



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola, & Ouko, SCJJ)

PETITION (APPLIC) NO. E032 OF 2025

-BETWEEN-

THE NATIONAL ASSEMBLY.....APPELLANT/APPLICANT

-AND-

H.E. RIGATHI GACHAGUA.....1ST RESPONDENT/APPLICANT
THOMAS KIMOTHO MAINGI.....2ND RESPONDENT
HON. JANE NJERI MAINA.....3RD RESPONDENT
HON. DAVID MUNYI MATHENGE.....4TH RESPONDENT
PETER GICHOBI KAMOTHO.....5TH RESPONDENT
GRACE MUTHONI MWANGI6TH RESPONDENT
CLEMENT MUCHIRI MURIUKI.....7TH RESPONDENT
EDWIN MUNENE KARIUKI.....8TH RESPONDENT
SHERIA MTAANI NA SHADRACK WAMBUI.....9TH RESPONDENT
FATHER EDDIE WAIGURU10TH RESPONDENT
ANTHONY MWITHAGA11TH RESPONDENT
VICTOR NGATIA12TH RESPONDENT
ASSUMPTA WANGUI MUIRURI13TH RESPONDENT
CHRISTINE MUKAMI NJUGUNA14TH RESPONDENT
PETER KIMANI KOIRA15TH RESPONDENT
ALICE WAMUHU MBUGUA16TH RESPONDENT
MWANGI MANYEKI17TH RESPONDENT
MBUGUA WA MUMBI18TH RESPONDENT
KIGO KAHARI19TH RESPONDENT
PRISCILLAH WAMBUI GITARI20TH RESPONDENT
F. MUCHIRI NGATIA21ST RESPONDENT
MARIA NJERI22ND RESPONDENT
ERICK WARUI MWANIKI23RD RESPONDENT
BRIAN HUNJA24TH RESPONDENT

SERAH MUMBI	25 TH RESPONDENT
MARGARET WANJIRA	26 TH RESPONDENT
SAMUEL NJENGA	27 TH RESPONDENT
HEBRON GAKIRU	28 TH RESPONDENT
SAMUEL NGARI	29 TH RESPONDENT
JULIET WANGARE	30 TH RESPONDENT
JAMES NYAGA	31 ST RESPONDENT
DERRICK MAINA.....	32 ND RESPONDENT
JOHN NJOROGE	33 RD RESPONDENT
PETER WAWERU	34 TH RESPONDENT
BONIFACE MUNIU	35 TH RESPONDENT
RUTH M. KAMAU	36 TH RESPONDENT
JANE NAMU	37 TH RESPONDENT
MERCY NKATHA	38 TH RESPONDENT
ANN KARIMI MBAE	39 TH RESPONDENT
DANIEL MUNGAI	40 TH RESPONDENT
GEMA WATHO ASSOCIATION.....	41 ST RESPONDENT
BERNARD WANGOMBE KIRUGUMI	42 ND RESPONDENT
MORARA OMOKE	43 RD RESPONDENT
DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY	44 TH RESPONDENT
HON. MWENGI MUTUSE	45 TH RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY OF KENYA	46 TH RESPONDENT
THE SPEAKER OF THE SENATE OF KENYA.....	47 TH RESPONDENT
THE SENATE OF KENYA	48 TH RESPONDENT
THE HON. ATTORNEY GENERAL.....	49 TH RESPONDENT
H.E. WILLIAM RUTO	50 TH RESPONDENT
THE LAW SOCIETY OF KENYA	51 ST RESPONDENT
KITHURE KINDIKI.....	52 ND RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION	53 RD RESPONDENT
DR. JOHN KHAMINWA	54 TH RESPONDENT
KITUO CHA SHERIA	55 TH RESPONDENT
MT. KENYA JURISTS ASSOCIATION	56 TH RESPONDENT
KATIBA INSTITUTE	57 TH RESPONDENT
JUBILEE PARTY OF KENYA	58 TH RESPONDENT
WIPER DEMOCRATIC PARTY	59 TH RESPONDENT
UNITED DEMOCRATIC ALLIANCE.....	60 TH RESPONDENT
ORANGE DEMOCRATIC MOVEMENT.....	61 ST RESPONDENT
KENYA KWANZA ALLIANCE	62 ND RESPONDENT
FORD KENYA PARTY	63 RD RESPONDENT
AMANI NATIONAL CONGRESS.....	64 TH RESPONDENT
REGISTRAR OF POLITICAL PARTIES	65 TH RESPONDENT

DR. CLARENCE EBOSO MWERESA.....66TH RESPONDENT
WANJIRU MWANGI67TH RESPONDENT

(Being an application for stay of proceedings, striking out of the appeal, expunging of documents in the Supplementary Record of Appeal, and striking out the cross-appeal)

Representation:

Mr. Delbert Ochola holding brief for Mr. Moses Kipkoge for the Appellant
(G & A Advocates, LLP)

Mr. John Njomo holding brief for Mr. Paul Muite, SC, Mr. Tom Macharia, Mr. Victor Swanya, Ms. Faith Waigwa and Mr. Ochiel Dudley for the 1st Respondent
(Kamotho Njomo & Company Advocates)

Mr. Andrew Muge for the 3rd Respondent
(Muge Law Advocates)

Mr. Evans Ogada, appearing together with Mr. George Sekimpa for the 4th to 8th Respondents
(Prof. Migai Akech Associates & Advocates)

Mr. Mungai for the 9th Respondent
(Kinoti Kibe & Co. Advocates)

Mr. Kuyioni Josphat for the 44th and 46th Respondent
(Kuyioni Josphat Advocate)

Mr. Mbakaya Moses holding brief for Mr. Obura for the 45th Respondent
(Muchemi & Co. Advocates)

Ms. Opola Holding brief for Ms. Thanji for the 47th Respondent
(W. Thanji Advocate)

Ms. E. Karanja holding brief for Mr. Edwin Mukele for the 48th Respondent
(Mukele Moni & Company Advocates)

Ms. Joan Jeruto holding brief for Dr. Muthomi Thiankolu for the 52nd Respondent
(Muthomi & Karanja Advocates)

Ms. Joy Anami for the 53rd Respondent
(Dr. Mutubwa Law Advocates)

Mr. Ndegwa Njiru for the 56th Respondent
(Ndegwa & Ndegwa Advocates)

RULING OF THE COURT

[1] The Supreme Court, by Article 163 (1) of the Constitution, consists of the Chief Justice, the Deputy Chief Justice and five other judges. The Court is properly constituted for purposes of its proceedings if it is composed of five judges. Further, all interlocutory applications, like the instant one, are under Rule 31(1) of the Supreme Court Rules, 2020, determined by way of written submissions. The Hon. Mr. Justice Mohammed Ibrahim, who had been designated to preside over this matter, passed away on 17th December 2025 during the pendency of these proceedings. In view of the fact that the appeal involves the question whether the Deputy Chief Justice, who is the Vice President of this Court, can, pursuant to the provisions of Article 165(4) of the Constitution, assign judges to hear matters certified by the court as raising substantial questions of law, the Deputy Chief Justice cannot sit in this application. Whereas the appellate court in its impugned judgment declared that the duty to constitute benches in the High Court is an exclusive preserve of the Chief Justice, and that it is not one of those administrative duties that the Chief Justice can delegate to the Deputy Chief Justice, that holding in view of the present complement of Judges on the Court and in line with the doctrine of necessity, cannot preclude the Chief Justice from presiding over the Bench to determine this application. It is in this context that the Bench is reconstituted to include the Honourable the Chief Justice in place of the late Ibrahim, SCJ. Having disposed of this question, we now turn to the consideration of the substantive matter before us.

[2] The proceedings herein arise from an extraordinary chain of constitutional events culminating with the impeachment of the then Deputy President of Kenya, H.E. Rigathi Gachagua. The motion for impeachment was introduced in the National Assembly by Hon. Mwengi Mutuse, Member of the National Assembly for Kibwezi West Constituency, on 1st October 2024 pursuant to Article 145 as read

with Article 150 of the Constitution. After debate, on 8th October 2024, the motion passed with 281 Members of the National Assembly voting in favour, surpassing the required two-thirds majority threshold. In accordance with Article 145(2) of the Constitution, the matter was transmitted to the Senate for hearing and determination.

[3] The impeachment process up to this point triggered a multiplicity of constitutional petitions, which were filed in the High Court, challenging various aspects of the parliamentary proceedings. Between 8th and 11th October 2024, six petitions were lodged in the High Court at Nairobi, namely ***Petitions Nos. E506, E509, E522, E524, E528 and E537 of 2024***. Recognizing the substantial constitutional questions raised in the petitions, the High Court (*L. Mugambi, J.*), on 11th October 2024, certified the matters under Article 165(4) of the Constitution as involving substantial questions of law and referred them to the Chief Justice for empanelment of an uneven number of judges. On 14th October 2024, the Chief Justice empanelled a three-judge bench consisting of *Ogola, Mrima, and F. Mugambi, JJ.* to hear the six (6) petitions.

[4] On 15th October 2024, a day after the Chief Justice empanelled the bench, Hon. Gachagua filed ***Petition No. E550 of 2024*** to challenge the passage of the motion by the National Assembly to impeach him. Contemporaneous with the petition, he filed an application for, *inter alia*, a conservatory order to restrain the Senate from proceeding with the impeachment hearing, which was scheduled for hearing on 16th, 17th and 18th October 2024 until the determination of the petition. The application was placed before *Mwita, J.*, who declined to issue the interim conservatory reliefs but certified the petition as raising substantial constitutional questions and directed that the file be forwarded to the Chief Justice to consider empanelment of a bench of judges to hear the application. The judge expressly invited the Chief Justice to determine whether that application ought to be consolidated with the earlier cluster.

[5] Following the empanelment of the three-judge bench by the Chief Justice to hear the initial six petitions, the parties appeared before the bench (*Ogola, Mrima, and F. Mugambi, JJ.*) on 15th October 2024 for the hearing of those applications, including one seeking a conservatory order to restrain the Senate from commencing impeachment hearings the next day on 16th October 2024. The court, in its ruling rendered on the morning of 16th October 2024, declined to grant the interim orders sought. As a result, with no conservatory orders in place, the Senate proceeded with its hearings.

[6] Following the approval by the Senate of Hon. Gachagua's impeachment on 17th October 2024, the Speaker of the Senate communicated the decision to the public through Gazette Notice CXXVI-No. 170. Consequent upon this development, H.E. William Ruto, the President, nominated Prof. Kithure Kindiki to fill the vacant office of Deputy President. On the morning of 18th October 2024, the National Assembly convened to consider Prof. Kindiki's nomination. The Speaker of the National Assembly, through Gazette Notice CXXVI-No. 171 on the same day, informed the public that the National Assembly had voted in favour of the nomination of Prof. Kithure Kindiki to fill the vacancy.

[7] On the same day, 18th October 2025, some key events took place that are significant. The first was in respect of another petition, ***No. E565 of 2024, Rigathi Gachagua Vs State Law Office & 4 Others***, and application brought on 18th October 2024 by Hon. Gachagua. *Mwita, J.*, certified the application as urgent and granted conservatory orders staying, one, the Senate's resolution to uphold the impeachment charges against Hon. Gachagua, and two, the appointment of his replacement pending *inter partes* hearing. Being satisfied that the petition presented substantial questions of law and of public interest, *Mwita, J.* forwarded the file to the Chief Justice to constitute a bench to hear the petition. The temporary orders were to remain in effect until 24th October 2024, when the matter would be mentioned to confirm the appointment of a bench.

[8] The second development arose from a separate petition filed at the Kerugoya High Court, ***Petition No. E015 of 2024, Hon. David Mathenge & Others Vs The National Assembly & Others***, which sought, among other reliefs, orders to restrain Prof. Kithure Kindiki from assuming office as Deputy President. *Mwongo, J.* certified the petition as urgent and as raising matters of great national importance, with substantial legal questions, warranting the empanelment of a High Court bench of an uneven number of judges. The learned Judge issued conservatory orders stopping the implementation of the Senate's resolution, and restraining any person from assuming the office of Deputy President. Accordingly, the file was to be placed before the Chief Justice for the appointment of a bench. The matter was also like ***Petition No. E565 of 2024, Rigathi Gachagua Vs State Law Office & 4 Others***, slated for mention on 24th October 2024.

[9] At the time, the Hon. Chief Justice was away from office, and the Hon. Deputy Chief Justice, on 18th October 2024, proceeded to empanel the same three-judge bench (*Ogola, Mrima, and F. Mugambi, JJ.*) to hear ***Kerugoya HC Petition No. E013 of 2024, Kerugoya HC E015 of 2024*** and ***Milimani HC Petition E565 of 2024***. On 19th October 2024, a Saturday, the empanelled bench issued directions for an urgent *inter partes* hearing on 22nd October 2024.

[10] The interim *ex parte* conservatory orders issued by *Mwongo, J.* at Kerugoya High Court were set aside by the bench of *Ogola, Mrima, & F. Mugambi, JJ.* on application by the Hon. Attorney General. In the meantime, the orders issued by *Mwita, J.* had by operation of the law lapsed. These two events paved the way for the swearing-in of Prof. Kithure Kindiki as Deputy President on 1st November 2024, effectively succeeding Hon. Gachagua.

[11] The whole gravamen of Hon. Gachagua's grievance is the empanelment of the three judges of the High Court by the Deputy Chief Justice. It is that objection that led to the proceedings culminating in this appeal.

[12] Hon. Gachagua instituted two sets of challenges before the High Court. First, he contested the Deputy Chief Justice's authority to empanel the bench and the selective empanelment of only three (3) out of ten (10) petitions; and in the second challenge, Hon. Gachagua sought the recusal of all three judges on the grounds of bias and conflict of interest. In a ruling delivered on 23rd October 2024, dismissing the first challenge the learned judges held that the function of assigning judges under Article 165(4) was an administrative duty of the Chief Justice which can be delegated; that, pursuant to Articles 161 and 259(3)(b) of the Constitution, the Deputy Chief Justice, as the Deputy Head of the Judiciary, could lawfully perform that function whenever circumstances required; that there was no constitutional or statutory restraint on the powers of the Deputy Chief Justice to empanel a bench of the High Court; and that the Chief Justice herself had not raised any objection to her deputy exercising those powers. Regarding the applications for recusal, the judges, in a separate ruling of 25th October 2024, found that there existed no factual or legal basis to warrant their disqualification. The court emphasised the presumption of judicial impartiality and dismissed the prayer for recusal.

[13] After that disposition, the matter proceeded on appeal to the Court of Appeal through two separate appeals, being ***Civil Appeal No. E829 of 2024*** and ***Civil Appeal No. E022 of 2025***, which were consolidated. In assessing the legality of the empanelment by the Deputy Chief Justice, the appellate court declared that the duty to constitute benches in the High Court is an exclusive preserve of the Chief Justice under the Constitution, and it is not one of those administrative duties that the Chief Justice can delegate to the Deputy Chief Justice by dint of Section 5(2) of the Judicial Service Act. The Deputy Chief Justice can only exercise the extraordinary constitutional administrative function of Article 165(4) of the Constitution in exceptional circumstances, and the existence of those circumstances must be demonstrable and communicated, not just to parties in the dispute, but to the public at large.

[14] In its analysis of the prayer for recusal, the appellate court found that the allegations against the learned Judges of social associations, historical interactions and administrative directions issued on a Saturday, and unverified claims relating to family appointments did not meet the legal threshold for establishing a reasonable apprehension of bias. The court upheld the presumption of judicial impartiality and agreed with the High Court that the evidence presented did not warrant the recusal of any of the three judges.

[15] The holding that the Deputy Chief Justice lacked authority to empanel the High Court bench precipitated the filing of ***SC Petition No. E032 of 2025***, by the National Assembly, the appellant, before this Court. Hon. Gachagua was also aggrieved by part of the judgment and cross-appealed. Subsequent to the institution of the appeal and cross appeal, two applications have been brought. The first is an omnibus application by Hon. Gachagua seeking an order of stay of the proceedings before the High Court, the striking out of the appeal, and the expunging of certain documents from the Supplementary Record of Appeal. The second application is by the National Assembly, seeking to strike out Hon. Gachagua's Notice of Cross-Appeal. In view of the parallel nature of the two applications, and in the interest of judicial economy, the Court consolidates the two applications which are hereby determined together in this Ruling.

a) The first application

[16] In an omnibus application dated 17th July 2025 and expressed to be brought under Section 3A of the Supreme Court Act, Rules 3(5) of the Supreme Court Rules, 2020, Hon. Gachagua prays for orders that:

- a) *Spent...*
- b) *Pending the hearing and determination of the appeal and cross appeal, the Court be pleased to issue a stay of the High Court proceedings in Nairobi HC Constitutional Petition No. E565 of 2024 consolidated with*

- Kerugoya E013 of 2024, E014 of 2024 and E015 of 2024, Rigathi Gachagua and Others Vs Speaker of the National Assembly and Others;*
- c) *The appellant's (National Assembly) appeal be summarily struck out for being an abuse of the court process and violating the doctrine of judicial estoppel;*
 - d) *The documents appearing at pages 26 to 34 of the National Assembly's Supplementary Record of Appeal be expunged for unlawfully being introduced at the second appellate stage; and*
 - e) *There be no orders as to costs due to the public interest in the matter.*

The application is supported by the affidavit of John Njomo, counsel for Hon. Gachagua, sworn on 17th July 2025 and submissions of even date.

[17] *As regards the prayer for stay of proceedings*, Hon. Gachagua applies that conservatory orders be issued pending the hearing of his cross appeal; that the cross appeal is arguable as it raises jurisdictional questions on the failure of the Court of Appeal to find that the three judges ought to have recused themselves; that if the cross appeal succeeds, the Supreme Court could order a change of the bench, hence a stay of proceedings is warranted to prevent a successful cross appeal from being rendered nugatory.

[18] *Concerning the plea for the striking out of the appeal*, Hon. Gachagua argues that the National Assembly, having pleaded one way for five years and enjoyed the equitable remedy of stay, now pleads an inconsistent position on the Deputy Chief Justice's power under Article 165(4) of the Constitution. As a result, he contends that the appeal is barred by the doctrine of judicial estoppel, exemplifies abuse of the court process, and warrants summary dismissal as parties are bound by their pleadings. He submits that in ***National Assembly & Senate Vs Chief Justice of the Republic of Kenya & Attorney General; Leina Konchella*** [2021] KECA 539 (KLR) (***Konchella***), the National Assembly and Senate, supported by the Attorney General, sought and obtained stay orders on the basis that the Deputy Chief Justice could not assign judges to hear cases under Article 165(4) of the

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Constitution. It is therefore disingenuous, in his view for the National Assembly to adopt in these proceedings a diametrically opposed position. Judicial estoppel forbids a party from assuming successive inconsistent positions in the same or related proceedings. For these propositions, reliance is placed on the persuasive cases of **Attorney General Vs Okoiti & 3 others** [2025] KECA 309 (KLR), **Triton Gas Station Limited Vs Kenya Commercial Bank Limited** [2015] KEHC 3478 (KLR), and **MPB Vs LGK** [2020] EWHC 90.

[19] *Finally on the prayer for the expunging of documents*, Hon. Gachagua submits that the documents appearing at pages 26 to 34 of the National Assembly's Supplementary Record of Appeal were never part of the record at the High Court or the Court of Appeal; that the National Assembly introduced these documents into the Supreme Court record without leave to adduce further evidence under Rule 18 of the Supreme Court Rules; that this amounts to an attempt to fill gaps and patch up weak points in its case; and that the proportionality and prejudice of allowing such evidence, he argues, far outweighs any potential benefit, relying on **Jirongo Vs Soy Developers Limited & 9 Others** [2020] KESC 38 (KLR).

[20] In response to the application, the National Assembly filed grounds of opposition and submissions dated 19th June 2025. It submits that Hon. Gachagua has not laid grounds for a stay of the High Court proceedings because the cross appeal upon which it is based is fatally defective, raises no question of constitutional interpretation or application, and has not been certified as a matter of general public importance. Consequently, it is not arguable as it turns on factual issues. It has improperly invoked this Court's jurisdiction; and that granting an order of stay of proceedings would only delay the resolution of substantive issues presently pending before the High Court; and that such an order would prejudice the parties, and undermine public confidence in the timely administration of justice.

[21] The National Assembly further posits that the doctrine of judicial estoppel is inapplicable in Kenyan judicial proceedings, and even if it were to be applied, its

elements have not been satisfied, as there are no contradictory factual positions, as the arguments in this case are context-specific and do not contradict prior submissions. It asserts that no prior position was successfully advanced, as no judgment was rendered in *Konchellah (supra)*, and it therefore maintains its earlier stance. Moreover, Hon. Gachagua has not demonstrated any prejudice or abuse of process, as the submissions in *National Assembly & Senate Vs Chief Justice of the Republic of Kenya & Attorney General (supra)* and *Konchellah (supra)* were tailored to the procedural and factual context of those cases, which are distinguishable from the present submissions.

[22] The National Assembly, in addition to the foregoing, contends that for the appeal to be struck out under Section 18 of the Supreme Court Act, there must be an apparent defect or error on the face of the petition, which does not require elaborate argument.

[23] With regard to the prayer to expunge from the supplementary record certain documents, the National Assembly responds that the prayer lacks merit since, as noted by the Court of Appeal, the impugned documents were already part of the record and the objection is a dilatory tactic aimed at delaying the substantive determination of the appeal.

[24] In support of the National Assembly's position, the 44th, 46th, 47th, 48th, 52nd and 60th respondents, all agree that; the application is omnibus, incurably defective, and incapable of proper adjudication; that the multiple reliefs sought are governed by distinct rules and judicial principles, rendering the application procedurally untenable and is for striking out with costs; that the conditions for summary dismissal of an appeal under Section 18 of the Supreme Court Act have not been met; and that the doctrine of judicial estoppel requires elaborate legal reasoning, and cannot therefore be assumed simply by looking at the record. Accordingly, they have urged that the application be declared as incompetent, defective, and an abuse of the court process designed to delay both the appeal and the High Court proceedings.

[25] The respondents further argue that the question concerning the Deputy Chief Justice's power to assign judges to hear certain cases under Article 165(4) of the Constitution is substantial, novel, and of immense public importance, meriting the Supreme Court's authoritative determination. They maintain that the record of pleadings before the High Court and the Court of Appeal does not demonstrate any departure by the National Assembly from its original position.

[26] *As regards the prayer for stay of proceedings*, the respondents contend that Hon. Gachagua has not met the threshold for the grant of this relief as set out in ***Khan Vs International Commercial Company (K) Limited*** [2023] KESC 84 (KLR) and ***Board of Governors, Moi High School Kabarak & Another Vs Bell & 2 Others*** [2013] KESC 12 (KLR). They argue that the constitutionality or legality of the High Court proceedings sought to be stayed is not an issue before this Court, and therefore falls outside its jurisdiction. Further, the speculative possibility of a change in the composition of the current bench in the High Court cannot in itself render the proceedings nugatory; that the Supreme Court's jurisdiction extends only to staying decrees or orders of the Court of Appeal, not of the High Court proceedings; and that granting an order of stay as prayed would not serve public interest, but rather delay the timely administration of justice.

[27] *Concerning the prayer to expunge documents*, the National Assembly, the 44th and 46th respondents argue that the admissibility or propriety of documents introduced at the appellate stage is a matter to be determined at the hearing of the substantive appeal; that at this stage, such a prayer is premature and would amount to excluding evidentiary questions that properly fall within the remit of the full bench during the merits stage.

ii) The second application

[28] The second application by the National Assembly is dated 23rd September 2025, and brought pursuant to Article 50(4) of the Constitution, Section 3A of the

Supreme Court Act, Cap 9B and Rules 3, 40(1) and 40(3) of the Supreme Court Rules, 2020 for Orders that:

- i) *This Court be pleased to strike out the Notice of Cross-Appeal dated 17th July 2025;*
- ii) *This Court be pleased to issue any other order to meet the ends of justice; and*
- iii) *The costs of and incidental to this application be awarded to the National Assembly.*

The application is supported by the affidavit of Samuel Njoroge, the Clerk of the National Assembly, sworn on 23rd September 2025 and submissions of even date.

[29] To support the application, the National Assembly submits that it lodged an appeal challenging specific findings of the Court of Appeal in ***Civil Appeal No. E829 of 2024***, which concerned the interpretation of Article 165(4) of the Constitution, concerning the power of the Deputy Chief Justice to empanel a bench while acting as Chief Justice. The Court of Appeal also determined ***Civil Appeal No. E022 of 2025***, which arose from a separate High Court decision on an application for judicial recusal. Although these two appeals were not consolidated, the Court of Appeal delivered a joint judgment purely for administrative convenience; and that as a matter of fact, the appeals were heard sequentially, and not together or jointly.

[30] Subsequently, on 17th July 2025, Hon. Gachagua filed a Notice of Cross-Appeal seeking to challenge the Court of Appeal's findings in ***Civil Appeal No. E022 of 2025*** on the recusal of the three judges. The National Assembly contends that the issues raised in the cross-appeal are entirely distinct from those in its own appeal and that Hon. Gachagua is improperly seeking to introduce matters arising from a separate appeal that was not the subject of the present proceedings. It argues that the appropriate procedure for challenging the findings in ***Civil Appeal No. E022 of 2025*** would have been through a separate Notice of Appeal

under Rule 36 of the Supreme Court Rules. Hon. Gachagua neither filed such a notice nor obtained leave to raise new issues not contained in the principal appeal. Consequently, the National Assembly submits that the cross-appeal, having traversed entirely new legal ground without leave, is procedurally defective and ought to be struck out.

[31] The National Assembly further submits that the cross-appeal challenges a ruling on judicial recusal, an issue that is procedural, discretionary, and does not rise to the level of constitutional interpretation, application or a matter of general public importance. To support this position, it cites *University of Eldoret & another Vs Sitienei & 3 others* [2020] KESC 72 (KLR) and *Styne Vs Ruscone* [2013] KESC 11 (KLR). It also relies on this Court's guidance in *Stanbic Bank Kenya Limited Vs Santowels Limited* [2024] KESC 31 (KLR) and *Mumba & 7 others Vs Munyao & 148 others* [2019] KESC 83 (KLR), which held that a respondent who opts to cross-appeal must do so within the confines of the substantive appeal. It cautions that allowing the cross-appeal to proceed as presented would improperly widen the scope of the appeal and burden the proceedings with issues not properly before the Court. It argues that this would prejudice it by introducing matters unrelated to the main appeal, forcing it to respond to issues it never raised, and delaying the resolution of the central constitutional question under Article 165(4) of the Constitution.

[32] The 48th and 60th respondents have filed grounds in support of the application, wherein they reiterate the arguments by the National Assembly.

[33] In opposition, Hon. Gachagua relies on his grounds of opposition and submissions dated 30th September 2025. He argues that Rule 47 of the Supreme Court Rules grants a respondent an automatic right to file a cross-appeal in any appeal, and that a cross-appeal is inherently a response to the original appeal rather than a separate proceeding requiring a Notice of Appeal or leave of the Court. To support this position, he cites *Communications Commission of Kenya & 3 others Vs Royal Media Services Limited & 7 others* [2014]

eKLR and *IEBC Vs Sabina Chege* [2023] KESC 74 (KLR). According to him, a cross-appeal is designed to counter the appellant's case and seek relief, and may properly raise issues that cannot be sufficiently addressed through a mere response to the appeal. He therefore maintains that the National Assembly's contention that the cross-appeal ought to have confined itself to answering the main appeal is incorrect, as there is no such requirement in law. In this regard, he relies on *Kenya Ports Authority Vs Munyao & 4 others* [2023] KESC 112 (KLR).

[34] On whether the cross-appeal first needed to be certified, Hon. Gachagua cites *Stanbic Bank Kenya Limited Vs Santowels Limited (supra)*, and argues that no such requirement exists in law or under Article 163(4)(a), as this would effectively invite the Court to exercise concurrent jurisdiction over a single appeal. He also argues that the issue of recusal engages principles of natural justice anchored in Article 50(1) of the Constitution, and that questions surrounding recusal, owing to the composition of the bench, required constitutional interpretation and application at both the High Court and the Court of Appeal. Having been the losing party on the recusal issue, Hon. Gachagua maintains that he is entitled to cross-appeal under Article 163(4)(a) of the Constitution.

[35] Bearing in mind the terms of the two applications and arguments which we have set forth in the foregoing paragraphs, for good order, we shall deal with the applications sequentially. To begin with, we restate that Hon. Gachagua's omnibus application seeks an order of stay of proceedings presently pending before the High Court, the striking out of the appeal by the National Assembly, and the expunging of certain documents from the Supplementary Record of Appeal. The National Assembly and parties opposed to the application have called into question the multiple reliefs sought in the application and have asked the Court to declare it incompetent and strike it out. We restate, in the passage below, the sentiments expressed by this Court in *Hermanus Phillipus Steyn Vs Giovanni Gneccchi Ruscone*, Sup. Ct. Application 2 of 2012, with regard to its twin jurisdiction under Article 163(4) of the Constitution:

“A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make ‘omnibus’ applications, with ambiguous prayers, hoping that the Court will grant at least some.”

[Our emphasis]

[36] We assert that parties’ pleadings, especially before the Supreme Court, must be concise and specific in view of this Court’s circumscribed jurisdiction. An applicant must cite the relevant provisions under which they are moving the Court. The applicant should not submit a generic application for the reason that the judicial principles and considerations for granting interlocutory orders vary and are unique to each prayer.

[37] Having so said, we prefer to consider the substance of the application in view of the nature of the dispute instead of acceding to the technical invitation to strike it out. Starting with the prayer for “*stay of the High Court proceedings in Nairobi HC Constitutional Petition No. E565 of 2024* consolidated with *Kerugoya E013 of 2024, E014 of 2024 and E015 of 2024, Rigathi Gachagua and Others Vs Speaker of the National Assembly and Others*”, Section 23A (1) of the Supreme Court Act, which vests in the Court jurisdiction to grant orders of stay of proceedings, provides that:

“23A. Stay of proceedings

- (1) The Court may issue an order for stay of execution, an injunction, a stay of further proceedings or any other conservatory or interim orders, on such terms as the Court may deem fit where a party has—**
 - (a) instituted a petition of appeal as of right under Article 163(4)(a) of the Constitution; or**

- (b) **obtained a certification under Article 163(4)(b) of the Constitution and instituted a petition.**
- (2) **An application under subsection (1) shall only be made after filing the petition before the Court.”**

[38] This Court’s jurisdiction under Article 163(4) of the Constitution is clearly defined and circumscribed: to hear appeals from the Court of Appeal as of right in cases involving the interpretation or application of the Constitution and also where the appeal has been certified as involving a matter of general public importance. From our reading of Section 23A aforesaid as well as Article 163(4) of the Constitution, only appeals from the Court of Appeal can lie to this Court. Indeed, this appeal has been brought as of right under Article 163(4)(a) to challenge the decision of the Court of Appeal in ***Civil Appeal No. E829 of 2024 as consolidated with Civil Appeal No. E022 of 2025***. Therefore, by necessary and logical reasoning, only proceedings before the Court of Appeal can be stayed by this Court. Yet the instant application is inviting us to stay, not the proceedings in the Court of Appeal, but those before the High Court in ***Nairobi HC Constitutional Petition No. E565 of 2024*** consolidated with ***Kerugoya E013 of 2024, E014 of 2024 and E015 of 2024*** which are pending.

[39] The Court has expressed itself on this issue in a long chain of cases. For example, in ***Kwale Sugar International Company Limited Vs EPCO Builders Limited & 2 others*** [2025] KESC 32 (KLR), the Court stated that:

“It should follow that this court can only grant an order of stay of further proceedings in the Court of Appeal and no other court below, and specifically the High Court, as sought in this application....The court cannot frog-leap the Court of Appeal to provide relief to a party before the High Court.”

See *Dande & 3 others Vs Director of Public Prosecutions & 2 others* [2022] KESC 23 (KLR) and also *Moi Teaching and Referral Hospital & another Vs Gikenyi B & 76 others* [2025] KESC 78 (KLR). In the latter, it was held that this Court can only grant an order of stay of a decree or order of the Court of Appeal or stay of further proceedings in the Court of Appeal. For these reasons, we find that this Court lacks jurisdiction to grant an order of stay of proceedings before the High Court.

[40] The next prayer seeks to strike out the appeal on the ground of judicial estoppel. According to Hon. Gachagua, the National Assembly has deviated from its position expressed in past proceedings regarding the Deputy Chief Justice’s power under Article 165(4) of the Constitution, and has pleaded a contrary stance in the present proceedings.

[41] Summary dismissal is provided for by Section 18 of the Supreme Court Act, which states that:

“The Court may make an order for summary dismissal of a petition, a reference or an application, where it is apparent on the face of it that it is wholly defective.”

In more or less the same language, Rule 42A of the Supreme Court Rules provides for the summary dismissal, specifically of petitions in the following words:

“(1) The Court may, on its own motion, summarily dismiss a petition of appeal if, in the opinion of the court —

- (a) the Court lacks jurisdiction to entertain the appeal; or**
- (b) it is apparent on the face of the petition that the petition is wholly defective and incompetent.”**

[42] In view of these clear provisions, it must follow that the Court can only summarily dismiss a petition for two specific reasons: where it is apparent on the

face of the petition that it is wholly defective and incompetent, or second, where the Court lacks jurisdiction.

[43] It is our considered view, first that, the determination of the question whether the National Assembly's position in these proceedings is a departure from its earlier position and therefore barred by the doctrine of judicial estoppel would require a comparison between those positions, including those alleged to have been expressed in the cited cases of *National Assembly & Senate Vs Chief Justice of the Republic of Kenya & Attorney General* (*supra*) and the *Konchellah* case (*supra*). Apart from the fact that those proceedings are not before this Court, to appreciate Hon. Gachagua's arguments, the Court would be required to conduct an analysis and to go to great lengths. This is certainly not what was contemplated to be the nature of summary dismissal proceedings in the two provisions we have reproduced in the foregoing paragraph, to determine whether the Court outrightly lacks jurisdiction or that there are errors apparent on the face of the petition. Consequently, we find that this prayer lacks substance and must therefore also fail.

[44] On the final prayer on expunging of documents, Hon. Gachagua submits that the documents appearing at pages 26 to 34 of the National Assembly's Supplementary Record of Appeal were never part of the record at the High Court or the Court of Appeal and that the National Assembly introduced them into the Supreme Court record without leave to adduce further evidence. In objection, the National Assembly contends that the impugned documents were already part of the record, a fact noted by the Court of Appeal in its judgment.

[45] The impugned documents contained in the supplementary record are:

- i) Letters dated 18th October 2024 from the Deputy Registrar, Office of the Chief Justice, to the Deputy Registrar, High Court, forwarding the respective empanelment directions in *Kerugoya Petition No. E013 of*

- 2024; Kerugoya Petition No. E015 of 2024; and Milimani HCCHR Petition No. E565 of 2024.*
- ii) Empanelment directions by the DCJ/Ag. CJ dated 18th October 2024 in *Kerugoya HC Petition No. E013 of 2024; Kerugoya HC Petition No. E015 of 2024; and Milimani HCCHR Petition No. E565 of 2024.*
 - iii) Order by *Mwita, J.* in *Milimani HCCHR Petition No. E565 of 2024* given on 18th October, 2024.
 - iv) A Bench Memo to the Chief Justice regarding *Milimani HCCHR Petition No. E565 of 2024.*

[46] Our own reading of the record, as well as the judgment of the Court of Appeal, leaves us in no doubt that the entire appeal before us arises from and hinges on the Deputy Chief Justice's empanelment directions of 18th October 2024. The impugned documents all relate to those very empanelment directions. These documents are intrinsically linked to the appeal before us. Whereas Hon. Gachagua maintains that the documents in question were never part of the record at the High Court or the Court of Appeal, the Court of Appeal, in its judgment, repeatedly refers to those directions. Moreover, it has not been demonstrated that, by those documents, the National Assembly seeks to introduce new evidence, or change the character of the appeal in a manner that would be prejudicial to his case. For these reasons, this ground also fails, and in the end, we find that this application by Hon. Gachagua lacks merit and dismiss it in its entirety.

[47] The second application has been brought by the National Assembly and seeks to strike out Hon. Gachagua's Notice of Cross-Appeal on the grounds that the issues it raises are entirely distinct from those in the main appeal, and that Hon. Gachagua is improperly seeking to introduce matters arising from a separate appeal which are extraneous to the present proceedings.

[48] In this regard, we shall once again resort to the same principles in Section 18 of the Supreme Court Act as read with Rule 42A aforesaid, which apply *mutatis mutandis* to the summary dismissal of a cross-appeal, the two main considerations

being, whether the Court lacks jurisdiction to entertain the cross-appeal; or if it is apparent on the face of the cross-appeal that it is wholly defective and incompetent.

[49] The cross-appeal challenges part of the judgment of 9th May 2025 on five (5) broad grounds, which we summarize thus: the Court of Appeal failed to find the learned trial court judges were biased, given the fact that they were empaneled outside the official court hours contrary to Article 50 of the Constitution; by moving the dates to accommodate the Attorney General's application to discharge the conservatory orders; the empanelment ruling prematurely delved into issues and merits of pending determination in the application for recusal thereby prejudging it in violating Article 50 of the Constitution. On the second ground, Hon. Gachagua contends that the Court of Appeal erred in dismissing his claim over a close friendship between one of the judges and a party, the Speaker of the Senate. Third, that the Court of Appeal further erred in confining its consideration of the question of bias to only actual bias instead of the appearance of bias. Fourthly, that the appellate court misapplied the Judicial Service (Code of Conduct and Ethics) 2020, on recusal of a judge; and finally, that the Court of Appeal erred in failing to exclude the judges appointed by the Deputy Chief Justice from being part of the bench despite having allowed the appeal.

[50] Whereas a cross-appeal can be filed as a matter of right to the Supreme Court under Article 163(4)(a) of the Constitution, as a matter of law, it must, like the main appeal, exclusively involve the interpretation or application of the Constitution, and follow the standard appellate path. It must meet the jurisdictional test by demonstrating the precise constitutional articles and how they were applied or interpreted by the Court of Appeal; that the constitutional issues being raised were central to the decisions of the superior courts below, or arose from a trajectory of constitutional interpretation or application.

[51] Does the cross-appeal challenge the interpretation or application of the Constitution by the Court of Appeal? Our own examination of the judgments of the two superior courts below and the grounds of the cross-appeal set out in paragraph

49 above on the issue of bias and judicial recusal leaves no doubt in our minds that the answer is in the affirmative. The strictures for admission of an appeal or cross-appeal enunciated in *Munya Vs Kithinji & 2 others* [2014] KESC 30 (KLR) and *Nduttu & 6000 others Vs Kenya Breweries Ltd & another* [2012] KESC 9 (KLR) have been satisfied. Although the central constitutional issue before the two courts below was the application of Articles 161, 165(4) and 259(3)(b) of the Constitution, on the powers of the Deputy Chief Justice, as the Deputy Head of the Judiciary, to lawfully empanel a High Court bench, Article 50 was applied by both the High Court and the Court of Appeal on the question of bias and recusal of the judges. We reject the submissions by the National Assembly that the issues raised in the cross-appeal are distinct from those in the appeal. The appeals to the Court of Appeal by both Hon. Gachagua and the National Assembly were consolidated, and a single judgment was rendered. Part of that judgment aggrieved Hon. Gachagua, hence the cross-appeal. In view of the foregoing, we find that the application by the National Assembly does not fall within the parameters for summary dismissal and must therefore be dismissed.

[52] On the issue of costs, bearing in mind that costs follow the event and are awarded as a matter of discretion as enunciated in *Rai & 3 others Vs Rai & 4 others* [2014] KESC 31 (KLR), noting further the public interest nature of this matter, we make no orders as to costs.

[53] ACCORDINGLY, we make the following Orders:

- i) *The Notice of Motion dated 17th July 2025 be and is hereby dismissed.*
- ii) *The Notice of Motion dated 23rd September 2025 be and is hereby dismissed.*
- iii) *There shall be no orders as to costs.*

It is so Ordered.

DATED and DELIVERED at NAIROBI this 30th Day of January, 2026.

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true
copy of the original.**

REGISTRAR
SUPREME COURT OF KENYA

