REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSOLIDATED PETITIONS NO. 56, 58 & 59 OF 2019

BETWEEN

NUBIAN RIGHTS FORUM .....1ST PETITIONER

KENYA HUMAN RIGHTS COMMISSION .....2ND PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .....3RD PETITIONER

AND

THE HON. ATTORNEY-GENERAL .....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT .....2ND RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRYOF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT .....3RD RESPONDENT

THE DIRECTOR NATIONAL REGISTRATION.....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INFORMATION,

COMMUNICATION & TECHNOLOGY.....5TH RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY .....6TH RESPONDENT

KENYA LAW REFORM COMMISSION .....7TH RESPONDENT

AND

CHILD WELFARE SOCIETY .....1ST INTERESTED PARTY

AJIBIKA SOCIETY .....2ND INTERESTED PARTY

MUSLIMS FOR HUMAN RIGHTS INITIATIVE .....3RD INTERESTED PARTY

HAKI CENTRE.....4TH INTERESTED PARTY

LAW SOCIETY OF KENYA.....5TH INTERESTED PARTY

INFORM ACTION .....6TH INTERESTED PARTY

BUNGE LA MWANANCHI .....7TH INTERESTED PARTY

INTERNATIONAL POLICY GROUP.....8TH INTERESTED PARTY

TERROR VICTIMS SUPPORT INITIATIVE .....9TH INTERESTED PARTY

AND

CENTRE FOR INTELLECTUAL PROPERTY & INFORMATION

TECHNOLOGY.....PROPOSED *AMICUS CURIAE*

RULING NO. 3

Introduction

1. On 20th November 2018 the National Assembly voted in favour of the enactment into law of the **Statute Law (Miscellaneous Amendment) Act No. 18 of 2018**. On 31st December 2018, the President of the Republic of Kenya gave his assent to the said Act, and it commenced operation on 18th January 2019. The effect of the Act was *inter-alia* to amend several provisions of a number of statutes, among them the **Registration of Persons Act** (Cap 107 Laws of Kenya).

2. The amendments to the Registration of Persons Act establish a National Integrated Information Management System (hereinafter "NIIMS") that is intended to be a single repository of personal information of all Kenyans as well as foreigners resident in Kenya.

3. The Nubian Rights Forum (the 1st Petitioner), the Kenya Human Rights Commission (the 2nd Petitioner), and the Kenya National Commission on Human Rights (the 3rd Petitioner), are aggrieved with the amendments made to the Registration of Persons Act, which they claim were passed in violation of the Constitution and in bad faith, and pose serious and immediate threats to fundamental rights and freedoms protected under the Bill of Rights. The three Petitioners therefore respectively filed Petitions in this Court, namely Nairobi High Court Petition No 56 of 2019, Nairobi High Court Petition No 58 of 2019 and Nairobi High Court Petition No 59 of 2019, which petitions were subsequently consolidated for hearing by this Bench. The Respondents in the consolidated Petitions are the Honourable Attorney General; the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government; the Permanent Secretary, Ministry of Interior and Co-ordination of National Government; the Director of National Registration; the Cabinet Secretary for Information, Communication and Technology; the Speaker of the National Assembly, and the Kenya Law Reform Commission.

4. A perusal of the Petitions reveals the following key areas of contention:

a. The exclusion and discrimination against the Nubian community whom it is argued do not have national identity cards and/or birth certificates hence are disadvantaged by the uneven playing field as far as implementation of the NIIMS system is concerned;

b. The impugned amendments were introduced and passed without public consultation and /or public participation;

c. There are no adequate and/ or proper safeguards for protection of the data and/or personal information intended for collection under the NIIMS system, hence there is a violation and/or threat of violation of the right to privacy guaranteed under Article 31 of the Constitution;

d. The impugned amendments were published in an omnibus legislation and in a Gazette Notice that was crafted in such a manner as to conceal the amendments from the public. To wit, the impugned amendments were published alongside sixty seven other pieces of legislation, notwithstanding the substantive nature and seriousness of the impugned amendments.

5. The Petitioners thus sought various declarations, *inter alia* that sections 3, 5 and 9 of the Registration of Persons Act as amended by the Statute Law Miscellaneous (Amendment Act) 2018 are unconstitutional for infringing various provisions of the Constitution. Orders were also sought that the State implements the decisions of the African Commission on Human Rights and the African Committee on the Rights and Welfare of the Child in the cases of **Nubian Community of Kenya v. Kenya** and **Children of Nubian Descent v. Kenya** before commencing the NIIMS registration process. Lastly, that the Respondents, by themselves, their employees, agents and/or servants be prohibited from installing and operationalizing the NIIMS process in any manner howsoever until policy, legal and institutional frameworks compliant with the Constitution are put in place.

6. After the Petitions were filed, a number of parties sought to be enjoined as interested parties. These are Child Welfare Society, Ajibika Society, Muslims for Human Rights, Haki Centre, Law Society of Kenya, Inform Action, Bunge La Mwananchi, International Policy Group and Terror Victims Support Initiative. Orders were granted by this Court on 25th March 2019 and the said parties were accordingly joined as the 1st to 9th Interested Parties.

The Applications

7. Simultaneously with the Petitions, the 1st, 2nd and 3rd Petitioners also filed applications for various conservatory orders. The 1st Petitioner filed an application by way of Notice of Motion dated 14th February 2019 seeking the following outstanding prayers:

a. That pending the inter-parties hearing and determination of the Petition the Honourable Court be pleased to issue a conservatory order prohibiting the Respondents whether by themselves, or any of their employees or agents or any person claiming to act under their authority from implementing Sections 3, 5 & 9 of the Registration of Persons Act as amended by the Statute Law Miscellaneous (Amendment) Act 2018;

b. That pending the inter-parties hearing and determination of the Petition the Honourable Court be pleased to issue a conservatory order prohibiting the Respondents whether by themselves, or any of their employees or agents or any person claiming to act under their authority or the authority of from implementing the registration National Integrated Information Management System (NIIMS) or under the authority of Sections 3, 5 & 9 of the Registration of Persons Act as amended by the Statute Law Miscellaneous (Amendment) Act 2018;

c.That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice;

d. That pending the hearing and determination of this suit the Honourable Court be pleased to declare that citizens who wish to withhold their data from being entered in the new register be at liberty to do so;

e. That pending the hearing and determination of this suit a restraining order be and is hereby issued prohibiting any and all data collected for the registry from being taken out of the country or sold to any third parties in line with international best practice;

f. That the Honourable Court do issue any other relief as it deems fit and proper.

8. The application was premised on the grounds on its face and in a supporting affidavit sworn on 14th February 2019 by Shafi Ali Hussein, the 1st Petitioner's Chairman. These are that there was no public participation on the impugned amendments which are in breach of several fundamental rights protected under the Constitution. Further, that there are no clear provisions regarding how the data will be collected, and there is no provision on who can access the data and for what purpose, hence encouraging access to the sensitive data by unauthorized persons.

9. It is further contended that there is no provision on amendment of data once it is collected, which poses the risk of people being locked out from accessing government services because of wrong data. Considering that the data in question is personal and private, mishandling of the same amounts to breach of, among other rights, the right to privacy. It is contended that introduction of a complex system will occasion further challenges and/or obstacles to marginalized and/or minority groups such as the Nubians, who have faced and continue to face difficulties including discrimination in the process of registration under the current, simpler, system, and many have failed to register.

10. The 1st Petitioner contended that its petition has raised the question of the constitutionality of the legislation, and members of the public are entitled to protection of their rights under the Constitution. Further, that its Petition would be rendered nugatory if the orders sought are not granted. It contended that it has established a *prima facie* case, and that the Respondents would suffer no prejudice if the orders it sought were granted. Lastly, that granting the orders sought would advance the cause of justice and would not be determinative of the Petition.

11. The 2nd Petitioner filed an application by way of Notice of Motion dated 18th February 2019 supported by an affidavit sworn on the same date by George Kegoro, its Executive Director. It seeks the following orders:

a. That pending the hearing and determination of the Petition, the amendments to the Registration of Persons Act Cap 107 Laws of Kenya vide Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 be suspended;

b. That pending the hearing and determination of the Petition, the Respondents by themselves, their employees, agents and or servants be and are hereby restrained from installing and operationalizing the National Integrated Information Management System (NIIMS) in any manner howsoever;

c. That the costs of this application be provided for;

d. Any further or other orders or directions the Honourable Court considers appropriate in the circumstances.

12. The 2nd Petitioner's application is premised on three broad grounds. Firstly, that the impugned amendments require in mandatory and unqualified terms that all Kenyan citizens, including children, submit their personal information to the state. It however, does not define what constitutes personal information, the applicable standards and principles to be observed in gathering the said information including where, when and how the said information may be gathered and by whom. Further, that the provision permits the state to require of citizens all manner of private information including DNA information without their consent, and DNA information can be used for a variety of purposes that makes the same susceptible to abuse by the state and/or unintended third parties. Reference was made to section 3 and 9A(2)(c) and (d) of the impugned amendments which, according to the 2nd Petitioner, essentially make every aspect of people's lives, including access to the right to education and health as well as related services, the protection of property, freedom of movement, right to receive public services, right to presumption of innocence, freedom from self-incrimination, right to privacy and security of the person subject to surrender of personal information/data to the state.

13. Secondly, it is contended by the 2nd Petitioner that the impugned provisions do not provide for any and/or adequate security guarantees for the integrity of the system, and integrating all personal information of the population of Kenya in one system will expose citizens to unimaginable risks should the system be compromised or breached in any way and thereby disrupt and/or curtail, in material respects, the enjoyment of almost all fundamental rights and freedoms under the Bill of Rights. Its argument is in essence that the impugned amendments impose excessive and/or unnecessarily extensive mandatory requirements for citizens' personal information without providing for concomitant safeguards to prevent abuse and/or intrusions into the same by the state or unintended third parties. Further, that the threats are further exacerbated by the fact that Kenya does not have legislation or policy on

data protection.

14. It is contended, lastly, that the impugned provisions were passed without public participation and consist of substantive provisions which were passed vide an omnibus Statute Law Miscellaneous Amendment Act despite on-going efforts to anchor the same provisions vide a substantive National Registration Identification Bill 2012. In addition, that there exists already, before the current amendments, a registration and identification regime under the Registration of Persons Act and the Kenya Citizens and Foreign National Management Service Act No. 12 of 2012, and no prejudice would be occasioned to any person if the impugned provisions are suspended pending the outcome of the Petition. The 2nd petitioner contends therefore that the harm or damage that shall be caused on citizen's fundamental rights and freedoms will be disproportionate to any inconvenience and/or damage, if any that will be caused to the state by delaying the implementation of the impugned amendments.

15. In its application brought by way of Notice of Motion dated 18th February 2019 supported by an affidavit by Dr. Bernard Mogesa which appears not to have been signed or commissioned, the 3rd Petitioner seeks the following orders:

a. That pending the hearing of the petition herein, this Honourable Court be pleased to grant an order of stay restraining the Respondents, by themselves, their employees, agents and/or servants from installing, rolling out, operationalizing or in any manner howsoever implementing the National Integration Management System;

b. That the Petition be heard on a priority basis in the interest of justice;

c. Such further and/or other orders as this Honourable Court may deem fit to grant.

d. There be no order as to costs.

16. In the grounds in support of its application, the 3rd Petitioner reiterated the contentions by the 1st and 2nd Petitioners that the impugned amendments introduce changes to sections 3, 5 and 9 of the Registration of Persons Act illegally, unprocedurally and without public participation, contrary to the Constitution and the law, It contends that these changes are consequently unconstitutional, null and void as they violate several provisions of the Constitution, particularly Article 31 on the right to privacy and Articles 10 and 118 on national values and public participation. Further, that there is potential threat of violation to other rights and freedoms as stated in the Petition. It further contends that the impugned amendments would lead to the requirement of unnecessary information which is not related to identification and is needlessly intrusive.

The Response

17. The Respondents filed various responses to the applications. The 1st Respondent filed Grounds of Opposition on 21st February 2019 and 27th February 2019 in which they contend that the Petitions do not disclose any threat or violation of the Constitution or any laws and are premised on conjecture and misconceptions that negate the substance and object of the NIIMS system. Further, that the formulation and enactment of the impugned amendments were made within the confines of a proper and justified legislative process and are not substantive, therefore enactment through a Statute Law Miscellaneous (Amendment) Act was justified.

18. According to the 1st Respondent, the objective of NIIMS is to capture and store data in a centralized digital database for effective and efficient administration which will facilitate accountability in various forms and curb wastage of resources in line with Articles 201 and 203 of the Constitution. Further, that contrary to the Petitioners' allegations, the NIIMS programme will ease registration and identification of persons thereby improving the security of the country by authenticating and verifying persons, and therefore that consideration of public interest militates against the grant of the orders sought.

19. The 1st Respondent further argues that the Petitioners have not demonstrated how Parliamentary procedure was flouted in the process of enacting the impugned amendments including the allegations on public participation under Article 118(2). Further, that public participation may be effected directly by the people or indirectly through their democratically elected representatives, and the Petitioners have failed to rebut the presumption of constitutionality of the amendments. Lastly, that contrary to the Petitioners' assertions, data protection is provided for under various statutes including section 83 of the **Kenya Information and Communications Act (KICA)**, and section 20 of the **Computer Misuse and Cyber Crimes Act**.

20. The 2nd and 3rd Respondents on their part filed Grounds of Opposition dated 20th February 2019, a Replying Affidavit sworn on 26th February 2019 by Dr Eng. Karanja Kibicho, one of its Principal Secretaries, and a Replying Affidavit sworn on 26th February 2019 by Janet Mucheru. They oppose the applications on the grounds that the Petitions herein and applications have been filed after inordinate and unexplained delay on the part of the Petitioners since the impugned amendments were enacted in November 2018, thereby disentitling the Petitioners to the orders sought. Further, that as a result of the inordinate and unexplained delay, granting the orders sought would occasion irredeemable and irreparable loss and damage to the State and to the citizens of Kenya who are the beneficiaries of NIIMS. It was stated that the State has installed and operationalized NIIMS to a substantial extent, including conducting the pilot exercise from 18th February 2019 in fifteen (15) Counties, and therefore the test of proportionality militates against the grant of the orders sought.

21. The 2nd and 3rd Respondents detailed how the information to be collected and stored under the NIIMS platform will be critical to governance, planning and enforcement of various development projects by the government, including taking critical security measures and fighting crime. They also stated that the integration of data through the NIIMS platform will facilitate the matching of resources to individual's socio-economic needs and enable the government to deliver on its constitutional mandate, which includes a mandatory requirement for efficient, effective and economic use of resources, accountability for administrative acts, transparency, and provision to the public of timely and accurate information.

22. It was contended that except for the fundamental rights and freedoms in Article 25 of the Constitution that cannot be limited, all the other rights and freedoms in the Constitution, including the right to privacy, can be limited by statute in appropriate circumstances. However, that the Petitioners have not shown that the Respondents have sought to limit any right which is among those fundamental rights which cannot be limited. Further, that the Petitioners have not laid a constitutional and/or legal basis for the assertions that DNA information can be used for a variety of purposes that makes it susceptible to abuse by the State and/or third parties. The 2nd and 3rd Respondents also sought to clarify that NIIMS does not in fact seek any DNA information from its citizens.

23. The 2nd and 3rd Respondents reiterated that there exist adequate and effective information, communication and technology laws, national security laws, regulations, administrative procedures, guidelines, customs and practices in public service with respect to management of information held by the Government that guarantees security and integrity of the information. The 2nd and 3rd Respondents also sought to clarify that the Integrated Population Registration System (IPRS) is a separate administrative action and it is not linked to other Government department and therefore cannot be a duplication of the functions of the NIIMS.

24. Lastly, the 2nd and 3rd Respondents asserted that in compliance with Article 118 of the Constitution, the Ministry of Interior and Co-ordination of National Government undertook extensive public participation through various modes to wit; publication of articles in newspapers that are widely circulated, live appearance in media by the Principal Secretary, State Department of Interior, publication in the Kenya Gazette and active online engagements. They also reiterated that there is a general presumption of law that statutes enacted by Parliament are constitutional and the burden falls on the person who alleges otherwise to rebut this presumption, and that the Petitioners have not discharged this legal burden at all.

25. The 4th Respondent filed a replying affidavit sworn on 21st February 2019 by its Director, Reuben Kimotho, in response to the applications. He pointed out that his department is vested with the mandate of implementation and enforcement of the Registration of Persons Act, and provided the objectives of NIIMS, which are to facilitate co-ordination in the registration of people, allocation of public resources, address duplication in registration, detection and prevention of fraud, impersonation and other criminal activities.

26. The 4th Respondent confirmed that a pilot programme for the collection of personal data for purposes of developing the integrated system has commenced and stated that extensive financial and human resources, including over 50,000 registration officials, had been deployed for this purpose. Further, that for the purposes of data collection during the pilot programme, the Respondents developed and are utilizing a Data Capture Tool, a copy of which was annexed to his affidavit, which is aimed at capturing the personal information of individual citizens. That the Respondents have further deployed biometric data registration devices for the purposes of capturing biometric data (fingerprints and facial features), and that the aim of the NIIMS is to integrate and consolidate these two identification aspects in one database.

27. Furthermore, that it is apparent from the Data Capture Tool that the information currently being collected from Kenyans in the pilot phase of NIIMS is information that is already held and/or in the custody of the National Registration Bureau and other government agencies from existing national registration processes such as information captured prior to the issuance of national

identity cards. The 4th Respondent annexed a copy of the National Registration Bureau's data capture tool normally used during registration for the issuance of a national identity card and averred that the only new aspects introduced by NIIMS are the digital photos and the digital fingerprints of Kenyans and registered foreigners for purpose of integrating the personal information to the biometric data. In addition, that each person will then be assigned a unique national identification number that would be used as a foundational number from which all databases will be built, and that contrary to the Petitioners' assertions, Deoxyribonucleic acid (DNA) and Global Positioning System (GPS) of Kenyan citizens are not currently being captured in the piloted phase of NIIMS.

28. The 4th Respondent averred that together with other government agencies, it has been holding in custody the personal information and/or data of Kenyan citizens without any breach or threatened breach and/or infringement of the citizens' right to privacy, and that this information is currently held in a "protected system" as defined by section 83Q of the Kenya Information and Communication Act. The 4th Respondent also reiterated that there exist adequate and effective policies, legislation, administrative procedures, guidelines, custom and practices in the public service with respect to management of information held by the Government that guarantees security and integrity of the said information.

29. It was its contention therefore, that there is no immediate threat of violation of the right to privacy of Kenyans to warrant the issuance of the order of stay prayed for by the Petitioners, and that the Petitioners have not demonstrated any prejudice that they would suffer should this Court not grant the stay orders sought. The 4th Respondent, in conclusion, stated that to the contrary, the Kenyan public will suffer immense prejudice in staying a process on which substantial public resources have been expended, and that is aimed at facilitating access to and delivery of services, efficiency in planning, fiscal savings, development of the digital economy including e-government and enhanced public and private sector service delivery.

30. On its part, the 5th Respondent filed Grounds of Opposition dated 26th February 2019 and a Replying Affidavit sworn on the same date by Jerome Ochieng, one of its Principal Secretaries. The 5th Respondent also reiterated that the process of enactment of the Statute Law (Miscellaneous Amendment) Act, 2018 was constitutional and did not violate any precepts of the Constitution; that NIIMS does not violate the right to privacy as enshrined in Article 31 of the Constitution; and that any limitation to the right to privacy, if at any, is reasonable and justifiable in an open and democratic society. It was its contention further that the Statute Law (Miscellaneous Amendment) Act, 2018 meets the constitutional standard in purpose and effect as well as the test of proportionality relative to the object and purpose it seeks to achieve.

31. The 5th Respondent averred that contrary to the allegations by the Petitioners, the design, architecture and operation of the NIIMS system guarantees the privacy and security of the individual, and the 5th Respondent sets out the measures that have been put in place in this regard. It is also its contention that there is already in existence a robust legislative regime which guarantees the safety of data and protects against any compromise, including the **Kenya Information and Communications Act**, the **Computer Misuse and Cybercrimes Act, 2018**, the **Access to Information Act**, and the **Registration of Person's Act**, all of which guarantee protection and safety of digital data. It is its case, therefore, that the applications and the orders sought are based on presumptions without any demonstrable manifest loss, injury or violation of fundamental rights and freedoms as alleged.

32. The response by the 6th Respondent was in Grounds of Opposition dated 20th February 2019, and a Replying Affidavit sworn on 28th February 2019 by Michael Sialai, the Clerk of the National Assembly. The 6th Respondent avers that the Petitioners are guilty of inordinate delay in instituting these proceedings and are time barred under the provisions of the **Fair Administrative Actions Act**. Further, that the National Assembly's mandate to enact, amend and repeal laws is derived from the Constitution, and the Petitioners' applications therefore threaten the legislative role of Parliament and specifically the National Assembly's mandate under Articles 1(1), 94 and 95 of the Constitution, and seek to restrict the National Assembly from carrying out its constitutional mandate derived from Article 95 (3) of the Constitution in enacting the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018.

33. The 6th Respondent also contends that the applications contravene Article 109 of the Constitution which mandates Parliament to enact, amend or repeal any law through Bills passed and assented to by the President, and that all the legislation passed by Parliament is presumed constitutional unless such presumption is rebutted. Therefore, that sections 3, 5 and 9A introduced to the Registration of Persons Act through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018, are constitutional and properly enacted by the legislative arm of government. In addition, that the Petitioners have not disclosed how the Constitution is violated by the said amendments.

34. Lastly, the 6th Respondent asserted that there was adequate public participation in the process of enactment of the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 and gave the details of the public participation that was conducted through

advertisements, memoranda and public hearings in its replying affidavit. Consequently, that the amendments did not violate the principle of public participation.

35. The 7th Respondent filed Grounds of Opposition on 28th March 2019 in response to the applications. It stated that the applications have been filed after inordinate delay since the impugned amendments were enacted in November 2018, thus disentitling the Petitioners to the orders sought. Further, that the orders sought in the Petition and applications are contrary to public interest and the doctrine of separation of powers. It terms the Petitions an abuse of the Court process to the extent that the Court is being invited to substitute its views with those of Parliament contrary to the provisions of Article 94(1) of the Constitution.

THE SUBMISSIONS

Submissions in support of the applications

36. In accordance with directions issued in the matter, the three applications were canvassed together by way of written submissions which were highlighted on 29th March 2019. The arguments in support of conservatory orders were made by the Petitioners and the 3rd, 4th, 5th, and 6th Interested Parties.

37. The Petitioners chiefly set out to demonstrate that they had attained the threshold required for granting of the conservatory orders sought. They relied on 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** and cited various judicial authorities that have set the threshold to be met in order for conservatory orders to be granted, including demonstrating that they have an arguable case. The decisions cited were **Muslims for Human Rights (MUHURI) & 2 Others vs AG, (2011) eKLR, Centre for Human Rights Education & Awareness (CREAW) & 7 Others vs AG (2011) eKLR, Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR**, **E.W.A. & 2 Others vs Director of Immigration and Registration of Persons & Another, (2018) eKLR** and **Kenya Association of Manufacturers & 2 Others vs Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others, (2017) eKLR.**

38. The petitioners submitted, first, that an arguable case had been made out that the impugned amendments significantly violate the right to privacy owing to their intrusiveness, particularly the collection of DNA without consent; the absence of a legislative scheme on how to secure privacy or individual privacy rights; and the vagueness and lack of intelligibility by the impugned amendments to guide implementation. Further, that the linkage of registration to services violates numerous rights in a manner that is not justifiable in a free and democratic society, including the right to citizenship and all attendant rights – such as the right to movement; economic and social rights; and the right to property, In any event, that the amendments limit the rights in a manner that is unjustifiable in a free and democratic society based on the non-derogable criteria stipulated in Article 24(1).

39. It was submitted in addition that the implementation of NIIMS based on the amendments will occasion denial of the nationality rights of members of the Nubian community and other marginalized groups (including some foreign nationals) who have been denied (directly or constructively) registration as nationals which is discriminatory. The Petitioners relied on the decision by the African Commission on Human and People's Rights in the case of **The Nubian Community in Kenya vs The Republic of Kenya Communication 317/2006,** which they stated declared that the processes which subject communities such as the Nubian Community to differential treatments in registration of persons in fact results in infringement of their fundamental right to equality and freedom from non-discrimination**.** They submitted that the holding in that matter supports the position that this is in fact a case with a likelihood of success.

40. It was submitted, secondly, that it was unconstitutional to pass the amendments through a Miscellaneous Amendment Bill and the attendant process. Further, that the Respondents' responses elaborated on the complex nature of the subject matters sought to be addressed by the amendments, hence providing the *prima facie* evidence that a regular law-making process should have been followed to effect the amendments. It was submitted that it is only proper to use the procedure of a Statute Law Miscellaneous Amendment in cases of minor and non-controversial amendments. The decision in **Law Society of Kenya vs Attorney General & Another (2016) e KLR** was relied upon for these propositions.

41. Thirdly, it was argued that aside from not providing or by withholding the necessary information to educate the public on the purpose and reach of the amendments and the effect of implementation of NIIMS, the Respondents failed to accord sufficient and

effective public participation in passing the amendments. Further, that the Senate was excluded from the process of passage of the amendments notwithstanding that the amendment involved matters concerning County government and the Respondents acknowledge as much in their responses.

42. In her oral submissions, Learned Counsel for the Petitioners, Hon. Martha Karua, contended that the impugned amendments were published in a Gazette Notice that was crafted in a manner so as to conceal it from the public as the impugned amendments were published alongside sixty seven (67) other pieces of legislation, notwithstanding their seriousness. It was her submission that the impugned amendments are not housekeeping matters and ought to have come as a separate Bill. The Petitioners relied on the holding in **Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR** with respect to what constitutes effective public participation.

43. Fourthly, it was submitted that the Petitions would be rendered nugatory if the conservatory orders were not granted. The Petitioners contended that their Petitions will be rendered moot as there will be no way of undoing the registration and the violations, especially those relating to privacy, which will have occurred. Citing the holding of Odunga, J in **Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR** (para 175) it was submitted that all the provisions of the amendments relating to registration of persons are violative of rights as they are all relevant and applicable in the implementation of NIIMS and should be suspended. Further, that the pilot project for select Counties for this collection began on the 15th of February 2019 and the government intends to roll out national-wide from 2nd April 2019. In this regard, the sensitive data to be collected by the Respondents shall be uploaded to the servers and retrieving such information will be a mere exercise in futility. Further, that this data could fall in the hands of persons who could misuse the information, causing permanent damage on the victims.

44. The Petitioners further submitted that the NIIMS project's national roll-out is scheduled yet there are no proper safeguards and/ or mechanisms for protection of the personal data that is to be collected. They made reference to the Replying Affidavit of Jerome Ochieng' on behalf of the 5th Respondent to which is annexed a Policy for Data Protection and a Data Protection Bill, a clear indication that there are presently no legal provisions for data protection, contrary to the deponent's averments. They submitted that since the NIIMS system is a concept that was conceived in 1989 and has therefore been a slow process, staying the roll-out process would not occasion any havoc.

45. Lastly, the Petitioners submitted that they and the general public were set to suffer great prejudice in the manner hereinbefore highlighted if the conservatory orders are not granted. It is their submission that the Respondents shall suffer no prejudice whatsoever. This is because the system is not yet operational therefore there is no harm in waiting to roll it out and the Respondents shall not be barred from carrying on with registration of people since the current registration system is still functional. In any case, there is nothing new in the registration system save for digitizing it. It was submitted that in the event the conservatory orders are granted and the *status quo* is maintained pending the hearing and determination of the Petitions, the object of the right to privacy and the right to equality and freedom from non-discrimination shall be enhanced. In addition, owing to the numerous public resources invested in the impugned project, the public would suffer grave disturbance for the government having invested heavily in a process that for all intents and purposes, was unlawful and meaningless.

46. The 3rd Interested Party filed submissions on 28th March 2019 which it highlighted at the hearing of the applications. It submitted that the question whether the instant Petitions raise a *prima facie* case is answered in the affirmative by the very composition of a 3-judge Bench by the Chief Justice following referral of the Petitions under Article 165(4). It contended that the Bench had the duty to preserve the substratum of the Petitions, otherwise the determination of the substantial questions would be reduced to a mere academic exercise. In this respect, the 3rd Interested Party cited the cases of **Kevin K. Mwiti & Others v Kenya School of Law & Others (supra)** and **Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others (supra).**

47. The 3rd Interested Party further submitted that there is no proper safeguard put in place to ensure the data already collected will be safe and not used for improper purposes. That relying on the Data Protection Bill that is meant to safeguard data collected does not stand since it's not yet legislation yet the data to be protected will already have been collected and exposed to manipulation. The 3rd Interested Party accordingly relied on the holding of Mativo J. in **Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others [2018] eKLR** to submit that should the Court not grant the conservatory orders, the Petitions will lose meaning as the right of citizens to privacy will have been infringed if the exercise is allowed to begin.

48. The 4th Interested Party submitted that the stateless communities which it represents, being the people of Pemba, Burundi, and

Rwandese descent, are at risk of being highly marginalized when the NIIMS process takes effect. It was its submission that these stateless persons are recognized by statute and ought to be protected. It supported the contention by the Petitioners that they had met the threshold for the grant of the conservatory orders sought, relying in support on the decision in **Lipisha Consortium Ltd & Another vs Safaricom Ltd. 2015 e KLR**.

49. The 5th Interested Party filed a Replying Affidavit sworn on 15th March 2019 by Mercy Wambua and written submissions on 27th March 2019. It is averred on its behalf that sections 3, 5 and 9A of the Registration of Persons Act directly violate and limit the right to privacy contrary to Article 31 without conforming to the requirements of reasonableness and justification for limitation as provided under Article 24 of the Constitution. Further, that *en masse* collection of such sensitive information without a data protection framework is unacceptable in an open and democratic society. The 5th Interested Party gave the example of the European countries which have put in place the General Data Protection Regulation (GDPR) restricting the collection of biometric data and prescribing how such data should be processed.

50. The 5th Interested Party argued that the applicants had demonstrated a *prima facie* case, citing in support the case of **Hon. Kanini Kega v Okoa Kenya Movement & 6 Others [2014] eKLR** where the Court held that a *prima facie* case is a case which is not frivolous, and discloses arguable constitutional issues. It was also their submission that combining all information relating to a person into one database and using biometrics to secure this information enables the Respondents to carry out mass surveillance, which this Court held to be unconstitutional in **Okiya Omtatah Okoiti vs Communication Authority of Kenya & 8 Other (2018) eKLR**.

51. The 5th Interested Party submitted that the Respondents will not be prejudiced should the impending roll-out of NIIMS be suspended pending the hearing and determination of the petition. Further, that contracts entered into with third parties to execute NIIMS are based on an unconstitutional exercise and can therefore not give rise to legal obligations. Furthermore, that any monetary losses can be adequately compensated. On the other hand, should the conservatory orders not be granted, millions of Kenyans will be coerced to submit their personally identifiable information.

52. The 6th Interested Party filed submissions on 27th March 2019. Its submission was that the Respondents, particularly the 1st, 2nd, 3rd, 4th and 5th Respondents, all exercise delegated authority pursuant to Article 3 of the Constitution, hence have a duty and obligation to act solely in the best interests of all Kenyans. Further, that the Respondents are bound in all their conduct and actions, including in making and implementing public policy decisions, by the national values and principles of governance in Article 10 of the Constitution. The 6th Interested Party stated that the Court ought to do a balancing act by weighing the harm or loss the public will suffer if the rollout of the NIIMS project is suspended for the limited duration of the Petitions *vis-a-vis* the continuation of the rollout, which could lead to violation of fundamental rights and freedoms that are complained of, and loss of public resources in the interim if the project is ultimately stopped. The decisions in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (supra)** and **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** were cited in this regard**.**

53. Relying on the case of **Republic vs County Government of Mombasa e*x parte* Outdoor Advertising Association of Kenya (2014) e KLR,** the 6th Interested Party further submitted that the issues they raised about the impugned amendments allude to breach of the law and the Constitution, in which there can never be public interest. It was submitted that the material placed before the Court by the applicants falls within the threshold principles for granting of the conservatory order(s) sought.

54. In her oral submissions on behalf of the 6th Interested Party, Learned Counsel, Ms. Soweto, termed it paradoxical that the 30-year old NIIMS, which was a substantive national plan, was tacked away and then sneaked in as an omnibus Bill. It was therefore improper for the Respondents to benefit from a bad situation that they themselves have created.

Submissions in Response

55. All the Respondents and the 1st, 2nd, 7th, 8th and 9th Interested Parties opposed the Petitioners' applications for conservatory orders in their respective written and oral submissions.

56. The 1st Respondent cited various decided cases to submit that the Petitioners have not satisfied the threshold for grant of conservatory orders set out in **Centre for Rights Education and Awareness (CREW) and 7 others v Attorney General (supra)** and **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others (supra)**. It was its submission that the Petitioners have failed to demonstrate *prima facie* how the NIIMS exercise violates the Constitution.

57. The 1st Respondent noted the allegations made by the Petitioners against the NIIMS process. It observed that the Petitioners were alleging that their Petitions raise serious concerns that need to be addressed before the process starts. These concerns included allegations that the Respondents were taking information from citizens, including children, without proper structures in place; that the information sought is personal and is being taken forcefully with threats of being unable to access government services if they fail to register; and that the process seeks to invade people's privacy in seeking to collect DNA and GPS without the person's consent. Further, that there are no adequate data protection measures to protect the said information. The 1st Respondent's submission with respect to these allegations is that they are farfetched and there is no demonstration of how the NIIMS exercise violates the rights and fundamental freedoms protected under the Constitution.

58. It was further submitted that Eng Karanja Kibicho, the Principal Secretary in the Ministry of Interior and Co-ordination of National Government has confirmed on oath that the government is not interested in DNA or GPS of citizens. Further, that since the 5th Respondent has also confirmed that there exist adequate data protection laws for all information collected by the government, the applicants' fears have been addressed and there is no threat to constitutional rights as alleged by the applicants.

59. It was the 1st Respondent's submission that the Petitioners have not demonstrated the prejudice they are likely to suffer if the conservatory orders are not issued. Further, that if the orders are not granted, the Petitions will still be alive as many issues are yet to be determined by the Court, including the legality of the law-making process. Its submission was that, on the contrary, it is in fact the larger public, who are the beneficiaries of the programme, who will lose if the conservatory orders are granted since the government has invested numerous resources into the project at the expense of the taxpayer.

60. The 1st Respondent further submitted that the Court should be guided by the doctrine of presumption of constitutionality of legislation. It was its case that the burden of rebutting that presumption lies solely on the applicants. Further, that the Court needs to decide whether the allegations regarding the impugned amendments are true or false and this can only be done through a critical interrogation of the process *vis a vis* the allegations made. That underlying issues cannot be determined at the interlocutory stage as the legality or otherwise of the said allegations can only be determined after a full hearing. It was submitted therefore that in the instant case, granting conservatory orders would be detrimental to the public interest, namely that the orders sought have the effect of stalling a massive project that has consumed numerous resources without hearing the merits of the case.

61. In his oral submissions on behalf of the 1st Respondent, Learned Counsel, Mr. Bitta, contended that the Miscellaneous Statute Law (Amendment) Act dealt with only 3 sections, and one of them, section 3, is merely the interpretation section. Counsel faulted the Petitioners for questioning the necessity of the personal information needed for the NIIMS system, contrary to the provisions of Article 31(c). It was his submission further that no material has been placed before the Court to demonstrate the weakness of the system. Counsel submitted in closing that the Court has the discretion to fashion appropriate remedies in determining applications such as was presently before it.

62. On their part, the 2nd and 3rd Respondents submitted that the Petitioners have not demonstrated exceptional circumstances to warrant the grant of conservatory orders, contrary to what is required in law. It was their submission that in fact, such circumstances do not exist. Their case was that in a matter such as this, where the Petitioners are challenging the constitutionality of a statutory provision, conservatory orders should not be issued. Further, that as is trite law, the presumption of constitutionality of statutes militates against the ready issuance of conservatory orders pending the hearing and determination of a challenge to the constitutionality of the impugned statutes. They argued that the Court ought to choose the side of caution and decline the invitation to issue conservatory orders as it would amount to unwarranted departure from a long-established principle of law. According to these Respondents, the Petitioners were, in essence, inviting this Court to presume that the subject provisions of the Act are unconstitutional before hearing the Petitions.

63. The Respondents submitted further that the Applicants have not demonstrated a *prima facie* case with a likelihood of success. They refuted the allegations that the process of enactment of the Act was unconstitutional since it was allegedly not in accordance with the constitutional requirement of public participation. They submitted that the Bill was duly published as required by the law, and the Clerk of the National Assembly had published, in the local newspapers of nation-wide circulation, a call for submission of memoranda. Further that various memoranda were received, including a memorandum from the 3rd Petitioner. Indeed, the 3rd Petitioner had categorically supported the amendments now sought to be declared unconstitutional and had also supported the roll out of NIIMS whose suspension it now seeks. The 2nd and 3rd respondents contended that the views submitted by members of the public had found expression in the Act.

64. The 2nd and 3rd Respondents further argued that the allegation that NIIMS would perpetuate discrimination is unfounded. It was their submission that it has not been demonstrated that the current registration system discriminates against the members of the 1st Petitioner in any way. That to the contrary, it has been demonstrated that the 1st Petitioner has in the past written to the National Registration Service expressing satisfaction with the current system. In any case, NIIMS would eradicate the inefficiencies associated with the current registration systems. Further, in planning for the pilot phase of NIIMS, the Ministry, in consultation and guidance of the National Steering Committee and the National Technical Committee, carefully identified centres around the country so as to promote inclusive data, participation of a representative sample of Kenyans, and also to ensure that even marginalized communities and areas are fully engaged and involved in the whole process without any discrimination.

65. With regard to the allegation that there are no adequate legal mechanisms to protect the data being collected by the government, their submissions was that this contention is unsupported by evidence. They argued that the 5th Respondent's response already outlines the existing framework and that it is adequate for data protection. They reiterated that the information being sought under NIIMS is already collected by various agencies of the government and so far, there has been no case of data theft. It was their submission that the implementation of sections 3, 5 and 9 of the Registration of Persons Act as amended by the impugned Act does not pose real and imminent danger at this very moment, and the Petitioners have failed to discharge the burden of showing real and imminent danger.

66. The 2nd and 3rd respondents argued that the Petitioners and anyone with reservations regarding NIIMS will not be compelled to register on the first day of the mass roll-out. As such, the rights of the Petitioners are not under real and imminent danger. Further, that no personal data collected and stored in NIIMS would be susceptible to misappropriation or expatriation as alleged; that NIIMS hardware components were all tested and cleared for data-mining software; and that the software components were locally developed. As such, the allegations of the Applicants are merely speculative at best.

67. The 2nd and 3rd Respondents urged the Court to find that in the circumstances of these consolidated Petitions, granting conservatory orders would inconvenience the larger public which is highly supportive of the immediate roll-out of NIIMS. They submitted that since NIIMS carries many public and personal benefits to the people of Kenya, which benefits are outlined in detail in their submissions, the public interest consideration is in favour of refusing the conservatory orders sought. It was submitted that the Applicants would not suffer any prejudice if the conservatory orders are not issued as the Applications had not shown any real and imminent prejudice or danger that they would face in the event that sections 3, 5 and 9A of the Act are implemented pending the hearing and determination of the Petitions. It was their case that in fact, the prejudice would be suffered by the State and Kenyans at large.

68. The 2nd and 3rd Respondents further submitted that the inordinate delay and non-compliance with the Court's directions by the Applicants disentitle them of the conservatory orders. Further, that the said delay together with the aforesaid presumption of constitutionality of statutes gave the government the green light to take various steps in implementing the said provisions of the law. Reliance was placed on the decision in **Ndyanabo vs. Attorney General (2001) EA 495.** As a consequence, the government has put in place various measures at enormous public expenditure in implementing the NIIMS project. Therefore, it would be unfair for the Petitioners to seek to belatedly challenge the constitutionality of sections 3, 5 and 9 of Cap 107 as amended and on the basis whereof, seek the conservatory orders. It was further submitted that the substratum of the Petitions will not be lost even if the NIIMS mass registration is allowed to commence.

69. Counsel for the 2nd and 3rd Respondents, Mr. Regeru, stated in his oral submissions that the government already has the personal data in various platforms and NIIMS is for efficiency purposes. He added that there is nothing suspect about digitization and this was indeed the direction the world is taking. It was submitted that the larger majority of Kenyans want the NIIMS project rolled out, and that the three Petitioners are the only ones seeking for the process to be stopped. Counsel submitted that the Petitioners have not demonstrated exceptional circumstances to warrant the grant of conservatory orders. He cited in this regard the decisions of the court in **Martin Nyaga Wambora v. Speaker of the County of Assembly of Embu & 3 Others (2014) eKLR; Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others (2018) eKLR** and **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another (2016) eKLR** to urge the court not to grant the conservatory orders.

70. The 4th and 7th Respondent jointly filed written submissions in opposition to the conservatory orders sought, as well as a bundle of authorities. Citing the Supreme Court case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, (supra),** it was their submission that the Applicants have failed to satisfy the grounds for the grant of conservatory orders. That the Petitioners have failed to demonstrate the manner in which the deployment of NIIMS has violated any constitutional provision. Instead, the Petitions

merely contain vague, speculative and unsubstantiated allegations upon which a *prima facie* case cannot be established.

71. It was submitted that in view of the totality of the pleadings filed before Court, there was sufficient public participation and as such this constitutional imperative was met by the 6th Respondent. Further, that the personal information required for purposes of the NIIMS system is necessary for the effective discharge of the State's constitutional mandate. The Petitioners have failed to demonstrate the manner in which the collection of personal information is an "unnecessary requirement", especially in light of the fact that this information is already held by the State, albeit in different institutions. It was their submission that the Petitioners do not challenge any other statutory provisions which allow the government to collect personal information on account of an alleged infringement on the right to privacy, which is indicative of the Petitioners' *mala fides*. That in any case, the security of data that is held by the government has never been called to question, and the contention by the Petitioners that the deployment of NIIMS would amount to a breach of privacy is based on mere discomfort and not a real threat and/or danger.

72. Referring to Article 27 of the Constitution, it was their submission that the principle of equality does not mean that every law must have universal application for all who are not, by their circumstances, in the same position. To wit, differentiation is inherent in the concept of equality, which requires parity of treatment under parity of conditions. They acknowledged, as deponed by the 4th Respondent, that members of the 1st Petitioner's community undergo a vetting process to establish the authenticity of their claim to Kenyan citizenship, as do other members of other border communities. They however submitted that vetting has a statutory underpinning in section 8 (1) of the Registration of Persons Act, thereby placing the burden on the Petitioners to demonstrate the manner in which their vetting is discriminatory, and in this respect relied on the decision in **John Harun Mwau vs. Independent Electoral and Boundaries Commission & Another [2013] eKLR.**

73. It was their submission that the Petitions challenge the constitutionality of the enactment of the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 yet none of the Applications or the supporting affidavits anchor this claim on a precise constitutional provision. They termed the lack of precision on the constitutional provision alleged to have been infringed by the legislature as contrary to the dictum set by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR**. It was submitted that the Petitioners have in the circumstances failed to meet the threshold for obtaining orders suspending the impugned legislation.

74. The 4th and 7th Respondent submitted further that the responses filed by the Respondents, including the 4th Respondent's Replying Affidavit, have set out in necessary detail the sufficiency of existing statutory safeguards on the protection of data held by government. That none of the Petitioners have discharged the burden of demonstrating the insufficiency or otherwise of the current existing safeguards on information held by the State. They further submitted that the Respondents have sufficiently demonstrated the need for the deployment of NIIMS to safeguard public interest. Their submission was therefore that it is in the public interest not to grant the orders sought. That granting the conservatory orders would result in a situation that offends Article 201 (d) of the Constitution which provides that public money shall be used in a prudent and reasonable way. Further, that it has also been demonstrated that conservatory orders halting the deployment of NIIMS could portend liability on the government to possible court action stemming from the contractual commitments that have been entered into in the process.

75. The 4th and 7th Respondents further submitted that the Petitioners have not demonstrated that the orders sought must be granted as a matter of priority; no evidence has been adduced by the Petitioners of an imminent threat to the privacy and security of the personal information to be collected through NIIMS or that any person has been discriminated against or is threatened with discrimination during registration under NIIMS. They therefore prayed that the Applications should be dismissed with costs to the Respondents.

76. In his oral submissions on behalf of the 4th and 7th Respondents, Learned Counsel, Mr. Nyamodi, addressed himself to the submission by Counsel for the 3rd Interested Party that the constitution of a Bench by the Chief Justice automatically means the Petitions raise substantial issues. His submission was that a substantial question of law ought to be distinguished from a *prima facie* case. It was also his submission that the issue of the quality of public participation that was accorded the public prior to the enactment of the impugned legislation is beyond the Court at this interlocutory stage.

77. In its written submissions in opposition to the Petitioners' applications, the 5th Respondent relied on the case of **Kenya Association of Manufacturers & 2 Others v Cabinet Secretary Ministry of Environment and Natural Resources & 3 Others (supra)** and highlighted the Court's finding that:

"the jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order".

78. It was its submission that it had, through the affidavit of Jerome Ochieng, demonstrated the existence of a robust policy and legislative framework, administrative procedures and guidelines that guarantee protection of data and information collected and held by government, hence the allegations on lack of data security are baseless. That it is also deponed in the said affidavit that the government already has in place a Data Protection Bill 2019 which is before the National Assembly for legislation. That in any case the government already has in store a huge accumulation of personal data and by virtue of section 83 G, 83 H and 83 I of KICA, a large segment of that information is already digitized.

79. The 5th Respondent agreed with the submissions by the other Respondents on the doctrine of the presumption of constitutionality. It also outlined in detail the benefits of the NIIMS system, submitting that it was in the public interest to deny the orders sought. It was submitted that the Applicants had not demonstrated the prejudice likely to be suffered if the orders sought are denied.

80. The 6th Respondent submitted that the Replying Affidavit sworn by Mr. Michael Sialai, the Clerk of the National Assembly on behalf of the 6th Respondent clearly reveals that the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was enacted in accordance with the Constitution and thus the impugned sections are constitutional. It was its submission that the National Assembly debated and passed the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 12 of 2018) and the President assented to it. Further, that the National Assembly conducted public participation and considered public views, the evidence of which is contained in the documents annexed to Mr. Sialai's Replying Affidavit. That therefore, the allegations that the impugned amendments were approved and passed without subjecting the provisions to public participation is therefore not supported by facts. The 6th Respondent cited various decisions on the extent of public participation including the decision in **Kiambu County Government & 3 others v Robert N. Gakuru & Others (supra),** and the decision of the South African Constitutional Court in **Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) (2006) ZACC 11**

81. The 6th Respondent also supported the position taken by the other respondents on the doctrine of presumption of constitutionality of legislation. Its submission was that neither the Constitution nor the rules of the House have disallowed Miscellaneous Amendment Bills. It refuted the notion that unlike the 2015 and 2016 Statute Law (Miscellaneous Amendment) Bills, the 2018 statute did not contain and/or use the word "minor", hence it is not proper to argue that the impugned amendments were treated as minor.

82. The 6th Respondent further made reference to the context of the Finance Bill, which is passed every year, whose intention is to amend several laws to deal with revenue-raising measures or even repeal in entirety certain taxation provisions in the law. The effect of a Finance Bill cannot be underrated to constitute an interpretation as minor amendments. This scenario, in its view, applies to a Statute Law (Miscellaneous Amendment) Bill whose intention is to amend many statutes. It termed the approach by the Petitioners as intrusive on Parliament's mandate and cautioned that Parliament ought to be allowed to regulate its internal affairs with no interference, including by the Senate. The 6th Respondent relied in support for this submission on the case of **John Harun Mwau vs Dr. Andrew Mullei & Others. Civil Appeal No. 157 of 2009; Prebble vs Television New Zealand Limited [1995] 1 AC 32** and the South African decision in **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No. 10/99**.

83. It was submitted that the right to privacy is not absolute but is subject to limitation as provided for in Article 24 of the Constitution. The 6th Respondent cited the decision of the Supreme Court of India in **Civil Original Jurisdiction Writ Petition (Civil) No. 494 Of 2012 - Justice K.S. Puttaswamy (Retd.) and others –Versus- Union of India and Others**) in support. It was its submission that nothing has been produced by the 1st Petitioner to support the assertion that the Nubians or any other marginalized community would be discriminated against by the NIIMS system. It further relied on the case of **Mohammed Abduba Dida v Debate Media Limited & another [2017] eKLR** on the burden of proof when alleging discrimination. According to the 6th Respondent, the authorities on equality suggest that the right to equality does not prohibit discrimination but unfair discrimination.

84. Lastly, the 6th Respondent submitted that none of the statutes amended falls under Article 110(1)(a) and Part 2 of the Fourth Schedule to the Constitution, which provides for Bills that concern Counties, so as to warrant committal to the Senate or to be classified as a Bill concerning Counties. The mandate of the Senate under Article 96(2) of the Constitution is to participate in law

making function of Parliament by considering debate on and approving Bills concerning Counties as provided for under Article 217 of the Constitution and exercise of revenue allocated to Counties. It was submitted that the matters raised by the Petitioners herein will not be rendered nugatory by refusal to issue the conservatory orders since the Petitioners can opt not to participate in the exercise until the matter is heard and finalized. Further, that the Petitioners' applications do not disclose any arguable issues compelling issuance of the orders sought.

85. The 1st Interested Party opposed the grant of the prayers sought by the Petitioners. It submitted that the impugned Act was signed into law on 31st December 2018, yet the 2nd and 3rd Petitioners conveniently waited until 18th February 2019, which was in the run up to the roll out of NIIMS, to move the Court for an order to stay its implementation. It was its submission that the delay of over 47 days in filing the present application is unreasonable, inordinate and has not been explained by the 2nd and 3rd Petitioners.

86. It was also the 1st Interested Party's case that no *prima facie* case had been established and that the 1st Interested Party represents a fragile and special interest group, children, whose rights as protected under Article 53 shall suffer prejudice if the court grants an order staying the implementation of NIIMS as envisaged in the impugned Act. The 1st Interested Party outlined the benefits of NIIMS as it applied to its constituents as follows:

i. NIIMS shall ease tracing of families of separated children with special needs and by this the Government shall be able to reunite these children with their families hence upholding the provisions of Article 53 (1) (e) and 53 (2) of the Constitution of Kenya, 2010. The tracing shall be made easy due to the fact that all information shall be stored in one data base;

ii. NIIMS shall curb cases of illicit adoption practices, child trafficking and permanent separation of children from their biological families. It shall prevent loss of children identities and put an end to the cases of duplicate registration;

iii. NIIMS seeks to capture and store data in a centralized digital database for effective and efficient tracing a child's family and confirm parentage. This shall curb wastage of resources in conducting DNA tests which are costly and time consuming and this is in line with Articles 201 and 2013 of the Constitution of Kenya, 2010;

iv. NIIMS platform will facilitate the marching of resources to children socio economic needs and enable the Government deliver on its key constitutional mandate as envisaged in Article 53 of the Constitution of Kenya, 2010.

87. The 2nd Interested Party also opposed the grant of conservatory orders. It filed submissions on 28th March 2019 in which it submitted that the NIIMS project was intended for the benefit of the wider public, hence it is in the public interest that the orders sought be denied. Reliance was placed in this regard on the decision in **Simon Otwori & Others v Lake Victoria South Water Service Board & Others, Kisii Petition no. 2 of 2018.** Further, that the Applicants have not demonstrated that they would suffer peril if the orders were denied.

88. The 7th 1st Interested Party filed written submissions on 27th March 2019. Its submission was that the impugned exercise is being carried out in the public interest, hence the Court should be slow to impede the exercise of public functions, which causes disruption and wastes public resources. It was its submission that there was public participation in the process leading to the roll out of the NIIMS project, and the Applicants have not met the threshold for grant of conservatory orders.

89. The 8th and 9th Interested Parties filed written submissions on 28th March 2019. Their position was that while they are in support of government efforts to combat terrorism, the existing mechanisms, laws and strategies are not enough as terrorists constantly change tactics, including using minors as suicide bombers and telephone equipment to set up improvised explosive devices. They submitted that the Constitution provides for the limitation of rights and fundamental freedoms. In this context, they submitted that the right to privacy must be limited as privacy can be an avenue for terrorists and their sympathizers to disguise their identity, which may in fact lead to mass murders. The limitation of the right to privacy would be a small price to pay compared to the many lives so far lost in terrorist attacks. It was their submission therefore that the Petitioners do not have a *prima facie* case with a likelihood of success. Their Learned Counsel, Mr. Omuganda, relied on the decision of the Supreme Court of India in **Writ Petition (Civil) No. 494 of 2012 Justice K.S. Puttaswamy (RETD.) and Another vs Union of India and Others** in which the Court addressed the issue of violation of the right to privacy in the context of the **Aadhaar system**, which is India's equivalent of the NIIMS system. It was their submission, in reliance on this case, that it is in the public interest that the orders sought by the Petitioners should be declined.

Analysis and Determination

90. We have read and carefully considered the pleadings and submissions made herein. We believe that there are two issues for determination at this stage. The first is whether the amendments to the Registration of Persons Act Cap 107 Laws of Kenya vide Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 should be suspended pending the hearing and determination of the Petitions filed herein. Second, whether, pending the hearing and determination of the said Petitions, the Respondents should be restrained from installing and implementing the National Integrated Information Management System (NIIMS).

91. This Court is granted powers to issue conservatory orders in constitutional petitions 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.

93. We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J (as he then was) observed in **High Court Petition No. 16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others**:

"...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."

94. The Petitioners seek to suspend amendments to the Registration of Persons Act that were introduced by the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. The Statute Law (Miscellaneous Amendment) Act amends section 3 of the Registration of Persons Act by introducing new definitions of "biometric" and "global positioning systems coordinates" and section 5 to include global positioning systems coordinates and biometric data in the registration of persons. Lastly, it introduces a new section 9A to the Registration of Persons Act that establishes a National Integrated Information Management System and its functions.

95. Odunga J. had occasion to review various decisions on this point when considering a petition and application for suspension of the Security Laws Amendment Act in **Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another [2015] eKLR**, and held as follows at paragraphs 120 to 124 of his decision:

"**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….. 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."

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."

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."

96. We agree with the position set out by the various judges as captured in the decisions set out above that strong and cogent reasons and a constitutional basis must be shown before legislation can be suspended at an interlocutory stage. However, once such cogent reasons have been established, the Court has power to suspend impugned provisions of a statute. This was the position taken by the Court of Appeal in **Attorney General & another vs Coalition for Reform and Democracy & 7 others, Civil Application No. Nai 2 Of 2015 (Ur 2/2015) [2015] eKLR** in which the Court stated:

"While the Court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of the Constitution has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace."

97. In the present applications, three main arguments are put forward by the Petitioners on the unconstitutionality of the impugned amendments. The first is that the correct procedure for amendment was not followed in that substantive amendments were made to the Registration of Persons Act using an omnibus Bill that included other legislation, instead of a Bill to substantively amend the Act. The Respondents argue that the amendments were minor and as such the proper procedure was used. It is our view, however, that the extent and effect of the amendments made to the Registration of Persons Act is not an issue that can be decided at this

stage and will have to await the final determination of the Petitions. This cannot therefore be a ground for suspending the said amendments.

98. The second ground put forward by the Petitioners was that of lack of public participation in the enactment of the said amendments. The Respondents countered this argument by placing before the Court evidence of the public participation carried out. In the light of this evidence and given that the issue of whether the said public participation was sufficient will have to await the final determination of the Petitions, we are of the view that this ground does not warrant the suspension of the amendments at an interlocutory stage.

99. This leaves the last ground: the threatened violations of the rights of the Petitioners and of the public and especially as regards the right to privacy, in light of the nature of personal information that will be collected in the NIIMS and the lack of any security in the manner of storage of and access to the data collected in NIIMS.

100. In response to these concerns, the 2nd and 3rd Respondents submitted and made an undertaking that they would not be collecting personal information on DNA and on the global positioning system (GPS) co-ordinates. While conceding that a Data Protection Bill is in the process of being finalised, the Respondents stated that there are laws in existence to provide security of data. We note, however, that at least one of the laws cited by the Respondents as providing protection for data, the **Computer Misuse and Cyber Crimes Act** 2018 has been suspended pursuant to orders issued on 29th May 2018 in **Constitutional Petition No 206 of 2018- The Bloggers Association of Kenya (BAKE) v Attorney General & 3 Others**, now pending before the High Court. As matters stand currently therefore, it would appear that there is no or no specific legislation that provides for the collection, storage, protection and use of data collected by or held by government or other entities.

101. That being the case, we are satisfied that an element of a *prima facie* case has been made out by the Petitioners as regards the likely prejudicial effect that would result from collection of some of the personal data that will be required by the Respondents under NIIMS.

102. The second issue regards the stay of implementation of NIIMS. In addition to their concerns about the security of the data collected, the Petitioners argue that the implementation of NIIMS will cause them and members of the public grave prejudice; that the public interest lay in ensuring that their rights are not violated; and that public resources are incurred responsibly on NIIMS after all the risks attendant thereto are addressed. The 1st Petitioner in addition contended that the discrimination already existing against them will be compounded given the timelines set for implementation of NIIMS, which the Petitioners also urged will render their Petitions nugatory if the conservatory orders are not granted.

103. The Respondents on the other hand argued that the pilot phase of NIIMS had been implemented without any such prejudice to the members of the public being demonstrated, and that public resources had been incurred and invested in the preparations for the implementation of the NIIMS as scheduled, which would go to waste. They also argued that the Petitioners had been indolent and stated that there are no services or deadlines that are pegged to NIIMS, which will be an on-going exercise.

104. The Supreme Court of Kenya in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (2014) *eKLR*** expounded on the public interest nature and requirement for grant of conservatory orders as follows:

"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 applicants' 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."

105. We have already found that the Petitioners have established, and the Respondents have conceded that there is a risk of prejudice being caused to members of the public and their right to privacy by the disclosure of certain types of personal information in the absence of proposals on how that data will be protected. As regards where the public interest falls in light of the respective prejudices that will be caused if the implementation of NIIMS is stayed, we are persuaded by the definition of public interest by the Indian Supreme Court in the case of **Dattraj Nathuji Thaware v State of Maharashta, Indian &Others[2004] INSC 755 S.C 755**

of 2004 which adopted the meaning of public interest as set out in **Stroud's Judicial Dictionary Vol. 4 (v Ed)** as:

"A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

106. We take the view that it is in the public interest to have an efficient and organised system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the Respondents. There is, however, also a public interest in ensuring that the said system does not infringe on fundamental rights and freedoms. There is thus a need for a balancing of the competing public interest rights while the consolidated Petitions are heard, so as to safeguard rights and resources, and ensure that the Petitions are not rendered nugatory.

Disposition

107. While we have found that a *prima facie* case has been made out as regards some elements of the Petitioners' case, we are not satisfied that the conservatory orders should issue in the terms prayed by the Petitioners. In order to avoid any violation of rights to privacy, and to preserve the substratum of the Petitions, we accordingly make the following orders:

1. The inclusion of Deoxyribonucleic Acid (DNA) as one of the unique identifiers or attributes in the definition of "biometric" in section 3 of the Registration of Persons Act be and is hereby suspended, pending the hearing and determination of the consolidated Petitions herein. For the avoidance of doubt the remaining unique identifiers and attributes contained in the definition of "biometric" in section 3 and section 5 of the Registration of Persons Act shall continue to apply and be in operation.

2. The definition of "Global Positioning System co-ordinates" in section 3 of the Registration of Persons Act and the inclusion of "Global Positioning System co-ordinates" in section 5 (g) of the said Act be and are hereby suspended, pending the hearing and determination of the consolidated Petitions herein.

3. The Respondents shall be at liberty to proceed with the collection of personal information and data under the National Integrated Information Management System (NIIMS) pursuant to the operational provisions of the Registration of Persons Act. However, pending the hearing and determination of the Consolidated Petitions, the Respondents shall not:

a. Compel any member of the public to participate in the collection of personal information and data in NIIMS.

b. Set any time restrictions or deadlines as regards the collection of the said personal information and data in NIIMS.

c. Set the collection of personal information and data in NIIMS as a condition precedent for the provision of any Government or public services, or access to any government or public facilities.

d. Share or disseminate any of the personal information or data collected in NIIMS with any other national or international government or non-governmental agencies or any person.

4. The Costs of the 1st, 2nd and 3rd Petitioners' Notices of Motion dated 24th February 2019 and 18th February 2019 shall be in the cause.

108. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF APRIL 2019

P. NYAMWEYA MUMBI NGUGI W. KORIR

JUDGE **JUDGE** **JUDGE**