

**Usikimye CBO & 4 others v Chebochok & 4 others; Law Society  
of Kenya & 9 others (Interested Parties) (Constitutional Petition  
E006 of 2024) [2024] KEHC 10121 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CONSTITUTIONAL PETITION E006 OF 2024**

**JK SERGON, J**

**AUGUST 15, 2024**

**IN THE MATTER OF PETITION UNDER ARTICLES 1, 3(A), 10, 19, 20, 21, 22, 23, 26, 27(4),  
28, 29 (C), 43 (1)(A), 73, 88(4), 165 (3), 258, OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 22 OF THE TEA ACT, NO. 23 OF 2020 LAWS OF KENYA**

**AND**

**IN THE MATTER OF REGULATION 3 AND 11(C), (E) OF THE TEA (TEA  
FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021**

**AND**

**IN THE MATTER OF SECTION 21, THE PUBLIC  
OFFICER ETHICS ACT, CAP 183 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ELECTION OF MR. JOHN CHEBOCHOQ ON 28TH JUNE  
2024 AS THE DIRECTOR OF TEGAT/TOROR TEA FACTORY, AINAMOI ZONE**

**BETWEEN**

**USIKIMYE CBO ..... 1<sup>ST</sup> PETITIONER**

**WANGU KANJA FOUNDATION (K) REGISTERED ..... 2<sup>ND</sup> PETITIONER**

**OXFAM ..... 3<sup>RD</sup> PETITIONER**

**THE AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM)  
REGISTERED TRUSTEES ..... 4<sup>TH</sup> PETITIONER**

**FLONE INITIATIVE ..... 5<sup>TH</sup> PETITIONER**

**AND**

**MR JOHM CHEBOCHOK ..... 1<sup>ST</sup> RESPONDENT**

**TEGAT TEA FACTORY LIMITED ..... 2<sup>ND</sup> RESPONDENT**



**KENYA TEA DEVELOPMENT AGENCY ..... 3<sup>RD</sup> RESPONDENT**  
**TEA BOARD OF KENYA ..... 4<sup>TH</sup> RESPONDENT**  
**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 5<sup>TH</sup>**  
**RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**  
**UTU WETU TRUST ..... INTERESTED PARTY**  
**ASSOCIATION OF GRASSROOT JOURNALISTS KENYA . INTERESTED PARTY**  
**ADVOCATES FOR SOCIAL CHANGE-KENYA ..... INTERESTED PARTY**  
**INDEPENDENT MEDICO-LEGAL UNIT ..... INTERESTED PARTY**  
**KATIBA INSTITUTE ..... INTERESTED PARTY**  
**PARTY NATIONAL GENDER AND EQUALITY COMMISSION .. INTERESTED**  
**PARTY**  
**NATIONAL COMMISSION ON HUMAN RIGHTS ..... INTERESTED PARTY**  
**CENTRE FOR RIGHTS EDUCATION AND AWARENESS**  
**(CREW) ..... INTERESTED PARTY**  
**KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV/**  
**AIDS ..... INTERESTED PARTY**

**RULING**

1. The subject matter of this ruling is the notice of motion dated 5th July 2024 seeking for the following orders inter alia:
  - (i) Spent.
  - (ii) Spent.
  - (iii) Spent.
  - (iv) That the Honourable Court be pleased to issue interim orders/ conservatory orders restraining the 1st Respondent from holding any public office pending the hearing and determination of the Petition.
  - (v) That the Honourable Court be pleased to issue any other appropriate interim reliefs.
  - (vi) That the costs of this application be borne by the Respondents.
2. The application is premised on the grounds set out on the face of the motion and the facts deponed in the supporting affidavit sworn by Njeri Migwi, a co-founder of Usikimye, the 1<sup>st</sup> Petitioner/Applicant herein.
3. The applicant avers that the petitioners are Non-Governmental Organisations under the Coalition of Organisations working on Sexual Violence in Kenya (CASV), crusaders of human rights and public



- interest and that the instant application was brought under article 22 and 258 of *the Constitution* of Kenya.
4. The applicant avers that on 20th February 2023, BBC News Africa aired a documentary titled "Sex for Work: The True Cost of Our Tea- BBC Africa Eye," which exposed Mr, John Chebochok for abusing his power and office. The documentary revealed that he sexually exploited women who worked and those who sought for employment at Finlays Company. The petitioners further argued that gross misconduct not only tarnishes the reputation of the tea industry but also inflicts severe harm on the victims, whose wounds remain unhealed and their cries for justice need to be heard and redressed.
  5. The applicant avers that Finlays Company acknowledged the allegations against the 1st respondent and immediately terminated his contract and barred him from all Finlays' sites.
  6. The applicant avers that despite these allegations the 2nd -5th respondents cleared and authorised the 1st Respondent to contest for the position of Director of Tegat/Toror Tea Factory, Ainamoi Zone. The applicant further avers that elections were done on the 28th day of June, 2024 and the 1st respondent was elected as the Director of Tegat/Toror Tea Factory, Ainamoi Zone.
  7. The applicant also avers that the 1st respondent's action of sexually abusing women as per the BBC expose violates article 10, 19, 20, 26, 27 (4), 28, 29 (c), 43 (1) (a) and 73 of *the Constitution* and further that the clearance and his election as the Director of Tegat/Toror Tea Factory, Ainamoi Zone violates the national values and principles of governance provided for under Article 10 and 73 of *the Constitution* of Kenya.
  8. The applicant avers that the instant petition questions the constitutionality of the clearance of the 1st respondent to contest for Directorship of Tegat/Toror Tea Factory, Ainamoi Zone and the election to the said position. The applicant further avers that there is an ongoing investigation at Kericho Police Station and a case against him at the HIV Tribunal.
  9. The applicant avers that the directorship of the 1st respondent has caused national and international uproar resulting in some international companies shying away from conducting business with Kenya Tea Development Agency which ripple effect will be a violation of the farmers economic rights as a result of the misguided decision by the 1st-4th respondents.
  10. The applicant avers that for the election of the 1st respondent to be constitutionally valid; the procedural and substantive tests must be met. The applicant further avers that the procedural propriety of appointment of state or public officers includes the weighing of qualifications and attributes of nominees and candidates against the constitutional threshold of chapter six and more specifically article 73 of *the Constitution*.
  11. The applicant avers that section 22 of the *Tea Act*, No. 23 of 2020 Laws of Kenya established the Board of Directors of Tea Factory Limited Companies. This Act caused the enactment of the Tea (Tea Factory Limited Company Election) Regulations, 2021 which is a subsidiary legislation that governs elections of Tea Factory Limited Company Directors. The applicant cited section 11 (e) of the Tea (Tea Factory Limited Company Election) Regulations, 2021 which invites chapter six of *the Constitution* to guide the qualification of candidates for the Tea Factory Directorship.
  12. The applicant avers that the petitioners have locus to bring the suit as provided for in article 258 of *the Constitution* and further that article 165 (3) of *the Constitution* clothes this Court with the jurisdiction to hear any question with respect to interpretation of *the Constitution*.
  13. Kipkoech John Chebochok 1st respondent filed a replying affidavit he swore in response to the application dated 5th July, 2024.



14. The 1st respondent avers that he had written a demand letter to the BBC News Africa seeking compensation, an apology and retraction of the said documentary which was prepared and aired without his input on the damning allegations against him.
15. The 1st respondent avers that he terminated his contract with Finlays vide a letter dated 12th January, 2017 to pursue personal interests and it was therefore misleading this Court to allege otherwise.
16. The 1st respondent avers that IEBC was given the mandate by the Tea Board of Kenya to run the said elections, there was no justification or basis to postpone the elections, consequently they deemed him fit and cleared him to run for the Directorship of Togat/Toror Tea Factory, Ainamoi Zone.
17. The 1st respondent avers that he has neither been summoned, charged or convicted before any competent authority with regards to the false, outrageous and damning allegations in the impugned documentary.
18. The 1st respondent avers that the law pertaining to his election was followed to the latter, both substantively and procedurally and further that he met all the requirements that occasioned him to be validly and democratically elected by farmers as the Director of Togat/Toror Tea Factory, Ainamoi Zone.
19. The 2nd respondent filed a replying affidavit in response to the application dated 5th July, 2024. The replying affidavit was sworn by Dickson Kirui the Company Secretary of Togat Tea Factory Limited.
20. The 2nd respondent avers that its election exercise was conducted on 28th June, 2024 and the exercise was conducted by the IEBC pursuant to a directive issued by the industry regulator, the Tea Board of Kenya.
21. The 2nd respondent avers that it is a limited liability company whose affairs including but not limited to election and appointment of its Directors are governed by its Articles of Association.
22. The 2nd respondent avers that pursuant to its Articles and Memorandum of Association and section 132 of the *Companies Act*, the 1st respondent would only be deemed as duly elected and appointed to serve as a Director subject to the shareholders' approval and endorsement pursuant to a vote taken during a Special General Meeting, where a vote on the 1st respondents eligibility and fitness to serve shall be taken by all the 2nd respondent's shareholders including but not limited to those who elected him from Ainamoi Zone.
23. The 2nd respondent also avers that it acknowledged the grave concerns raised over the integrity of the 1st respondent by various stakeholders in the tea sector and that major buyers of their tea had expressed their concern over the election of the 1st respondent as a Director of Togat Tea Factory Limited.
24. The 4th respondent filed a replying affidavit in response to the application dated 5th July, 2024. The replying affidavit was sworn by Willy K.Mutai the Chief Executive Officer of Tea Board of Kenya.
25. The 4th respondent avers that it received numerous complaints about the suitability and moral fitness of the 1st respondent from various tea industry stakeholders and subsequently wrote a letter to IEBC, the 5th respondent requesting it to postpone the elections of the Ainamoi Electoral Zone within Togat Tea Factory Company to a later date to allow the relevant government agencies to investigate the allegations levelled against the 1st respondent.
26. The 4th respondent avers that it placed the responsibility of overseeing the election of directors of smallholder tea factories to the IEBC.



27. The 4th respondent avers that its mandate in as far as elections of directors as outlined on the manual for election of directors of small holder tea factories is the nomination of a credible independent electoral body whereas the responsibility of clearing and shortlisting the qualified candidates is vested on the independent electoral body.
28. The 4th respondent avers that it did not contribute and /or aid violation of the constitutional provisions more so chapter six.
29. The 4th respondent avers that in any event the mandate of electing directors for the Ainamoi Zone rests with the shareholder of Tegat/Toror Tea Factory.
30. The 3rd and 5th respondent did not file their responses to the instant application.
31. The 2nd interested party filed a replying affidavit in response to the petition and the application dated 5th July, 2024. The replying affidavit was sworn by Yvonne Anyango Oyieke the Executive Director at Utu Wetu Trust.
32. The 2nd interested party avers that the thematic area of sexual gender based violence strongly falls within their purview of operations as a Non Governmental Organisation and a member of the Coalition Against Sexual violence in Kenya (CASV).
33. The 2nd interested party avers that it was aware of the expose against the 1st respondent that was aired by BBC and that the expose revealed that the 1st respondent repeatedly sexually exploited and harassed women in exchange for working opportunities at the James Finlays Company and that following public outcry the 1st respondent was terminated from the said company on grounds of gross misconduct. The 2nd interested party avers that the above notwithstanding, the 5th respondent cleared him for election and subsequently elections were held on 28th June, 2024 and the 1st respondent declared a Director of Tegat/Toror Tea Factory, Ainamoi Zone.
34. The 2nd interested party avers that gross misconduct on the part of the 1st respondent and subsequent election as Director of Tegat/Toror Tea Factory, Ainamoi Zone offends the spirit of articles 10 and article 73 of *the Constitution* and that these constitutional provisions highlight personal integrity, competence and suitability as being imperative to persons holding public office such as the 1st respondent herein.
35. The 2nd interested party avers that the second schedule of the *Tea Act*, No. 23 of 2020 and section 11 (e) of the Tea (Tea Factory Limited Company Election) Regulations, 2021 set out the criteria for assessing the professional and moral suitability of persons proposed to be directors.
36. The 2nd interested party avers that there are robust international and regional human rights instruments to which Kenya is a state party and therefore obligated to prevent sexual gender based violence, afford protection to victims and promptly investigate and prosecute these cases as and when they occur.
37. The 2nd interested party avers that the election of the 1st respondent, a perpetrator of sexual and gender based violence is a grave affront to the constitutional principles of good governance, integrity, transparency, accountability and high standards of professional ethics.
38. The 1st respondent filed a preliminary objection on points of law on the following grounds;
  - (i) The suit is misconceived and wanting and this Court ought to be divested of jurisdiction on the grounds that the suit offends the doctrine of exhaustion of the Manual for Election of Directors of Small Holder Tea Factories (2024) that governs the conduct of the elections



- (ii) The petitioners lack locus to institute the suit as the affairs of the 2nd respondents are that of a private company.
39. This Court directed the parties to file their written submissions.
- The applicant complied and filed her written submissions, while the applicant contended that the conditions for a meritorious preliminary objection are set out in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows; “ A preliminary objection must consist of a point of law, must have been pleaded or arises from the pleadings and if argued may dispose of the suit. Where a court is asked to look outside the pleadings or for evidence to come up with a decision on the preliminary objection, then the same does not fit to be termed as a preliminary objection but to call for either viva voce or affidavit evidence.” The applicant contended that the two grounds on the preliminary objection raised by the 1st respondent are facts which need to be ascertained by production of evidence and therefore do not raise any pure point of law.
40. The applicant argued that the instant petition does not offend the exhaustion doctrine as the Manual for Election of Directors of Small Holder Tea Factories (2024) is not applicable in this suit. The said manual applies to members of KTDA only and since the petitioners are not members of KTDA they are not bound by the said manual and cannot access remedies under the said manual. The applicant cited the High Court in *Mark Ndumia Ndung’u v Nairobi Bottlers Ltd & another* [2018] eKLR where the court held that; “ If the availability of a remedy is not evident, it cannot be invoked to the detriment of a Petitioner. Thus, where a party argues that a Petition is inadmissible before this court because alternative remedies have not been exhausted, that party bears the burden of demonstrating the existence of such remedies and that they have not been exhausted.” The applicant further argued that the petition seeks redress for violation of constitutional rights and therefore the suit was within the jurisdiction of this Court.
41. The applicant contended that the issues for election of directors for tea factory limited companies is governed by the *Tea Act* No. 23 of 2020 Laws of Kenya and the Tea (Tea Factory limited Company Elections) Regulations, 2021 and cited the provisions of section 11 (e) of the Tea (Tea Factory limited Company Elections) Regulations, 2021 and cited section 11 (e) of the Tea (Tea Factory Limited Company Elections) Regulations, 2021 which invokes chapter six of *the Constitution* to guide the qualifications of candidates for the Tea Factory Directorship. It provides that; “A person shall be eligible to vie for elections of the Board of tea factory limited company if that person: -
- (e) Meets the requirements of Chapter six (6) of *the Constitution* on leadership and integrity. ”
42. The applicants reiterated that the petitioners have locus standi to institute this suit article 22 and article 258 of *the Constitution* of Kenya gives the petitioners the locus standi to institute this suit on behalf of the victims whose rights have been violated.
43. They cited the case of *Cradle (The Children Foundation) suing as trustee through Geoffrey Maganya vs. Nation Media Group Limited*, High Court JR. Misc. App. No. 217 of 2011 where Githua J. relied on article 2(1) and article 20(1) of the Kenyan Constitution as a basis for finding that the Bill of Rights 'applies to all laws and binds all state organs and all persons'.
44. In her view, Lady Justice Githua argued state organs as well as private entities such as Nation Media were bound to respect and obey all the provisions of the Kenyan Constitution. The applicant cited paragraph 11 of the Guiding Principle of Business and Human Rights, 2011 which makes it a mandatory obligation for business enterprises to respect human rights. It states that “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”



45. The applicant reiterated that the 1st respondent's Preliminary Objection has no merit and the same should be dismissed with costs.
46. It is imperative to first determine the notice of preliminary objection before determining the merits or otherwise of the instant application. I have taken into account the rival arguments over the Preliminary Objection raised by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent has put forward two main grounds as the basis of the Preliminary Objection.
47. First, it is argued that the petition offends the doctrine of exhaustion. It is pointed out that under regulation 6(1) of the Manual for Election of Directors of Small Holder Tea Factories (2024), a party who is dissatisfied with the shortlisting of candidates and election of directors of the tea factory should approach the Dispute Resolution Committee appointed by the Tea Board of Kenya. This court was therefore urged to strike out the application and petition.
48. The second ground which was also urged by the 1<sup>st</sup> Respondent is that the Petitioners lack the locus standi to institute the petition and the instant application since the dispute is in respect of a private company.
49. The Petitioners beseeched this court to dismiss Preliminary Objection arguing that the same lacks merit and that those grounds are not pure points of law to warrant being regarded as a Preliminary Objection.
50. There is no doubt that the petition is premised on various Articles of *the Constitution* of Kenya 2010 to wit Articles 1,3(a), 10, 19, 20, 22, 23, 26, 27(4), 28, 29(c), 43(1), 73, 88(4), 165(3) and 258 of *the Constitution* of Kenya, 2010.
51. It is expressly pleaded that the clearance of the 1<sup>st</sup> Respondent to contest for the position of director of Tegat/Toror Tea Factory, Ainamoi Electoral Zone and his subsequent election to the said position violated Articles 10, 26, 27, 28, 29(c) and 73 of *the Constitution* of Kenya
52. I have carefully considered the arguments on the question as to whether the Petition and the instant application offends the doctrine of exhaustion. It is clear from the pleadings that the Petitioners are not merely challenging the candidacy and outcome of the election of the 1<sup>st</sup> Respondent as a director of Tegat/Toror Tea Factory but they are also questioning his suitability. They are saying that the 1<sup>st</sup> Respondent did not meet the constitutional threshold under Chapter six of *the Constitution*. In Article 22(1), *the constitution* expressly provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
53. It is the humble view of this court that the doctrine of exhaustion cannot be used to scuttle the Petitioners right to mount the instant petition. In other words the existence of another dispute resolution mechanism could not and cannot be used to deny a party the institute an action envisaged under Article 22(1) of *the Constitution*.
54. As regards the second ground of the Preliminary Objection it is argued that the dispute is in respect of a purely private company hence the petitioners had no locus standi to institute these proceedings.
55. I have already stated that the main complaint before this court is that the Respondents breached *the Constitution* when they purported to shortlist and clear the 1<sup>st</sup> Respondent to vie for the position of director in Tegat/Toror Tea Factory. It is specifically pleaded that the Bill of Rights was breached. Under Article 20(1) of *the Constitution* it is expressly stated that the Bill of Rights applies to all law and binds all state organs and all persons. It is therefore clear that all persons or enterprises whether private or public are bound to respect Human Rights.



56. In the end I find no merit in the Preliminary Objection raised by the 1<sup>st</sup> Respondent. The same is ordered dismissed.
57. I now turn my attention to the merits or otherwise of the motion dated 5<sup>th</sup> July, 2024.
58. The 1st respondent complied and filed his submissions and contends that he has never been charged before any court where the prosecution provided evidence against him to enable him produce exculpatory evidence and that he is not in any lawful custody, rightly so, and therefore he is available to discharge his duties as the Director of Tegat/Toror Tea Factory once he is confirmed.
59. The 1st Respondent contends that Tegat/Toror Tea Factory is funded by farmers and that it is the said farmers who with full confidence in the 1st Respondent, elected him as the Director. Failure to confirm him in the said position will disenfranchise the farmers and that further delay in confirming the 1st Respondent as the Director of Tegat/Toror Tea Factory will negatively impact on the management of the factory and heavily disadvantage the farmers.
60. The 1st respondent submitted that Finlays has a Sexual Harassment Policy and a Grievance Handling Policy which policy statement, purpose and scope which was approved in 2009. The same was revised and approved in 2016. A key feature in the said policies encourage complainants to make reports anonymously. No such complaint nor report was made against the 1st respondent when he worked as an employee.
61. The 1st respondent reiterated that he resigned and the evidence is well on record and further that his 27 years of service were recognized by the then Managing Director. The impugned documentary and consequently the petition/application herein is clearly an after-thought which sought to taint his image and reputation.
62. The 1st Respondent submits that the electoral body did not contravene any constitutional provisions while executing its mandate as to require this Court's intervention. Any allegation of error on the part of IEBC is therefore neither factual nor legally competent in this petition and that Courts could only exercise its jurisdiction over the IEBC where it has been demonstrated that it had failed and or refused to carry out its constitutional mandate.
63. The 1st respondent reiterated that no court of competent jurisdiction has tried and found him guilty of a criminal offence, furthermore, article 50(2) (a) of *the Constitution* guaranteed his right to be presumed innocent until proven guilty.
64. The 1st respondent placed reliance on article 259(3) of *the Constitution* which provides that: "Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking ...." and the case of John Harun Mwau & 3 Others v Attorney General and 2 Others, [2012] eKLR, where the High Court held that Courts should interpret *the Constitution* in a manner that remains relevant to its spirit. It discouraged re-writing *the Constitution* to suit popular opinion. The 1st respondent contended that the documentary on which the application is based is now popular opinion as several entities including media outlets had aired it
65. The 1st respondent contended that by choosing to file the instant petition, the petitioners are attempting to sanitise their indolence having squandered their opportunity to lodge the complaint as directed by the elections manual and cited the Court of Appeal in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015) eKLR, which stated that the requirement of exhausting structured mechanisms does not merely exist in a vacuum but it is in conformity with Article 159 of *the Constitution* as it encourages the use of alternative dispute resolution mechanism.



66. The 1st respondent highlighted the Court’s holding as follows: “It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews... as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts.” The 1st respondent maintained that the petitioners in this case have improperly moved this Court after failing to adhere to the Elections Manual’s provisions regarding the hearing of disputes and complaints and therefore the petition ought to be struck out.
67. The 1st respondent contended that the applicants have not satisfied the requirements to warrant a grant of conservatory orders and cited the case of the Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR, where the Court summarised the principles for grant of conservatory orders as: -
- “(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
  - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”
68. The 1st respondent contended that the applicant had not meet the threshold of a prima facie case as he had not been subjected to any criminal proceedings that have adjudged him guilty and therefore granting of the orders in the petition and application will have the effect of rendering the 1st respondent guilty without a fair trial while placing reliance on the case of International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR (PET. 552 OF 2012 AS CONSOLIDATED WITH 554 OF 2012, 573 OF 2012 AND 579 OF 2012) where a five- judge bench observed that the implication of allegations and unproven facts against an individual’s right to be presumed innocent and capable of vying for public office.
69. The 1st Respondent further contended that the applicant had not aptly demonstrated irreparable damage that if the interim conservatory order is not granted the substratum of the petition will be rendered nugatory.
70. The 1st Respondent also contended that this Court had been called upon to balance public interest in this case, it is the Petitioners’ case that the 1st respondent be declared unfit to hold public office and that his election as director of the 2nd respondent be annulled for unproven allegations that he was involved in molesting and sexually exploiting women working in tea farms whereas on the other hand, the 1st respondent has a right to be presumed innocent and the right to fair administrative action in line with the rules of natural justice.
71. The 1st respondent cited article 50 (2) (a) of *the Constitution* which provides that an accused person is presumed innocent until proven guilty which underpins the principle of a fair hearing and further that the right to a fair hearing as entrenched in *the Constitution* cannot be limited. The 1st respondent



- maintained that the BBC documentary so much quoted and cited by the petitioners cannot be used as the gavel that adjudges a man guilty and therefore any objection to his immediate confirmation as the Director of Togat/Toror Tea factory would be against the tenets of *the Constitution*.
72. The 1st respondent reiterated that the applicant has NOT met the requirements for the granting of conservatory orders and therefore the instant application ought to fail.
73. Upon consideration of the pleadings and the submissions filed in respect of the instant application, it is clear that this court is called upon to determine the question as to whether or not conservatory orders should be granted pending the hearing and determination of the substantive petition.
74. On one part, the applicants maintain that they satisfied all the three requirements for the grant of temporary orders sought, to wit a prima facie case raising triable issues of public interest which have a high chance of success; that if the orders sought are not granted, the petitioner and the general public shall suffer irreparable harm as the swearing in of Mr. John Chebochok as the Director of Togat Tea Factory is not in the public interest and finally that the balance of convenience tilts in granting the orders sought.
75. On the other part, the 1st respondent maintained that the applicants have not met the threshold for grant of conservatory orders. The 1st respondent contends that the applicants have not established a prima facie case as the 1st respondent had not been subjected to any criminal proceedings that have adjudged him guilty and therefore granting of the orders in the petition and application will have the effect of rendering the 1st respondent guilty without a fair trial.
76. The 1st respondent also argued that the applicants have not demonstrated the irreparable damage; that is if the interim conservatory order is not granted the substratum of the petition will be rendered nugatory. The 1st respondent invited this Court to balance public interest in this case, the petitioners case that the 1st respondent ought to be declared unfit to hold public office and that his election as director of Togat Tea Factory be annulled for unproven allegations that he was involved in molesting and sexually exploiting women working in tea farms and the 1st respondent's case on the presumption of innocence and the right to a fair administrative action in line with the rules of natural justice.
77. The threshold for the grant of conservatory orders was stated by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR Application No. 5 OF 2014* as follows:
- “(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
- (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant a stay of execution have been crystallised through a long line of judicial authorities at the High Court and



Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

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

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

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

78. The principles in regard to interim conservatory orders were reiterated in the case of Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR, the Court reinstated the principles in regard to the grant of interim conservatory orders as follows:

“(91) This Court is granted powers to issue conservatory orders in constitutional petition under Article 23(3) (c) of *the Constitution* and Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013.

(92) The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

79. When a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the applicant has put forward a case that is arguable and not frivolous. This was the holding of the court in the case of Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR : “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 not therefore 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*.”

80. In *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR the Learned Judge observed as follows; “At this stage I am alive to the fact, that the Court is not supposed to examine the merits of the Petition but has to consider whether the Petitioner, has established a prima facie case to warrant interim orders of protection, in order to secure the substratum of the suit and not to render the petition herein nugatory and become a mere academic exercise.
81. The questions raised in the petition surround the interpretation of article 10 and article 73 (2) of *the Constitution* of Kenya as against the professional and moral suitability of the election of the 1st respondent as a director of Togat/Toror Tea Factory following allegations that he was involved in molesting and sexually exploiting women working in tea farms. This court therefore finds that the applicant has established a prima facie case warranting interim orders of protection.
82. The second hurdle to be cleared by an applicant seeking conservatory orders is the need to prove that the substratum of the petition will be rendered nugatory if orders are not granted,, given the gravity of the allegations against the 1st respondent it is imperative that his professional and moral suitability be ascertained before confirmation as director of Togat Tea factory.
83. The Tea Board of Kenya, (the 4th respondent) and industry regulator filed a replying affidavit in response to the instant application, where the CEO avers that it received numerous complaints about the suitability and moral fitness of the 1st respondent from various tea industry stakeholders and subsequently wrote a letter to IEBC, the 5th respondent requesting it to postpone the elections of the Ainamoi Electoral Zone to a later date to allow the relevant government agencies to investigate the allegations levelled against the 1st respondent.
84. It is the view of this Court that the applicants have put forward a satisfactory argument that the petition will be rendered nugatory if a conservatory order is not granted, in that the 1<sup>st</sup> Respondent will have been confirmed as a director with the allegations still hanging on the head.
85. The final issue to be determined is whether the public interest lies in granting the orders sought by the applicant. According to Black’s Law Dictionary, “public interest” is defined as:

“The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake, especially an interest that justifies governmental regulation.” This court finds that public interest would thus be greatly jeopardised and compromised should the court decline to grant the interim orders preserving the substratum of the suit herein. There is need to first determine the question as to whether the 1<sup>st</sup> Respondent was suitable to be cleared to contest as a director of Togat/Toror Tea Factory under Chapter six of *the Constitution* of Kenya, 2010.
86. The upshot is that the petitioners’ application dated 5th July, 2024 is found to be meritorious. The same is allowed giving rise to issuance of the following orders.
  - (i) A conservatory order is hereby granted staying and/or suspending and/or halting the confirmation and/or appointment of the 1st Respondent as the Director of Togat/Toror Tea Factory pending the hearing and determination and final disposal of the Petition.
  - (ii) The costs of the application to await the outcome of the constitutional petition.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 15<sup>TH</sup> DAY OF AUGUST, 2024.**



.....

**J.K. SERGON**

**JUDGE**

IN THE PRESENCE OF:

Court Assistant: Rutto

Miss Koech

Miss Arusei

Miss Kiget

Miss Cherono For the Petitioners

Miss Kirui

Mr.Sunkule

Willy and Lilan for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents

Miss Nekesa

Mr. Omari For 1<sup>st</sup> Respondent

Miss Njege holding brief for Miss Gichohi for 1<sup>st</sup> Interested Party

Miss Wangui Ndungu holding brief for Mr. Langat for 1<sup>st</sup> Respondent

Miss Imbosa holding brief for Isinde for 5<sup>th</sup> Interested Party

Korir holding brief for Koech for 2<sup>nd</sup> Respondent

Aoko Anyangi for 2<sup>nd</sup> Interested Party

Miss Odek for 11<sup>th</sup> Interested Party

Yegon & Obara for 5<sup>th</sup> Interested Party

Njeri for 9<sup>th</sup> Interested Party

Miss Milimu for 10<sup>th</sup> Interested Party

3 | Page

