and from the commission's previous experience, any excessive and extra-legal security measures always inevitably lead to serious human rights violations mostly from security enforcement officers.

47. The deponent reiterated that the process leading to the promulgation of the subject legislation was unaccountable and offended the national value of accountability, transparency, heed to Human rights and in particular the bill of rights, as enshrine in Article 10 of the constitution of Kenya (2010) hence the entire legislation is unconstitutional and untenable and should be struck out.

48. It was the deponent's case that the above facts demonstrate that the 2nd Petitioner has a *prima facie* case with a likelihood of success and if the conservatory orders sort are not issued in the interim a great injustice will be occasioned to the people of Kenya due to the violation to Chapter 4 and 10 of the Constitution in respect to the Bill of Rights and National Security Organs.

49. On behalf of the KNCHR, it was submitted by its learned counsel, **Mr Kamau**, **Miss Shivutse** and **Mr Kiprono**, it was submitted that the proceedings which took place on 18th December, 2014 was a non-starter and lacking in integrity hence its product was a bogus process as it degenerated into mayhem, chaos and disorderly and shameful conduct and unless stemmed, we are likely to see similar episodes giving rise to draconian laws whose effect would be to erode fundamental human rights.

50. It was submitted that the Act has the potential of eroding fundamental rights in particular the rights of an arrested person since section 36A allows detention for more than the time contemplated by the Constitution in violation of the right to expeditious and fair trial as provided under Article 49 of the Constitution as it provides for extension of up to 360 days which is further in violation of Article 50 of the Constitution. To learned counsel the stringent measures contemplated ought to apply to all and not just suspects of terror. Since appropriate measures are provided under the Constitution, it was submitted that the proposed one year period is unnecessary.

51. According to KNCHR, the withholding of evidence as contemplated under section 42(2) of the ***Criminal Procedure Code*** until just before hearing would be contrary to Article 50(2) of the Constitution which requires that such information be availed in advance.

52. It was contended that Kenya's compliance with International Instruments is under threat as a result of the Act particularly in light of the capping of the number of refugees that can be accommodated in the country at 150,000 since there is a

possibility of the Government claiming it has the stipulated number allowed by the law in contravention of the International Instruments dealing with refugees which are part of our law under Articles 2(5) and (6) of the Constitution. The amendments, it was submitted are likely to leave refugees with no protection against persecution. Further the amendments are likely to restrict the freedom of movement of lawful refugees as it would restrict lawful refugees and their residences.

53. Based on **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC) (17 August 2006)**, it was submitted that the principle of constitutionality of legislation cannot be a blanket for Parliament not to obey the Constitution. It was therefore contended that when a law has been signed but before its operationalisation, the Court can give a relief so as not to render the petition nugatory. In support of the Court's jurisdiction to grant the orders sought reliance was sought in **Centre for Rights and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR**, otherwise referred to as CREAW Case and **Joseph Kiguru & 3 Ors vs. County Government of Laikipia [2014] eKLR**.

54. On the issue of the appointment of the Inspector General of Police, it was submitted that unless the same is stayed, section 12 of the National Police Service Commission may be rendered nugatory.

Kituo Cha Sheria's Case

55. On behalf of Kituo, it was submitted by **Dr Khaminwa**, Senior Counsel that the Court was presiding over a very weighty matter of public interest going beyond the borders of this Country since our Constitution is a product of a struggle and the Bill of Rights is the most important part of the Constitution and anybody who encroaches on the Bill of Rights is likely to attract reaction.

56. While appreciating that criminal gangs have killed many people in this country, it was submitted that the State ought not to go wild but that we have to remain sober and objective. Learned senior counsel invited the Court to scrutinise the Act which according to him was passed under embarrassing circumstances which law ought not to be allowed to stand and to allow its administration would be ridiculous. To learned senior counsel, this Court not only has the power to suspend the Act but to strike it out at this stage.

57. It was further submitted that the Counties ought to have been heard in line with Article 24 of the Constitution since limitation must be by law which law must be reasonable and justifiable. According to **Dr Khaminwa**, the offences in question are ***Penal Code*** offences and the problem is that of implementation. According to learned Senior Counsel, the State is not under siege since Article 58 of the Constitution is still in place. It was further submitted that the law lacks proportionality, is discriminatory and ought to be struck out at this stage. To him, the burden is on the State to show that the law in question is necessary, a burden it has failed to discharge.

58. Since Kenya is committed to International Instruments, it was submitted that if the Act is implemented, this country would be breaching the said Conventions.

Katiba Institute's Case

59. On behalf of Katiba it was submitted by **Mr Waikwa Wanyoike** who appeared with **Mr Lempaa Suyianka** and **Ms Christine Nkonge** that though it together with other civil societies submitted its memoranda questioning the process, the same were never considered and the manner in which the process took place was shambolic.

60. According to learned counsel, the traditional tests for grant of injunctive reliefs apply to conservatory orders hence the applicant ought to establish that there is an arguable case, that if the order sought is not granted irreparable harm may be occasioned and public interest considerations which is the same as balance of convenience.

61.It was submitted that there are several arguable issues raised which issues are not frivolous or vexatious though the Court need not be satisfied on each and every issue.

62. It was submitted that the time given for consideration of the 22 amendments to 22 Acts of Parliament on complex issues was too short in terms of public participation. It was further submitted that the Court ought to consider whether the amendments in question ought to have been brought through Miscellaneous Bill. Another issue which was raised was with respect to violation of standing orders since Standing Order 115 required Memorandum of Objects of Reasons. In this case it was submitted that there was no statement on limitation delegation and whether the Bill concerned County Governments. The next issue identified by learned counsel was the issue of maintenance of order as required in Standing Order 107 which deals with gross and disorderly conduct. To learned counsel, Article 131(2) of the Constitution enjoins the President to protect the Constitution hence the Act ought not to have been assented to.

63. Unless the orders sought are granted, it was contended that there is likely to be harm which would not be compensated in damages arising from the curfew in Lamu and the deportation of refugees.

64. On the balance of convenience it was contended that it had not been shown that the existing laws do not facilitate the implementation hence there is no gap. To the contrary the grant of conservatory orders will not, according to him prejudice anything. On the presumption of Constitutionality, it was submitted that the principle only applies until the law in issue is questioned and reference was made to section 7 of Schedule 6 and Article 24 of the Constitution as well as **Susan Wambui Kaguru & Ors vs. Attorney General Another** (supra).

Respondents' Case

65. In opposition to the application, the Respondents filed a replying affidavit sworn by **Asman Kamama**, the Chairperson of the Committee on Administration and National Security on 27th December, 2014.

66. According to the deponent, on the 26th day of November 2014 the President of the Republic of Kenya formed a team comprising of both the executive members and legislative members in the security sector, of which he was a member, to look into the issue of insecurity after 64 Kenyans were killed in Mandera on the 22nd November 2014 and 2nd December 2014.The said report was given to his Excellency the President on the 4th of December with a raft of urgent reforms in the security system including certain amendments to the security laws. Pursuant thereto, ***Security Laws (Amendment) Bill, 2014*** was published on Monday 8th December, 2014 and on Tuesday 9th December, 2014 a procedural motion was moved and passed shortening the publication of the Bill to one (1) day as contemplated under Standing Order 120 on the floor of the National Assembly during the afternoon session after which the bill was then presented for first reading in that sitting and was committed to the Committee on Administration and National Security (under standing order 127). The Speaker of the National Assembly then directed that any committee of the house to look at the bill and if indeed it touched on their mandate they can offer some amendments.

67. According to the deponent, on Wednesday 10th December, 2014, the committee on administration and national security put out an advertisement for public participation in the local newspapers inviting members of the public to submit written memoranda with their views with respect to the bill in accordance with standing order 127 and on the afternoon of Wednesday 10th December, 2014, the Committee of Administration and National Security began receiving views from the public and also sat down to deliberate the bill into the late hours of the evening. On the morning of Thursday 11th December, 2014, the Bill was presented for Second Reading and debate on the Bill took place and was concluded in the morning, in accordance with Standing Order 128. During the afternoon sitting, the Bill was to be presented for Committee of Whole House but was deferred to a later date to permit a greater period of public participation. The house resolution for a special sitting on Thursday 18th December, 2014 was communicated in Gazette Notice No. 9021 of 15th December, 2014.

68. It was deposed that the Committee on Administration and National Security received memoranda from various organizations. The said committee also met with all representatives who submitted memoranda in person including:

i. Common Wealth Human Rights Initiative

ii. Ministry of Transport & Infrastructure

iii. Kenya National Commission on Human Rights

iv Independent Policing Oversight Authority

v. Commission for the Implementation of the Constitution

vi. Ibrahim Ahmed

vii. Maina Njuguna

viii. Josephine Irene Kang

ix. Francis Maina

x. National Gun Owners

xi. Article 19

xii. Jamia Mosque Committee

xiii. Kenya National Commission on Human Rights-

xiv. Tumechoka Movement

xv. Muslim Consultative Council

xvi. Coalition for Constitution Implementation

xvii. Hon. Emmanuel Wangure, MP

xviii. Urban Refugee Network

xix. John Mwema

xx. Christian Kenyan

xxi. Teresia Kahuria

xxii. Winnerman Consult & Training Ltd

xxiii. Indigenous Tabernacle of Kenya

xxiv. Constitution and reform Education Consortium

xxv. Human Rights Watch

xxvi. Independent Medico- Legal Unit

xxvii. Katiba Institute

xxviii. Legal Resources Foundation

xxix. UHAI-EASHRI

xxx. The Federation of Women Lawyers

xxxi. Haki Focus

xxxiii. Kenya Private Sector Alliance

69. In the deponent's view, most of the memoranda was touching on clauses 3, 4, 5, 17, 21, 22, 38, 66, 67, 76, 77, 80 and 96.On the morning of Wednesday 17th December, 2014, the departmental committee on administration and national security held a joint meeting with the departmental committee on justice and legal affairs, the departmental committee on labour and the departmental committee on defence and

foreign relations to harmonize all proposed amendments in accordance with Standing Order 131.Further on the evening of the same Wednesday, the departmental on administration and national security invited and met with all the members of the national assembly who had proposed amendments to the bill, with a view to harmonizing all their proposals as contemplated under Standing Order 131 (winnowing process) which process was successful, with more than 15 proposed amendments being dropped in favour of the committee's amendments, and several other clauses agreed to be amended to incorporate majority and minority views. In instances where the meeting agreed to have some amendments dropped, it was also agreed in specific cases that amendments proposed by the individual members be also published in order paper in case the chairpersons of the committee failed to move the agreed position and was mostly in the amendments by moved by **Hon. Kaluma**, **Hon. Millie Odhiambo** and **Hon. Abdikadir**. It was averred that in other cases, it was collectively agreed, that in areas where there was no consensus, each of the members concerned would move their amendments on the floor of the house in accordance with standing order 133. However, after consultation, the following contentious clauses to the bill were agreed upon for deletion from the bill:-

a) Clauses 3, 4, & 5 of the bill on regulation of picketing

b) Clauses 3, 4, & 5 of the bill on regulation of picketing

c) Clause 21 of the bill on an accused disclosing his defense to the prosecution.

d) Clause 22 of the bill on recommencement of a trial.

e) Clause 44 of the bill on radiation matters.

f) Clauses 45 & 106 of the bill on landlord and tenant records.

g) Clause 46 of the bill on zoning restrictions for aerodromes.

h) Clause 49 of the bill on traffic matters.

i) Clause 67 of the bill on confidentiality of NIS Agents.

j) Clauses 76 & 77 of the bill on hours of detention and prolonged detention of arrested persons.

70. Apart from that it was deposed that the following contentious clauses were redrafted to incorporate the views contained in the memoranda and the amendments by the 22 individual members-

a) Clause 15 of the bill on prohibited publications

b) Clause 16 of the bill on offences by public officers.

c) Clause 17 of the bill on insulting the modesty of a person by stripping.

d) Clause 20 of the bill on remand of an individual.

e) Clause 31 of the bill on process of revocation of a national identity card.

f) Clause 38 of the bill on detention of prisoners convicted of terrorist offences.

g) Clause 49 & 51 of the bill on powers of arrest by NIS officers.

h) Clause 62 of the bill on confidentiality of NIS Agents.

i) Clause 66 of the bill on special operations by NIS Agents.

j) Clause 72 of the bill on facilitation of terrorist acts.

k) Clause 73 of the bill on possession of illegal weapons.

l) Clause 80 of the bill on interception of communications.

m) Clause 96 of the bill on administrative command and control at county level of the national police service.

71. Thereafter, on the morning of Thursday 18th December, 2014, the deponent tabled the report of the committee that contained information on the public participation before the commencement of the 3rd reading and on Thursday the 18th of December 2014 the bill was presented on the floor of the house, for consideration in the committee of the whole house as per Standing Order 133.However, due to grave disorder, the house was suspended during part of the morning session, and thereafter adjourned until 2.30 pm. On resumption, the bill was finally considered, most of the agreed amendments moved, while other were dropped in absence of the movers after which the bill proceeded for committee of the whole house and third reading in accordance with Standing Orders 135, 136, 137, 138 and 139.

72. It was the deponent's opinion that the procedures contemplated to be followed for enactment of public bills under Chapter 8, part 4 of the constitution and Part XIX of the Standing Orders were strictly adhered to, including, very importantly, the process of public participation as stipulated under Article 118 of the constitution and Standing Order 127.

73. The deponent asserted that the application and the petition were incompetent, misconceived, misplaced and an abuse of the process of court as the petitioner did not show which of its rights and freedoms had been breached. On 22nd December 2014 the ***Security Laws (Amendments) Act*** came into force having been assented to by the President under powers granted to him by the constitution under Article 115 pursuant to a process which he was constitutional since the National Assembly standing orders permit the shortening of any period for debate. While admitting that the bill contained amendments to various statutes, it was contended that the bill did not contain any extensive amendments to any particular statute and that it met the threshold of a ***Statute (Miscellaneous Amendments) Act***. According to him, the practice of effecting amendments to various acts in one single Amendment Act when there are no extensive amendments to each Act is common in the commonwealth countries.

74. The deponent's position was that the Petitioner has come to court with dirty hands and cannot be heard to complain that there was chaos which they allege to have compromised voting in the house as its members were identified in the Hansard hence the calling of this honourable court to consider the law defective for want of proper procedure by the petitioner is clearly a mischief and should not be allowed. To him, the members were allowed ample time to present their proposed amendments to the committees before the third reading and those were the amendments which were to be voted for on the floor of the house in accordance with Article 122(1) of the constitution as this was to be a special sitting. He denied that there were strangers who voted in the proceedings and asserted that the voting was in accordance with the Article 122 of the Constitution. He further challenged the allegation that the speaker surrendered the legislative authority or independence of parliament at all as alleged. Based on the information from the Speaker, he asserted that there was consultation on the issue of whether or not the bill touches on matters concerning counties and concluded that it does not touch on matters concerning counties and in any case security is not a devolved function under the 4th schedule to the Constitution.

75. The deponent further contended that there exists a presumption of constitutionality of any law till the said law has been proved to be unconstitutional hence it is most appropriate for the honourable court to deny the petitioners the conservatory orders sought.

76. It was further deposed that the provisions of Article 245 of the constitution establishes the office of the Inspector General of Police appointed by the President with the concurrence of the National Assembly and that the provisions of Article 245 do not require the involvement of a panel in the appointment and confirmation of the inspector general of the national police service but places this squarely in hands of the President and the National Assembly alone.

77. It was averred further that the amendments have prompted by the actual reality concerning the internal security of the nation which has now been threatened by miscreants based both within and outside the country who have used loopholes in the criminal justice sector legislation to frustrate apprehension and/or arraignment in court in respect of offenses they have committed.

78. In his opinion, in order for any perceived grievance by the petitioners in both petitions to be deemed by this Honourable court to be justiciable, there has to be factual matrix, a real life set of experiences to be measured against the law as made by parliament in order to enable the court determine an issue and therefore the challenge raised to the laws even before proof of any actual negative effects of its application remains merely an academic argument to take up much needed judicial time. On the ground that there are no factual matters pleaded in these proceedings alone, and that the Petitions are overloaded with unwarranted apprehension, speculation, suspicion and unfounded mistrust which have no basis in law the deponent believed that these petitions should be struck out preliminarily.

79. It was submitted by **Mr. Njee Muturi**, the learned Solicitor General who was assisted by **Mr Mwangi Njoroge** and **Mr Kuria** that the country is at war as Kenyan forces are engaged in Somalia and the country has been attacked severally with resultant immeasurable loss of lives. According to learned Solicitor General the country is fighting unconventional war hence the need to enable its forces to successfully defend Kenyans. This, according to him has been informed by the changing nature of the attacks and strategies hence the amendments in question.

80. From the correspondences on record, it was submitted there was concurrence by the two Speakers of the Senate and the National Assembly since Article 110(3) of the Constitution deals resolution of the Speakers. Since there was concurrence by the Speaker of the Senate pursuant to the decision in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others** (supra) nobody else apart from the Speakers can determine whether or not a Bill is a County Bill. According to him, not even the Court can interfere. In his view Standing Order 122 does not talk about consideration of the Bill before the 1st reading since the consideration is at the 3rd reading when amendments are made and in this case, the resolution of the Speaker was before the third reading hence there was no need to refer the Bill to the Senate.

81.It was submitted that the replying affidavit was very clear that the principle of public participation was complied with and that the public, including the KNCHR submitted their memoranda to the Committee and pursuant thereto a report was tabled in the House before the debate begun. Pursuant to the said public participation, it was submitted the necessary amendments were made. Referring to **Centre for Rights and Awareness (CREAW) & 7 Others vs. Attorney General** (Supra) it was submitted that no formalities are required in order for the principle of public participation to be attained.

82. On the process, it was submitted that the steps taken were clearly set out in the replying affidavit whi9ch process culminated into the passing of the law. It was therefore submitted based on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** that what is to be considered are substantive defects otherwise the Court would be crossing the boundaries and as long s the debate took place and people voted the Court cannot do that. In this case, it was submitted that it was clear that the Bill was passed by the House. It was submitted that it was the applicants who disrupted the proceedings hence they are not before the Court with clean hands.

83. To learned Solicitor General, it was telling that the applicants are not seeking to impeach the whole Act but only 13 out of 98 provisions an indication that the Act is constitutional. To him, the applicants are estopped from alleging unconstitutionality of the other provisions.

84. It was contended that based on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** (supra), the petition lacks precision since it was not specified how the Bill of Rights was violated and how the applicants stand to be

affected. Since the allegations are very general, it was submitted that the Act cannot be suspended at this stage. On the issue of refugees, it was submitted that this Country is entitled to have its own policies on the refugee issue hence the issue is a policy issue as opposed to a constitutional issue. In any case the provisions relating thereto allows Parliament to increase the number of refugees.

85. Since Article 50 of the Constitution requires evidence to be given in advance, it was submitted that the provision which stipulates that the statements be furnished just before the hearing is not violative of Article 50 of the Constitution. This provision, it was submitted was amended due to public participation with the result that complete denial of statements was disallowed hence the provisions complies with the Constitution. It was submitted based on **Njoya & 6 Others vs. Attorney General & Another Nairobi HCMCA No. 82 of 2004 [2004] 1 KLR 232; [2008] 2 KLR (EP) 624 (HCK)**, that the Court deals with real and not hypothetical issues.

86. In **Mr Muturi's** view the applicants failed to establish a *prima facie* arguable and that their rights would be infringed. While admitting that the harm to the refugees would be incapable of being compensated, it was submitted that likewise dead people cannot be compensated. To his any person aggrieved by infringement of his rights is at liberty to approach the Court for appropriate remedies hence there is no instance when the petition would be rendered nugatory. Since we are in a state of war, it was submitted that the balance tilts in favour of not granting the orders sought more so as Article 24 of the Constitution allows for limitations.

87. It was contended that the presumption of constitutionality of legislation can only be rebutted at the hearing of the petition and that to grant the orders sought at this stage would amount to granting the petition. Further to grant the orders sought would compound the curfew issue in Lamu and is likely to lead to absurd situation. While renewing the application for empanelling of a bench, learned Solicitor General urged the Court to dismiss the applications with costs.

88. On his part **Mr Njoroge** reiterated that based on **Centre for Rights and Awareness (CREAW) & 7 Others vs. Attorney General** (Supra) no formalities are required for public participation to be attained which also applies to the issue of consultation between the Speakers of the two Houses. Learned counsel was of the view that the circumstances in these petitions are distinguishable from the ones in **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors** (supra) though in that case the Court also appreciated that urgency is a factor to be considered. With respect to **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors** (supra) it was submitted that that was an election petition. He submitted that the Court ought not to grant the orders sought unless there is *prima facie* breach. According to him, the case of **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge[1997] eKLR** established that where we have a local body of law, the International Conventions do not apply.

DPP's Case

89. In response to the application the DPP filed the following grounds of opposition:

> **1. That the Security Laws (Amendment) Act, 2014 is in all respects valid legislation under the doctrine of the presumption of constitutionality.**
>
> **2. That under the presumption of constitutionality doctrine, the burden of proving any alleged unconstitutionality in respect of the Security laws (Amendment) Act, 2014 lies with the petitioners at all times.**
>
> **3. That the presumption of constitutionality can only be rebutted at and upon the full hearing of the Petitions herein. Consequently the prayers for conservatory and or interim orders sought by the Petitioners are premature and cannot be granted.**
>
> **4. That in any event, the Petitioners have failed to satisfy the extremely high standard for the interlocutory suspension of legislation namely that the operation of the statute portends a danger to life and limb or that compelling and exceptional circumstances exist.**
>
> **5. That the mere possibility of abuse is not a ground upon which legislation can be declared unconstitutional. Petitioners have failed to demonstrate actual instances of abuse under the provisions of the Security Laws (amendment) Act, 2014.**
>
> **6. That in light of the current state of insecurity in Kenya, it shall not be in the Public Interest and national Interest to stay or suspend the coming into force of the Security Laws (amendment) Act, 2014.**
>
> **7. That the Petitioners have not demonstrated the harm to be personally suffered if the conservatory orders are not issued.**
>
> **8. That in light of the current state of insecurity in Kenya, the Balance of convenience favours the denial of the conservatory orders sought by the Petitioners.**
>
> **9. That the Petitions filed herewith fail to disclose prima facie chances for success upon which conservatory orders can be granted. This is because the amendments contemplated by the Security Laws (amendment) Act, 2014 are not in breach of any guaranteed constitutional rights.**

90. It was submitted by the Director of Public Prosecutions, **Mr Keriako Tobiko** who appeared together with **Dr Maingi** and **Mr Okelo** while also relying on the skeleton submissions filed herein that security situation in this country is a matter for judicial notice in terms of terrorists' attacks. Based on a decision of the Supreme Court of India in **Peoples Union for Civil Liberties & Anor vs. Union of India Writ Petition (civil) 389 of 2002**, he submitted while associating himself with the submissions of the learned Solicitor General that the Court ought to balance the security issue and the respect and validity of rights. While admitting that it is not in

dispute that the Constitution is supreme and that the judiciary has jurisdiction to invalidate legislation which is found to be unconstitutional or in violation of fundamental rights, he submitted that mere possibility of an abuse cannot be aground for declaring legislation invalid. In this case, he submitted there is no demonstration of imminent danger, threat or irreversible prejudice suffered by the petitioners and the mere fact that legislation is impugned is not a ground to suspend it.

91.On the presumption of constitutionality he relied on ***Presumption of Constitutionality*** by **Tarun Jain** which sets out the rationale for the presumption and submitted that Article 1(3) of the Constitution deals with sovereignty of the people. In his view, none of the authorities relied upon by the petitioners dealt with the issue of suspension of a statute which according to him is a drastic power hence the principles guiding the grant of injunctive reliefs cannot apply. Based on **Kizito Mark Ngaywa vs. Minister of State for Internal Security and Provincial Administration & Anor** (supra), he averred that there is a need in such matters to show danger to life and limb which has not been shown in this case.

92. According to the learned Director of Public Prosecutions, none of the provisions of the Act are unconstitutional hence the application ought to be dismissed and the matter referred to the Chief Justice to empanel a numerically superior bench as sought by the learned Solicitor General.

Jubilee's Case

93. In opposition to the application Jubilee filed the following grounds of opposition:

> **1. That the issues discussed in the Petition raise substantial questions of law which should be heard by a minimum of 3 judges.**
>
> **2. The application is bad in law and without merit.**
>
> **3. The principles governing constitutional interpretation provide that unless the contrary is proven, legislation is deemed and presumed constitutional.**
>
> **4. The application is an affront to the doctrine of separation of powers.**
>
> **5. The application raises the critical issue of legislation and on security matters which should await full argument by the parties and consideration by court before issuing of any orders.**
>
> **6. The petitioner has not set out a case for suspension of the laws.**
>
> **7. The laws were enacted pursuant to due process by Parliament.**
>
> **8. The current state of insecurity in the country does not allow for a suspension of any of the laws.**
>
> **9. None of the amendments are unconstitutional.**

10. The Petitioner has requested for a special sitting of the Senate and at the same time moved this court to suspend the Act.

11.The Interested Party shall further rely on the affidavits filed by the respective parties in this matter in opposing this Petition.

94. Apart from the grounds a replying affidavit sworn by **Johnson Sakaja**, the National Chairman of The National Alliance Party, a coalition partner in Jubilee on 29th December, 2014.

95. According to him, the Bill was duly passed having gone through all the requested motions and that it was incorrect to allege that the Speaker lost control of the proceedings and acted in a partisan and biased manner. In his view, the proceedings and debate of 18th December 2014 did not manifest the diversity of the nation and the Bill was not steamrolled and speeded up in the National Assembly. He therefore averred that all the averments in the Petitioner's Supporting Affidavit are factually incorrect and filed with the intention of misleading this Honourable Court. To him the Petitioner, having been unable to successfully oppose the passing of the Bill in the National Assembly, is seeking to overturn the implementation of the Act through the courts contrary to the doctrine of the separation of powers.

96. It was the deponent's position that the current Petition is an abuse of court process since **Hon. Moses Wetangula**, Leader of the Minority in Senate, by letter dated 11th December, 2014 wrote the Speaker of Senate seeking a special sitting of the Senate to discuss the ***Security Laws (Amendment) Act 2014*** .

97. It was deposed that by Gazette Notice 9288 of 24th December, 2014 the Speaker of Senate appointed 30th December 2014 as the day of the special sitting to discuss the Act hence it is an abuse of court power to litigate upon a matter, which the Petitioners are still intent on legislating upon.

98. Jubilee's case was presented by **Mr Gitau Singh** and **Mr Monari**.

99. According to the learned counsel the proceedings as conducted rendered the petition defective since Article 260 as read with Article 77(3) of the Constitution bars public officers from engaging in gainful employment. Public officers according to counsel include Members of Parliament hence **Hon. Orengo**, **Hon. Wetangula** and **Hon. Wako** ought not to have appeared in these proceedings as counsel.

100. It was further submitted that the petitioners intend to achieve through these proceedings what they failed to achieve in Parliament hence the matter before the Court is not a Constitutional issue but a battle for supremacy. In his view by granting the orders sought this Court would be disregarding the doctrine of separation of powers which mandates the Legislature to make laws and the Judiciary to interpret the same hence Parliament represents the will of the people. Good governance, it was submitted, requires that one arm of the Government should not interfere with another hence the principle of constitutionality of legislation. According to learned counsel,

the Court at this stage would be required to go into each and every provision of the law in question.

101. Relying on **Kizito Mark Ngavwa vs. Minister of State for Internal Security and Provincial Administration & Anor [2011] eKLR**, it was submitted that a *prima facie* case has not been set out. On the process, it was submitted that the replying affidavit sets out the steps which were undertaken and that whether or not the Senate was involved was taken care by the acknowledgement that the Bill did not involve the Senate.

102. It was further submitted that by requesting for a sitting of the Senate to discuss the Act, the petitioners were abusing the legal process. It was submitted that from the Hansard Report, there was debate in the house and there were no members in the Visitors' Gallery though there was a deliberate attempt to disrupt the proceedings in the House. According to learned counsel, the petitioners chose not to take part in the proceedings in the House.

103. On the constitutionality of the Act, it was submitted that other jurisdictions in the World such as the United Kingdom has similar legal provisions hence this Country is not an island.

104. It was further submitted that as there is no immediate harm and that the judiciary ought not to engage in judicial activism but should allow each provision to be put to scrutiny.

105. To wrap up the submissions, it was contended that the tears of the victims and innocent people as well as the graves of the deceased are still fresh. Similarly pictures of people running from the Mall under attack by terrorists are still fresh in our minds and that the Government has come up with a deterrent law and the Court was urged to remember innocent lives.

LSK's View

106. On behalf of the LSK, it was submitted by **Dr Nzamba Kitonga**, Senior Counsel that his role was to give the Court a neutral view as amicus curiae. According to him, the process in the National Assembly culminating into the enactment of the Act has been impeached by the parties and it is alleged that the process was chaotic and that it was infiltrated by strangers who may have shouted aye or nay. The other issue is the public participation. Though there are still no legal parameters to gauging the nature, extent and amount of public participation, he submitted that the decision in **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors** (supra) provided some wisdom. Whereas one side contends that the process was too hasty, very limited and even cosmetic, the other side contends that 5 days was adequate even to those in Mandera.

107. It was submitted that since fundamental issues have been raised by both parties on the constitutionality of some of the provisions of the enactment which relate to the Bill of Rights, these are issues which are weighty legal constitutional issues which require microscopic examination by the Court. It was therefore his view that the

issues raised by the petitioners established an arguable *prima facie* case which would be rendered nugatory unless conservatory orders were issued at this stage. Further the balance of convenience was in favour of issuance of the said orders.

108. It was however **Mr Kitonga's** case that if the Court declines to grant the conservatory orders sought, the matter ought to be heard as a matter of grave urgency.

CIC's View

109. On behalf of CIC, it was submitted by **Mr Nyamodi** who appeared with **Mr Eric Gumo** that his client's role was to put material before the Court which would assist the Court ad not to assist any party.

110. It was submitted that the consideration for grant of conservatory orders have been set out in several decisions notably **Centre for Rights and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR**, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & 2 Others [2011] eKLR** and in **Hon Kanini Kega vs. Okoa Kenya Movement & Others Petition No. 427 of 2014.** These principles, it was submitted are that there ought to be sufficient material to determine whether those who seek to suspend the legislation have established a *prima facie* case. Secondly is the effect of the legislation on those who seek the orders if the same were not granted. Further the Court ought to consider whether the remedies sought by the petitioners are the most appropriate remedies and whether there is a more appropriate one.

111. On the issue of presumption of constitutionality, it was submitted based on **Julius Ishengoma Francis Ndyanabo vs. Attorney General [2001] 2 EA 485, Kizito Mark Ngaywa vs. Minister of State for Internal Security and Provincial Administration & Anor** (supra), **Bishop Joseph Kimani & 2 Ors vs. The Hon Attorney General & Ors [2010] eKLR** and **Susan Wambui Kaguru & Ors vs. Attorney General Another [2012] KLR** that there is no place for conservatory orders in matters such as the one before the Court. It was therefore counsel's view that in recent pat the principle of separation of powers has been a source of bashing and that the Court ought to bear that in mind and that whatever decision the Court arrives at should ensure the disunity of the institutions involved is attained.

CORD's Rejoinder

112. In a rejoinder, **Mr Oluoch** submitted that the issue of lack of separate affidavit is dealt with by Articles 22 and 23 of the Constitution while the limitation under the ***Evidence Act*** ought to comply with Article 24 of the Constitution. However there is no indication of the extent of the limitation hence the same is not justifiable. He reiterated that there was no public participation as envisaged by the Constitution and that the proceedings before the House were being undertaken contemporaneously. In his view a *prima facie* case had been established since the skipping of a step in the legislative process renders the legislation void and in this case Standing Order 122 as read with Article 110 of the Constitution were not strictly adhered to. I his view the rights under Article 50 of the Constitution with respect to fair hearing cannot by virtue

of Article 25 be derogable. It was his view that the effect of the amendments would be to take away the spirit of the Article yet Kenya is not in a state of emergency and the rights ought not to be suspended. It was contended that it had not been demonstrated that the State will be incapable of dealing with terror without the amendments hence there is a need for balance which according to him tilts in favour of upholding the Constitution.

113. On the doctrine of separation of powers it was submitted that whereas the Legislature makes the law, it is the judiciary which interprets the same. On the issue of Article 77 of the Constitution learned counsel contended that that was not an issue before the Court.

114. On the same issue **Hon. James Orengo, SC** informed the Court that there was a judgement of this Court which disposed of the issue. According to him, the matter ought not to be treated emotionally or sensationally. He contended that in the old order the Government was always using State security hence the provision of Article 19 of the Constitution. In his view, whether at war or State of Emergency the Bill of Rights remains in force and we are not in a state emergency. With respect to the curfew in Lamu, it was submitted that the same has been in force even before the challenged amendments and continue to be in force.

115. It was his view that the issue of procedure is a constitutional issue and that the in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others** (supra) has upheld the same which discloses a *prima facie* issue. In his view, the effect of the amendments would be that Kenyans would be treated as suspects for 90 days without being charged or brought before a Court of law.

116. **Hon Orengo** further distinguished the **Anarita Karimi NJeru vs. Republic (No 1) (1976-1980) 1 KLR 1272** from the present case and contended that whereas **Anarita Karimi NJeru vs. Republic** (supra) was a case by an individual hence proceedings *in personam*, the instant proceedings are proceedings *in rem* since these proceedings seek the interpretation of the Constitution and the Act.

KNCHR's Rejoinder

117. In his rejoinder, **Mr Kamau** submitted that the public participation was a Nairobi affair with sittings only in Nairobi as opposed to the people in Wajir who might not even be aware of what an email is all about. Hence the principle was inadequately dealt with. According to him presumption of constitutionality of a statute is not a blank cheque to be abused. In his vie the presumption only applies where legal procedures have been followed. To him, the Constitution is a very powerful voice of the people and must be heard in its purest tonnes. It was submitted that the fear was not that of abuse but that draconian and unconstitutional laws were enacted.

118. **Miss Shivutse** on her part submitted that in ***Presumption of Constitutionality***, it is stated that the presumption of constitutionality of a statute is rebuttable. According to her even in the **Peoples Union for Civil Liberties & Anor vs. Union of India** (supra) it was recognised human rights cannot be violated in order

to combat terrorism. Learned counsel reminded the Court of the Constitutional mandate of KNCHR and decried submissions which are laced with political undertones. The Court was therefore urged to exercise its powers under Article 249 of the Constitution which enjoins the KNCHR to uphold constitutionalism.

Determinations

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

120. Before delving into the merits of the application, an issue of jurisdiction in my view was alluded to though not specifically. The issue was to the effect that this Court has no power to grant conservatory orders where the Constitutionality of Legislation is under challenge. **Nyarangi, JA** in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** while citing ***Words and Phrases Legally Defined*** – Vol. 3: I-N page 13 held:

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

6. In that case the Court further held:

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

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

122. In support of this contention, reliance was placed on **Kizito Mark Ngaywa vs. Minister of State for Internal Security and Provincial Administration & Anor**

(supra), and **Susan Wambui Kaguru & Ors vs. Attorney General Another** (Supra). In the ***Kizito Case***, **Ibrahim, J** (as he then was) referred to his own decision made on 6th October 2010 in Mombasa High Court Petition No. 669 of 2009 – **Bishop Joseph Kimani & Others vs. Attorney General & Ors** in which he pronounced himself as follows:

> **"It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment…It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain…I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."**

123. **Majanja, J** on his part in **Susan Wambui Kaguru & Ors vs. Attorney General Another** (Supra) expressed himself *inter alia* as follows:

> **"I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."**

124. Emphasis seems to have been placed on the underlined sentence in ***Bishop Joseph Kimani's Case***. However, it is my view that the learned Judge's decision ought to be read as a whole. If that is done what clearly comes out is that the power to suspend legislation during peace time ought to be exercised with care, prudence and

judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain. On my part I would modify that view by adding to the phrase "a danger to life and limb" the words "or where there is imminent danger to the Bill of Rights" since Article 19(1) of the Constitution provides that the "Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies" and Article 21(a) provides that "it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." Similarly **Majanja, J** did not rule out entirely the possibility of grant of conservatory orders. What the learned Judge held was that at the stage of the application for conservatory order he could not make an interim declaration which would effectively undo the legislative will *unless there are strong and cogent reasons to do so*. [Emphasis mine]. In other words where there are strong and cogent reasons conservatory orders may be granted.

125. Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution. If anyone is in doubt, Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. In my view, if the Court has power to declare an enactment void and invalid, likewise the Court must have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise is likely to render whatever decision the Court may arrive at a mirage. Our Constitution for example in Article 29(d) outlaws torture and freedom from torture is one of the fundamental freedoms which by virtue of Article 25 of the Constitution cannot be limited. If Parliament was to purport to pass an Act which introduces torture, it would be illogical for the Court to stand back and say that it has no jurisdiction to grant conservatory orders. To do so would amount to the Court ceding not only its powers but failing to protect the Constitution as envisaged in Article 21(a) of the Constitution. What use would a favourable determination of the petition be to the victim of torture if by the time of the determination, the torture has taken place and freedom lost beyond recall. I therefore disagree with the view that under no circumstances can conservatory orders be granted where a piece of legislation is under challenge.

126. Where in my view, the Court is convinced that the orders ought to granted, I do not see why the Court should shy away from doing so. On this note I wish to associate myself with the holding of **Mulenga, JSC** in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** to the effect that:

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

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

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

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

129. Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation. The only rider is that the case must be one which falls under Article 22 of the Constitution.

130. This however does not mean that Courts ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the Court is satisfied that it ought to be exercised. However, it can be exercised.

131. Whereas I agree that there is a presumption of Constitutionality of Statute that is a rebuttable principle. This was clearly appreciated in **Ndyanabo vs. Attorney General [2001] 2 EA 485** where it was held *inter alia* that in interpreting the Constitution, the Court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the

presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

132. I wish to associate myself with the holding of **Mbogholi Msagha, J** in **Macharia vs. Murathe & Another Nairobi HCEP No. 21 of 1998 [2008] 2 KLR (EP) 189 (HCK)** where he expressed himself *inter alia* as follows:

> **"The learned counsel cited several authorities from the English jurisdiction to advance his submission that the Courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because ...the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the... [Constitution]. That shows that even when Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense."**

133. In the same vein, **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** pronounced himself as follows:

> **"The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution."**

134. That brings me to the present case.

135. It was submitted that **Hon. Orengo**, **Hon. Kalonzo Musyoka**, **Hon. Wetangula** and **Hon. Wako** ought not to have appeared as legal counsel in these proceedings based on their positions as public officers. I take it the same position applies to **Hon. Sijeny**. First and foremost this Court is not aware of any public office held by **Hon. Kalonzo Musyoka**. With respect to the other Honourable Members of Parliament, the issue was dealt with by **Tuiyott, J** in **John Okelo Nagafwa vs. The Independent Electorial & Bounderies Commission & 2 Others[2013] eKLR** where he pronounced himself as follows:

> **"As I understand it, the complaint against Hon. Orengo is pointed. It is a specific charge, that by acting as Counsel in this matter and by signing pleadings, Hon. Orengo is contravening the provisions of Articles 77(1) of The Constitution and Section 26(1) of The Act. The Court must examine Counsels conduct in the light of the express provisions of Section 26(2) above. The onus was on the Petitioner to demonstrate that Hon Orengo's participation in these proceedings as Counsel:-**
>
> > **a) Is inherently incompatible with his responsibility as a Senator or**
> >
> > **b) Will impair his judgment in execution of the functions of his office as a Member of Senate or**
> >
> > **c) Will result in a conflict of interest in terms of Section 16 of The Act.**
>
> **It had been submitted that Counsel's participation here will keep him away from his office as a Senator. That he would not fully engage himself in the Senate…Evidently, the work of a Member of the Senate involves both Parliamentary and non-Parliamentary business. The work-hours for Parliamentary business are regulated by the Standing Orders of the House. This Court has looked up those Standing Orders and in particular Standing Order 30…It seems that even if a Member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00a.m to 5.00p.m. In respect to non-Parliamentary business, this Court was unable to find any regulation governing the work-hours. The Petitioner has not persuaded this Court that Hon Orengo has used up public time in preparing for and participating in this Election Petition. No evidence has been shown to this Court to demonstrate that Counsel's conduct this far is inherently incompatible or fundamentally in conflict with his role as a Member of The Senate."**

136. I associate myself with the sentiments of my learned brother and only wish to add that in this case the petition was not drawn by any of the said Members' of Parliament but by the firm of A T Oluoch & Co. Advocates. Therefore even if the objection was valid the Court would only have been entitled to bar the said Hon. Members of Parliament from participating in these proceedings but not to strike out

the petition on the ground of incompetency. Accordingly I decline to strike out the petition on that score.

137. It was also submitted that these petitions ought to be disallowed on the ground that the petitioners have opened two fronts in their battle against the Act since they are challenging the Act before this Court as well as before the Senate. Again whereas that contention may apply to the 1st Petitioner's petition, it may not necessarily be correct with respect to the 2nd petitioner's cause. It was not shown that the 2nd petitioner, a Constitutional Commission, has challenged the Act before the Senate. It would therefore be unjust to throw out the whole cases on the basis of an alleged abuse of the legal process by the 1st petitioner.

138. Article 165(3)(d)(ii) of the Constitution donates to the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. The Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity.

139. Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality, in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits. See **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331.**

140. Under what circumstances can the Court grant conservatory orders?

141. In **Judicial Service Commission v. 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."**

142. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors** (supra) 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*."

143. Whereas it is true that in applications seeking to suspend legislation care must be taken to ensure that Courts do not readily accede to the temptation to render legislation stillborn and that such power ought not to be exercised lightly, to hold that the Court can only grant conservatory orders where the Court is satisfied that the challenged provisions are unconstitutional would in my view be stretching the standard too far. The law as I understand it is that in considering an application for conservatory orders, the court is not called and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the first condition the applicant is required to establish a *prima facie* case with a likelihood of success.

144. What are the issues which the appellants intend to canvass at the hearing of the petitions? It is contended that the process of enactment of the Act was itself unconstitutional since it was not in accordance with Standing Orders of the National Assembly. Article 109(3) and (4) of the Constitution provides:

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

145. It is contended by the petitioners that the issue whether or not a Bill concerns county governments must under Standing Order 122 of the National Assembly Standing Orders be resolved before the 1st reading. According to the petitioners from the correspondences on record, that resolution was purportedly made after the first reading hence the Standing Orders were not adhered to. The Respondent is however of the view that in light of the concurrence from the Speaker of the Senate that the amended Bill giving rise to the Act in question did not concern County Governments, that process cannot be faulted since there ought to be substantive defects in the process to justify its invalidation.

146. It was further contended that the manner in which the Act was passed was so chaotic and that it was infiltrated by strangers who may have shouted aye or nay. It

was in fact described as a bogus process as it degenerated into mayhem, chaos and disorderly and shameful conduct. In opposition to the application it was however contended that the mayhem was caused by the petitioners. Here it must be stated that the petitioners are not all members of Parliament. The second Petitioner is in fact a Constitutional Commission hence the contention that the mayhem was caused by the petitioners may not necessarily apply to the 2nd petitioner though it may apply to members of the 1st petitioner. In my view if the process was shambolic as it is alleged, it would not matter who caused the chaos since Standing Order 98 places the duty of ensuring that order is maintained in the House squarely on the Speaker which entails ensuring that pursuant to Standing Order 104 every member is seated at all times when in the Chamber except when passing to and from his seat or when speaking.

147. In **Oloka-Onyango & 9 Others vs. The Attorney General** (supra) it was held:

> **"Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. The Speaker ignored the Law and proceeded with the passing of the Act. We agree with Counsel Opiyo that the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of Coram…Failure to obey the Law (Rules) rendered the whole process a nullity. It is an illegality which this Court cannot sanction."**

148. It was further contended that the Bill in question was a Bill concerning county governments since it touched on security. At paragraph 102 of the decision in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR**, the Supreme Court stated:

> **"The Court's observation in Re the Matter of the Interim Independent Electoral Commission is borne out in an official publication, Final Report of the Task Force on Devolved Government Vol. 1: A Report on the Implementation of Devolved Government in Kenya [page. 18]:**
>
> ***"The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase 'concerning counties' is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments.***

For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties….With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by both Houses."

149. It was however contended that the Speaker of the Senate having expressed his concurrence that the Bill did not concern county governments, that was the end of the matter and there was no need for the Senate to deliberate further on the same. At paragraph 131 of the above case, the Supreme Court held:

> **"Where the Speakers determine that a Bill is not one "concerning county government", such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people's public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate's initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people: this cannot be taken away by either Chamber or either Speaker thereof."**

150. From the above holding it would seem that if the Speaker of the Senate signifies concurrence with a Bill that it falls within one category or another, it may well be said that that is the end of the matter. However the petitioner's case is that there was no such concurrence since the Speaker of the Senate used the words **may not.**

151. It was further contended that there was no public participation before the Bill was passed as the 5 days period was not sufficient to enable Kenyans express their views on the extensive complex amendments. In **Robert N. Gakuru & Ors vs. The Governor Kiambu County & Ors [2014] eKLR** (supra) this Court cited with approval the decision in **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)**, where it was held *inter alia* that held that:

> **"For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a**

hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case."

152. As was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra):

> **"Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens….[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few……It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process……..In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining**

the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

153. In Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) the Court discussed what public participation may entail and expressed itself as follows:

> **"This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."**

154. In the instant case, it is alleged that when the Bill was published on 8th December, 2014 the same was only made available to the public on 9th December, 2014 through the limited use of digital technology only and that the tight timeline given by the Departmental committee on Administration and National Security for making submissions, the sheer volume of the bill and the difficulty in accessing the Bill seriously limited public participation and made it impossible for any meaningful public participation and engagement with the Bill.

155. It was contended that the Amendments made to the various pieces of legislations by the Act are major amendments that have had the cumulative effect of eroding the Bill of Rights and other Articles in violation of the Constitution especially Article 256(1)(c) and 2. One such amendment was introduced by clause 16 of the Act and is to the effect that in specified offences, the prosecution may, with leave of court, not disclose certain evidence on which it intends to rely until immediately before the hearing. This is impugned on the ground that it violates the spirit of Article 50(2)(j) of

the Constitution which decrees that every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. It is arguable whether the furnishing of witness statement immediately before hearing is information in advance of the evidence the prosecution intends to rely on. If it is not then the next issue would be whether it is a limitation and if so whether it has the effect of limiting the right so far as to derogate from its core or essential content. The same position applies to Clause 15 and whether it contravenes the letter and/or spirit of the rights enshrined under Articles 49 and 50 of the Constitution with respect to arraignment in court, charge and expeditious trial. One of the considerations which the Court hearing the petition will have to determine if it finds that the amendments amount to limitation of fundamental rights and freedoms will be the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. According to the petitioners, the crisis of insecurity afflicting our country is not due to a dearth of relevant laws to combat insecurity but rather due to a lack of the effective implementation of the law by the relevant security actors and agencies mostly due to other factors like endemic corruption prevalent within the security agencies. If that position is found to be correct then the Court may well find that there are less restrictive means to achieve what is intended to be achieved by the amendments. That however is not a matter for today.

156. With respect to the amendment limiting the number of refugees to a maximum of 150,000 unless increased by Parliament, it was contended that such an amendment contravenes the International Conventions and Instruments which form part of our domestic law by virtue of Article 2(5) and (6) of the Constitution.

157. I have identified only some of the issues raised by the petitioners. In my view these are not frivolous issues. To the contrary, they are weighty constitutional issues which require to be investigated further by the Court. To demonstrate that the Respondent and Jubilee appreciated this, they sought a certification under Article 165(4) of the Constitution. However there is a difference between a matter which raises *prima facie* case and one which raises substantial question under Article 165(4) of the Constitution.

158. In my view the decision whether or not to empanel a bench pursuant to Article 165(4) of the Constitution ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequence of delaying the cases which are already on the queue hence worsening the problem of backlogs in this country. As was appreciated by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** the meaning of "substantial question" must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation.

159. **Article 165** of the Constitution provides as follows:

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

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

(a) unlimited original jurisdiction in criminal and civil matters;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

160. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4)** under which the Judge is enjoined to certify that the matter raises a substantial question of law:

1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or

2. **That it involves a question respecting the interpretation of this Constitution and under this is included *(i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.***

161. Therefore it is not enough that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. The Constitution itself does not define what constitutes "substantial question of law". It is therefore upon the Court to determine what would amount to "a substantial question of law".

162. I am guided on this aspect by the decision in **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314** that:

"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

163. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

> **"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."**

164. In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

165. In my view these holdings offer proper guidelines to our Court in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution.

166. Other factors which the Court may consider in my view include: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition.

167. However, since the Article employs the word "includes", to my mind the list is not exhaustive.

168. The decision whether to certify that a matter raises a substantial question of law whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or is in respect of the interpretation of the Constitution being a judicial determination, the mere fact that parties agree that the matter ought to be certified does not bind the Court. It is however incomprehensible to me to reconcile the submission that the matter before the Court raises no *prima facie*

arguable issue and in the same breadth contend that the matter in fact raises substantial question of law as contemplated under Article 165(4) of the Constitution. In these petitions, I am however satisfied that the issues raised herein disclose substantial questions of law as what is at stake is the balancing of the need to secure the country on one hand and the protection of the Bill of Rights on the other both of which the State is enjoined to attain.

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

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

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

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

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

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

172. **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** on his part stated:

"...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."

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

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

174. In this case whereas, the 2nd petition seeks that the entire Act be suspended, the 1st petition seeks for the suspension of only some of the Articles. The Respondent took an issue with this and contended that since only some of the articles are sought to be suspended, it means that the petitioners' allegation of unconstitutionality of the Act is untenable. With due respect this position cannot be correct. From the authorities cited herein and in my own holding hereinabove, the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that that the operation of the legislative provision are a danger to life and limb or there is imminent danger to the Bill of Rights at that very moment and where the national interest demand. This is in consonance with the principle that a law is only void if inconsistent with the Constitution **to the extent of its inconsistency**. In my view, what the drafters of the Constitution intended is that the Court in determining the Constitutionality of an enactment ought to adopt what I would call "the guided missile" approach so as to target only the offensive parts of the Act lest the Court under the guise of determining the Constitutionality of an Act be guilty of usurpation of legislative mandate of the Legislature if it were to nullify the whole legislation simply because of a few offensive provisions.

175. By parity of reasoning, it is only those provisions which disclose a danger to life and limb or imminent danger to the Bill of Rights at that very moment that the Court may be justified in suspending by way of conservatory orders.

176. I must however make it clear that the mere fact that the Court suspends certain provisions of the challenged enactment, does not amount to a determination that those provisions are unconstitutional. In other words there is no inconsistency in the Court granting conservatory orders suspending certain provisions and after hearing the petition finding that the same provisions are after all not unconstitutional. Similarly there is no inconsistency in the Court invalidating provisions which at the hearing of the application for conservatory orders it did not find necessary to suspend. In other words at this stage this Court is not entitled to determine the petition in its entirety.

177. I now proceed to examine the Clauses sought by the Petitioners to be suspended. Clause 4 of the Act introduced an amendment deleting the words "Commissioner of Police or Provincial Commissioner" and substituting therefor the words "Cabinet Secretary, on the advice of the Inspector General of the National Police Service" with respect to declaration of curfew. Apart from that in enhances the fine to Kshs 10,000.00 from Kshs 1,000.00. In my view there is no imminent threat which cannot await the hearing of the petition. Similarly clause 5 only has the effect of substituting province with county, Commissioner of Police with Cabinet Secretary and reflects the enhanced fine. Again I see no reason to suspend the same.

178. Clause 12 of the Act introduces a Clause which limits the freedom of expression and freedom of the media and imposes a hefty fine of Kshs 5,000,000.oo for the offenders or 3 years in prison or both. If implemented, there is imminent danger of the offenders losing their liberty. Clause 15 of the Act though not specifically mentioned by the 1st Petitioner was challenged by the Petitioners on the

ground that it permits the keeping in custody of a suspect for a period of 90 days. Since that provision is subject to a Court order, I do not see the justification for suspending it at this stage. Clause 16 has the effect of denying the accused person evidence sought to presented against him until just before the hearing. As already discussed above, it is arguable whether this negates the spirit of Articles 49 and 50 of the Constitution. It must be remembered that Article 50 of the Constitution is one of the "protected" Articles by Article 24 and hence cannot be limited. If the Court was to find that this provision is unconstitutional the criminal process in this country would face a crisis with respect to persons whose trial were rendered unfair as a result of this clause.

179. Clause 25 empowers the Registrar of Persons to cancel registration or revoke identity cards under specified circumstances. Whereas the amendment is on the face of it a limitation of the rights enshrined under Article 12 of the Constitution, the amendment seems to provide for the due process to be followed before cancellation or revocation. Accordingly I do not see any immediate danger which cannot await the hearing of the petition. Clause 26 of the Act introduced an admission of statement by consent in criminal trials. This amendment is objected as contravening Article 50(2)(l) with respect to self-incriminating evidence. The DPP is of the view that this amendment does not add anything new to the current criminal process. Similarly if convictions were to be based on this provision and the Court was to find that the same is unconstitutional it would similarly lead to a crisis. Clause 29 seems to introduce summary procedure to criminal proceedings by introducing proof by way of notice though it is called agreement. Similar considerations to the foregoing provision apply.

180. Whereas nothing turns on Clause 35(a) clause 35(b) seems to enlarge the definition of "firearm" to include telescopes and night vision devices and outlaws the manufacture, assembling, purchase, acquisition or possession of an armoured vehicle without approval. I am not satisfied that there is any imminent danger that cannot await the hearing of the petition hence there is no justification to suspend this clause at this stage.

181. Clause 48 introduces a ceiling on the number of refugees and asylum seekers permitted to be in the country and places it at 150,000 though the same can be varied for a maximum of 12 months by Parliament. It is contended that this provisions flies in the face of International Instruments which are part of our law by virtue of Article 2(5) and 2(6) of the Constitution in particular ***Convention and Protocol Relating to Status of Refugees, 1951***, ***International Covenant on Civil and Political Rights, 1966*** and ***United Nations Universal Declaration of Human Rights, 1948*** as well as the ***African Charter on Human and Peoples Rights***. The effect of the implementation of this amendment would be the immediate reduction of the number of refugees which may lead to evacuation of some of them from the refugee camps and deportation of not a small number of refugees from the country if the 2nd petitioner's contention that there were 583,278 as at 30th November, 2014 is to be believed. If this was to happen before the petitions are heard, nobody including the learned Solicitor General was able to enlighten the Court how the situation would be

restored. Clause 56 introduced new Part V dealing with "special operations" which are operations meant to neutralise threats against national security. The provisions thereunder then proceed to deal with what are called "covert operations". It is contended that this provision is likely to take the Country back to the pre-2010 Constitution dark days. By enacting unto themselves the current Constitution by way of a referendum, no doubt Kenyans intended to have a break from the past. It is therefore necessary that this part be investigated by the Court in order to determine whether it is susceptible to abuse considering the current Constitutional dispensation.

182. Clause 58 seeks to replace "Parliament" with "National Assembly" effectively removing the Senate from playing oversight role on the National Intelligence Service. This provision is objected to as having been inserted without recourse to the Senate. Again the jury is still out on the question of the Senate's role in the enactment of the Act. Clause 64 introduced an offence of publication of offending material which is defined as publication or statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism.

183. That terrorism is a serious problem in this country and that the menace has led to loss of lives, limbs and property is an understatement. Any Kenyan of goodwill in my view must support all the lawful steps being taken by the Government to contain the terrorism menace in this country. Such steps if lawful ought to be applauded by all State Organs in this country. Faced with similar menace, India enacted ***Prevention of Terrorism Act, 2002*** (POTA) which was challenged on its Constitutional validity. In its decision in **Peoples Union for Civil Liberties & Anor vs. Union of India** (supra), The Supreme Court of India recognised that:

> **"In deciding the point of legislative competence, it is necessary to understand the contextual backdrop that led to the enactment of POTA which aims to combat terrorism. Terrorism has become the more worrying feature of the contemporary life. Though violent behaviour is not new, the present day 'terrorism' in its full incarnation poses extraordinary challenges to civilised world. The basic edifices of modern State, like democracy, state security, rule of law, sovereignty and integrity, basic human rights etc. are under the attack of terrorism. Though the phenomenon of terrorism is complex, a 'terrorist act' is easily identifiable when it does occur. The core meaning of the term is clear even if its exact frontiers are not…Our country has been the victim of an undeclared war by the epicentres of terrorism with the aid of well-knit and resourceful terrorist organisations engaged in terrorist activities in different states…To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. "**

184. I daresay that the grim picture portrayed in the above decision is exactly what we are confronted with in this country and the Government is obliged to take all lawful measures to nip acts of terrorism in the bud and such measures ought to be supported by Kenyans of all walks of life. Such moves however must pass

Constitutional and legal muster. Even the Supreme Court of India appreciated this when it pronounced:

> **"The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and the Court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights. Our Constitution laid down clear limitations on the state actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' Human Rights is the responsibility of Court in a matter like this."**

185. It will be the mandate of the Court at the hearing of the petition to determine whether the provisions of the Act met the Constitutional validity. Having read Clause 64 of the Act, it is my view that the new section 30A of ***The Prevention of Terrorism Act*** requires further interrogation by the Court. These provisions may *prima facie* infringe upon the freedoms and fundamental rights. Similarly, section 30F of the same Act which prohibits broadcast ought to be interrogated further by this Court before implementation.

186. Objection was further taken to Clause 86 which empowers the President to nominate the Inspector General of Police. In other words the amendment removes the role of the National Police Service Commission from the appointment of the Inspector General. Whereas that may be a contentious issue, I am not satisfied that it poses any danger which cannot await the hearing of the petitions. If after the hearing of the petitions the Court finds that the said amendment is unconstitutional I do not see any difficulty in the Court making appropriate orders to rectify the situation.

187. This Court was urged not to grant the orders sought on the ground that in the recent past there has been a lot of judicial bashing from other organs of the State and that the court may be construed as engaging in judicial activism. On this point I can do no better than cite the decision in **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146** where it was held:

> **"For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law."**

188. It has been said that the Courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the

mountaintops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. See **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.**

189. Justice, it has been said is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443.**

190. Before I part from this ruling I wish to express my gratitude to counsel who appeared in these proceedings for the well-researched submissions which I found very useful and which I have considered. If I have not expressly referred to each and every authority cited it is not out of disrespect or lack of appreciation for their industry.

191. In the result I grant conservatory orders suspending the following Clauses in ***The Security Laws (Amendment)Act, No 19 of 2014*** together with the amendments to the respective Statutes pending the hearing and determination of these petitions:

(1) Clause 12 which inserted section 66A to the ***Penal Code***.

(2) Clause 16 which inserted section 42A to the ***Criminal Procedure Code***.

(3) Clause 26 which inserted section 20A to the ***Evidence Act.***

(4) Clause 29 which inserted section 59A to the ***Evidence Act.***

(5) Clause 48 which inserted section 16A to ***The Refugees Act.***

(6) Clause 56 which repealed and substituted Part V of ***The National Intelligence Service Act***.

(7) Clause 58 which amended Section 65 of the ***National Intelligence Service Act*** by deleting the word "Parliament" and substituting therefor the words "National Assembly".

(8) Clause 64 to the extent that it introduces sections 30A and 30F of ***The Prevention of Terrorism Act.***

192. Pursuant to Article 165(4) of the Constitution I hereby certify that these petitions raise substantial questions of law under clause 3(b) and (d) of Article 165. Accordingly I direct that these petitions be transmitted to the Hon. The Chief Justice forthwith for the purposes of empanelling uneven bench of not less than three Judges assigned by him to hear and determine the petitions.

193. The costs of the applications shall be in the cause.

194. It is so ordered

Dated at Nairobi this 2nd day of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Hon James Orengo, SC, H E Kalonzo Musyoka, Senator Amos Wako, SC, Senator Moses Wetangula, Senator Judy Sijeny, Mr Paul Mwangi and Mr Antony Oluoch for the 1st petitioner.

Ms Jerusha Shivutse and Mr Kiprono for the 2nd petitioner.

Mr Njoroge for the Respondent.

Dr Maingi for the 1st interested party.

Mr Gitau Singh and Mr Evans Monari for 2nd interested arty.

Dr Khaminwa for the 3rd interested party.

Mr Lempaa for the 4th interested party.

Dr Nzamba Kitonga for the 1st Amicus Curiae.

Mr Paul Nyamodi for the 2nd Amicus Curiae.

Cc Richard.