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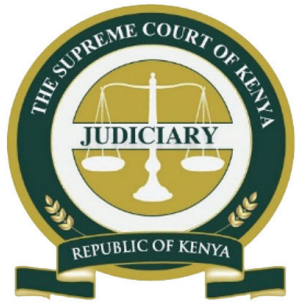
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SUPREME COURT LAW REPORTS

2023 VOLUME 1







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Editor
Prof Jack Mwimali

Nairobi

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Black, HC., (Ed) (1991) ***Black's Law Dictionary*** St Paul Minnesota: West Group 6th Edn 587

Branch, D., (Ed) (2011) ***Between Hope and Despair, 1963-2011*** New Haven: Yale University Press p 189 511

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Cameron, E., (1993) ***Sexual Orientation and the Constitution: A Test Case for Human Rights*** South African Lagal Journal, 110, p 450 322

Castel, JG., (Ed) (1971) ***"Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada"*** Montreal: McGill Law Journal 245

Collins, C., (Ed) (2011) ***Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*** Pennysylvania: Pennsylvania State University Press 1st Edn pp 21-22 511

Constitution of Kenya Review Commission (CKRC) (2005) ***The Final Report of the Constitution of Kenya Review Commission*** Constitution of Kenya Review Commission (CKRC) 107, 174

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Fordham, M., (Ed) (2012) ***Judicial Review Handbook*** London: Hart Publishing, 6th Edn 548

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Garner, BA. (2009) ***Black's Law Dictionary*** St Paul Minnesota: West Group 9th Edn p 116 ..... 1, 52, 133, 174, 245, 322, 450, 548, 628

Gelpe, MR., (Ed) (1985) ***Exhaustion of Administrative Remedies: The Lesson from Environmental Cases*** 53 George Washington Law Review 1: Faculty Scholarship Paper 81 322

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H.E. Read (1934) ***HE Read's Recognition and Enforcement of Foreign Judgments in the Common Law Unity of the British Commonwealth (1934), pp 52-53, 125*** Common Law Unity of the British Commonwealth (1934), pp 52-53, 125 245

Heymann, JH., et al (Eds) (2016) ***Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions*** New York: Yale Journal of Law & Feminism pp149-69 322

Hogg, QM (Lord Hailsham) et al (Eds) (1995) ***Halsbury's Laws of England*** London: Buttersworth para 1174 133

Hogg, QM, (Lord Hailsham) et al (Eds) (1993) ***Halsbury's Law of England*** London: Butterworths Ltd 4th Edn Re -Issue Vol 44(i) para 1433 587

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Kangu, JM., (Ed) (2015) ***Constitutional Law of Kenya on Devolution*** Nairobi : Strathmore University Press p 346 322

Kanogo.T., (Ed) (2020) ***Ohio Short Histories of Africa: Wangari Maathai*** Athens: Ohio University Press pp 128 - 135 511

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Loughlin, M., (Ed) (2004) ***The Idea of Public Law*** Oxford: Oxford University Press pp 84-85 245

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Mackay, J., (Lord of Clashfern) et al (Eds) (2015) ***Halsbury's Laws of England*** London: LexisNexis Butterworths 5th Edn Vol 61 para 656 628

Mann, P., (Ed) (1976) ***Family Law*** London: butterworths 5th Edn 628

Marussia, BR., (Ed) (1954) ***Recognition and Enforcement of Foreign Judgments' International and Comparative Law Quarterly,*** Cambridge: Cambridge University Press Vol 3 No 1 pp 49-92 245

McHenry, RD., (Ed) (2001) ***Britannica Online Encyclopaedia*** Encyclopædia Britannica, Inc 322

Mehren, AT., Trautman, DTM., (Eds) (1968) ***"Recognition of Foreign Adjudications: A Survey and A Suggested Approach"*** Cambridge: Harvard Law Review p 1603 245

Mulla, DF., (Ed) (2013) ***The Code of Civil Procedure*** London: LexisNexis 18th Edn p 293 133

Murphy, C., (Ed) (2017) ***The Conceptual Foundations of Transitional Justice*** Cambridge: Cambridge University Press p 1 511

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Neo, JL., (Ed) (2017) ***Constitutional Interpretation in Singapore; Theory and Practice*** London; Routledge 1st Edn p 1 107

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Ontario Human Rights Commission ***The Glossary of Human Rights Terms*** 322

Owour, M., (Ed) (2023) ***International Commission of Jurists: Election Technology and Electoral Justice in Kenya*** P 77 1

P

Pretorius, DM., (Ed) (2005) ***The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law*** 122 South African Law Journal 832 401

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Smith, JW., et al (Eds) (1929) ***Smith's Leading Cases on Various Branches of the Law with Notes*** London: Sweet & Maxwell Ltd 13th Ed, pp 717-18 245

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The Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission., (2003) ***Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*** Nairobi: Government Printer p19 511

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Webber, J., (Ed) (2012) ***Forms of Transitional Justice*** Baden - Baden: Nomos Vol 51 pp 98–128 511

Y

(2006) ***Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*** 322

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Constitutionality of statutory provisions – *constitutionality of section 15(2) of the Judicial Service Act on the procedure of appointment to the Judicial Service Commission (JSC) - whether section 15(2) was inconsistent with article 171 of Constitution on the establishment of the JSC to the extent that it donated to the President the power to appoint elected and nominated members of the JSC - whether section 15(2) was unconstitutional in as far as it purported to direct a specific timeline in which the President was to appoint individuals to the JSC - Constitution, article 171; Judicial Service Act, cap 8A, section 15(2).*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Executive – *Office of the President – powers – role in the appointment of commissioners of chapter fifteen commissions – role in the appointment of Judicial Service Commission Commissioners - what was the role of the President in the appointment of commissioners to the Judicial Service Commission - Constitution, articles 10, 73(2)(a), 171(2)(g) and (h) and 250; Judicial Service Act, cap 8A, section 15(2).*
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

Fundamental rights and freedoms – *enforcement of fundamental rights and freedoms - right to access information - when did the right to institute an action in a claim of violation of the right to access information crystallise - Constitution, article 35.*
Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) 1

Fundamental rights and freedoms – *enforcement of fundamental rights and freedoms - right to equality and freedom from discrimination - whether the refusal to reserve a name of an intended non-governmental organization on the ground that the Penal Code criminalized gay and lesbian liaisons amounted to discrimination - Constitution, article 27(4); Penal Code, cap 63, sections 162, 163 and 165.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Fundamental rights and freedoms – *freedom from torture and cruel, inhuman or degrading treatment or punishment - nature of inhuman or degrading punishment or treatment - whether inhuman or degrading punishment or treatment had to be inflicted for a specific purpose for it to be established - whether it was mandatory to exhibit any physical injuries or medical reports to*

establish existence of psychological/traumatic effect in a claim of violation of fundamental rights and freedoms - Constitution (repealed), section 74(1).
Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR) 511

Fundamental rights and freedoms – *limitation of fundamental rights and freedoms - limitation of the freedom of association - whether it was unconstitutional to limit the right to associate through denial of registration of an association based on sexual orientation - whether the refusal to allow the reservations of names of a proposed non-governmental organization which included the terms "gays" and "lesbians" was unreasonable, irrational or illegitimate - whether the refusal to register an organization of persons who fell within the lesbian, gay, bisexual, transgender, queer or questioning community violated the freedom of association - Constitution, article 36; Penal Code, cap 63, sections 162, 163 and 165.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Fundamental rights and freedoms – *right of access to justice – definition of the word fee - whether the use of the word fee in the wording of the right to access to justice extended to both filing fees and costs (inclusive of applications for additional security for costs) - Constitution, article 48.*
Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR) 450

Fundamental rights and freedoms – *right to fair administrative action - what were the grounds in which an administrative decision could be challenged and struck down by courts - Constitution of Kenya, 2010, articles 23 and 47, Fair Administrative Actions Act, cap 7L, section 7(2)(a) to (o).*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Fundamental rights and freedoms – *timelines for filing claims of violation of fundamental rights and freedoms - claim that appellants did not file claims of violation of fundamental rights and freedoms in the early 1990s due to a lack of confidence in the Judiciary under the previous constitutional dispensation - nature and rationale of transitional justice - whether there was limitation of time in matters relating to violation of rights under the Constitution - whether the Constitution applied to claims of violation of rights and freedoms before it came into force.*
Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR) 511

Interpretation of constitutional provisions – *interpretation of article 171 of the Constitution on the establishment of the Judicial Service Commission - whether article 171 was a self-executing provision - Constitution, article 171.*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Interpretation of constitutional provisions – *interpretation of section 23(2) of the Sixth Schedule to the Constitution - where section 23(2) provided that a removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under section 23(1) shall not be subject to question in, or review by, any court - whether the ouster in section 23(2) of the Sixth Schedule to the Constitution applied to magistrates - whether a contest to*

the decision of the Judges and Magistrates Vetting Board affecting judges involved in the vetting process was inconsistent with the terms of the Constitution - Constitution, articles 160,167, 168, Sixth Schedule, section 23(2).
Judicial Service Commission v Oduor & 5 others [2023] KESC 32 (KLR) 107

Interpretation of the Constitution – *interpretation of article 36 of the Constitution - where article 36 provided for the right to form, join or participate in the activities of an association of any kind - whether the right to form, join or participate in the activities of an association of any kind in article 36 included associations whose activities were contrary to the law - Constitution, article 36.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Interpretation of the Constitution – *interpretation of article 45(3) of the Constitution - where article 45(3) of the Constitution provided that parties to a marriage were entitled to equal rights at the time of marriage, during marriage, and at the dissolution of marriage - whether spouses were automatically entitled to a 50% share of proprietary rights after the dissolution of marriage - whether article 45(3) applied retrospectively - Constitution, article 45(3).*
JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (*Amicus Curiae*) [2023] KESC 4 (KLR) 587

Judges and Magistrates Vetting Board (the Board) – *functions of the Board - vetting of judges and magistrates - scope of the Board in considering the conduct of serving judges and magistrates - Constitution, article 262, Sixth Schedule, section 23(2).*
Judicial Service Commission v Oduor & 5 others [2023] KESC 32 (KLR) 107

Judicial Service Commission – *appointment of commissioners – representatives of the Public Service Commission – representative of the public/people - whether there was a requirement for merit and fair competition in appointment of Commissioners to the Judicial Service Commission who represented the Public Service Commission and the people - Constitution, articles 10, 73(2)(a), 171(2)(g) and (h) and 250; Judicial Service Act, cap 8A, section 15(2).*
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

Judiciary – *independence of the Judiciary - claim that the President's appointing role of Judicial Service Commission (JSC) commissioners and the National Assembly's approval role would interfere with the independence of the Judiciary and the JSC - whether the President's appointing role for JSC commissioners and the National Assembly's approval role would interfere with the independence of the Judiciary and the JSC - Constitution, articles 159 and 160.*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Office of the Director of Public Prosecutions – *decision to charge - administrative Law – judicial review– review of decision of the Director of Public Prosecutions (DPP)to charge – considerations - what were the circumstances in which a judicial review court could interfere with the decision of the DPP to charge an accused person - whether a challenge on the interpretation of the provisions used to charge an accused was an issue of propriety or otherwise of the decision by the DPP to charge an accused warrant consideration by a judicial review court – Constitution articles*

10, 25(c), 27, 28, 29, 41 and 50; Law Reform Act, cap 26, sections 8 and 9; Civil Procedure Rules, cap 21 Sub Leg, order 53.
Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR) 548

President – *powers of the President - appointment of members of the Judicial Service Commission (JSC) - nature of the President's power to appoint members of the JSC - whether the President's power to appoint a Court of Appeal Judge elected by judges of the Court of Appeal as member of the JSC was only ceremonial - Constitution, articles 132, 171, 248 and 250; Judicial Service Act, cap 8A, section 15(2).*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Public Service Commission –members – *qualifications – where an appointed member was a retiree - whether it was a disqualifying factor for a member of the Public Service Commission to be a retired public servant - Constitution, article 233(3).*
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

Rights and fundamental freedoms – *enforcement of rights and fundamental freedoms – right to property - whether the right to property under article 40 of the Constitution extended to property that had been found to have been unlawfully acquired - Constitution, article 40.*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

Separation of powers – *judiciary vis-à-vis the National Assembly – role in appointment of commissioners to the Judicial Service Commission – where it was contended that a nominee approved by the National Assembly for appointment had integrity issues – where a petitioner sought for the court to revoke the appointment due to integrity issues - whether the court had powers to revoke the appointment of a Judicial Service Commission Commissioner on grounds of lack of integrity where the National Assembly had considered the issues of integrity and confirmed the nominee for appointment - Constitution, articles 10, 73(2)(a), 171(2)(g) and (h) and 250; Judicial Service Act, cap 8A, section 15(2); Public Appointments (Parliamentary Approval) Act, cap 7F, section 7.*
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

DEVOLUTION – *intergovernmental disputes – nature of intergovernmental disputes - what were the factors to consider in determining what amounted to an intergovernmental dispute.*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

EVIDENCE LAW

Burden and standard of proof – *burden and standard of proof in an alleged threat or violation of rights and freedoms - who bore the burden and what was the standard of proof in an alleged threat or violation of rights and freedoms - Evidence Act, cap 80, section 107.*
Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR) 511

Evidence – *irregularly obtained evidence - whether irregularly obtained public documents/ information were admissible as evidence in court - whether documents obtained according to*

parliamentary processes mutated into public documents where parties to a suit got into possession of the documents through an opaque process - Constitution, 2010, articles 35 and 50(4); Evidence Act, (cap 80), sections 80 and 81.
Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) 1

FAMILY LAW

Custody – *rights of the child – best interests of the child – parental rights and responsibilities - parental responsibility agreement - what was a parental responsibility agreement – what were the legal consequences of entering into a parental responsibility agreement - what guidelines should courts consider when balancing a child's best interests vis-à-vis the enforcement of parental rights and responsibilities.*
MAK v RMAA & 4 others [2023] KESC 21 (KLR) 292

Marriage – *matrimonial property – division of matrimonial property - contribution of spouses towards the acquisition of the matrimonial property – principles applicable in assessing beneficial interests after a separation – direct financial contribution vis-à-vis other forms of contribution - where the parties were cohabitees that had acquired property together through the existence of their relationship – whether property acquired under such circumstances formed part of a constructive trust - whether a constructive trust as envisioned could be applied in solving disputes relating to cohabitees – whether a constructive trust could be inferred from the conduct of cohabitees who purchased property together in the subsistence of their relationship - what principles were courts to consider in assessing the beneficial interests due to cohabiting parties who separated - whether courts were to consider both direct financial contributions to the acquisition of the property and other forms contributions – Land Act, cap 280, section 38.*
MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (*Amicus Curiae*) [2023] KESC 2 (KLR) 628

Marriages – *applicable law for marital disputes that arose before 2013 – application and operation of the Married Women's Property Act (repealed) - what was the applicable law to matrimonial disputes that arose before the enactment of the Marriage Act, cap 150, and Matrimonial Property Act, cap 152 - whether the Marriage Act, cap 150, and Matrimonial Property Act, cap 152 applied to matrimonial disputes before 2013 - whether cohabitants could file proceedings under the Married Women's Property Act (Repealed).*
MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (*Amicus Curiae*) [2023] KESC 2 (KLR) 628

Marriages – *presumption of marriage – conditions precedent - what were the parameters in which courts could presume a marriage – whether a party that had separated from a previous marriage but had not formally registered the divorce could be presumed to be married – who had the burden of proving presumption of marriage - Evidence Act, cap 80, sections 109 and 119.*
MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (*Amicus Curiae*) [2023] KESC 2 (KLR) 628

Matrimonial property – *distribution of matrimonial property upon the dissolution of a marriage - contribution of spouses towards the acquisition of matrimonial property - whether spouses were automatically entitled to a 50% share of proprietary rights after the dissolution of marriage -Constitution, article 45(3).*
JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (*Amicus Curiae*)
[2023] KESC 4 (KLR) 587

JURISDICTION

Jurisdiction of courts in environmental matters – *jurisdiction in matters relating to the issuance of environment impact assessment licenses - whether courts had the jurisdiction to determine matters relating to the issuance of environment impact assessment licenses when the same had not been challenged at the National Environment Tribunal - Environmental Management and Co-ordination Act, cap 387, sections 125 and 129(1).*
Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) 1

Jurisdiction of the High Court – *jurisdiction over matters concerning the rights of the child – where a Kenyan High Court had issued an order that was not observed by a foreign court deciding over a case involving the same parties and the same subject matter - whether Kenyan Courts were bound by a decision of the High Court of England where the English Court pronounced itself on custody and parental responsibilities and the same parties were before the Kenyan courts - whether the High Court and the Court of Appeal deferred to the English Court by disregarding Kenyan Law as well as a High Court order that was in force while determining the matter that was before them - whether the rights and responsibilities issued by the Kenyan High Court in a parental responsibility agreement could be extinguished by a foreign court without considering Kenya's laws for the best interests of the child – Constitution, article 53; Children Act, No 8 of 2001 (Repealed), sections 6(1) and (2) and 24(1); United Nations Convention on the Rights of the Child, 1989, article 9; African Charter on the Rights and Welfare of the Child, article 19.*
MAK v RMAA & 4 others [2023] KESC 21 (KLR) 292

Jurisdiction of the High Court – *review jurisdiction of the High Court - review jurisdiction against the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates - whether the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates was subject to the review jurisdiction of the High Court - Constitution, articles 160,167, 168 Sixth Schedule, section 23.*
Judicial Service Commission v Oduor & 5 others [2023] KESC 32 (KLR) 107

Jurisdiction of the Supreme Court – *appellate jurisdiction – jurisdiction in appeals as of right in appeals involving interpretation or application of the Constitution - what was the nature of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution as of right in appeals involving interpretation or application of the Constitution - Constitution, article 163(4)(a).*
Ingang'a & 6 others v James Finlay (Kenya) Limited [2023] KESC 22 (KLR) 245

Jurisdiction of the Supreme Court – *appellate jurisdiction – jurisdiction to determine appeals involving constitutional interpretation or matters of general public importance – appeals of matters filed before the formation of the Supreme Court - whether the Supreme Court had the jurisdiction to determine appeals filed before the promulgation of the Constitution of Kenya, 2010 that formed the Supreme Court - whether the instant appeal involved constitutional interpretation or exceptional circumstances or a distinctive opportunity for the Supreme Court to provide guidance, which warranted an appeal to the Supreme Court – Constitution, article 163(4)(a).*

Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties) [2023] KESC 20 (KLR) 229

Jurisdiction of the Supreme Court – *appellate jurisdiction – jurisdiction to determine appeals involving constitutional interpretation or matters of general public importance – locus standi to institute such an appeal – where an appeal was instituted by a third party who was not a party to the proceedings at the trial court and the Court of Appeal - whether a person who was not part of the litigation at the High Court and Court of Appeal could file an appeal at the Supreme Court on grounds that the matter involved constitutional interpretation - whether the right to institute court proceedings claiming that a right had been infringed on behalf of others in public interest extended to appeals to the Supreme Court as of right in matter involving interpretation of the Constitution -Constitution, articles 22, 163(4)(a) and 258; Supreme Court Rules, 2020, rule 36.*

Law Society of Kenya v Communications Authority of Kenya & 10 others [2023] KESC 27 (KLR) 94

Jurisdiction of the Supreme Court – *appellate jurisdiction – where an appellant raised matters not canvassed at the High Court or Court of Appeal - whether the Supreme Court when acting as a second appellate court could determine an issue that was not canvassed before the superior courts below it - Constitution, article 163(4)(a).*

Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

Jurisdiction of the Supreme Court – *jurisdiction to determine appeals from the Court of Appeal involving interpretation of the Constitution – issues on parental access of a child, custody of a child, the best interest of the child, parental rights after a child has attained the age of 18 years – whether such issues warranted an appeal to the Supreme Court as a case involving the interpretation or application of the Constitution – Constitution, article 163(4)(a).*

MAK v RMAA & 4 others [2023] KESC 21 (KLR) 292

Jurisdiction of the Supreme Court – *jurisdiction to determine appeals from the Court of Appeal raising questions of constitutional interpretation – where the appeal arose from interlocutory applications - what was the distinction between an appeal emanating from an interlocutory ruling and an appeal from a conservatory order -whether the Supreme Court had the jurisdiction to determine appeals emanating from the Court of Appeal that arose from conservatory orders – whether the Supreme Court had the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal - Constitution of Kenya, 2010 article 165(3)(b); Court of Appeal Rules rule 5(2)(b).*

Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR) 401

Jurisdiction of the Supreme Court – *jurisdiction to determine issues which were not articulated in trial courts - whether the Supreme Court had the jurisdiction to determine an issue which was not articulated at the trial court but only at the appellate court - Constitution, article 163(4)(a).*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

LAND LAW

Allocation of land – *allocation of unalienated Government land - what was the procedure for the allocation of unalienated land.*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

Ownership of land – *proof of ownership of land - whether having the instrument of title was sufficient proof of ownership of land where the registered proprietor's root title was under challenge.*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

PRECEDENT – *precedents from courts of concurring jurisdiction – binding nature of precedents on courts of concurring jurisdiction – whether decisions made by courts of concurrent jurisdiction made in rem were binding on courts of equal jurisdiction.*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

PROCUREMENT LAW – *procuring entities – nature of procuring entities - whether a State corporation qualified to be a procuring entity where it followed directives issued to it by the Executive and never allocated funds towards a project directly from the consolidated funds - whether procurement and contractual agreements between two State corporations of two countries was a government-to-government transaction and thus not subject to the provisions of the Public Procurement and Disposal Act, 2005 - Public Procurement and Disposal Act, No 3 of 2005 (repealed), section 26(6).*
Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) 1

STATUTES

interpretation of statues – *interpretation of rule 36 of the Supreme Court Rules - what was the definition of a 'person seeking to appeal' as used in the Supreme Court Rules, 2020.*
Law Society of Kenya v Communications Authority of Kenya & 10 others [2023] KESC 27 (KLR) 94

Application of statutes – *application of the Matrimonial Property Act No 49 of 2013 - retrospective application of the Matrimonial Property Act - whether the Matrimonial Property Act No 49 of 2013 could be applied retrospectively to claims filed before the commencement of the Act - Matrimonial Property Act, cap 152.*
JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (*Amicus Curiae*) [2023] KESC 4 (KLR) 587

Constitutionality of provisions of a statute – *Judicial Service Act – section 15(2) - whether section 15(2) of the Judicial Service Act was unconstitutional in so far as it failed to prescribe merit,*

diversity and fair competition as prerequisites for appointment of one person to represent the Public Service Commission and one woman and one man to represent the public in the Judicial Service Commission - whether section 15(2) of the Judicial Service Act was inconsistent with the provisions of article 171(2) of the Constitution in so far as it assigned the President the role of appointing elected and nominated members of the JSC - Constitution, articles 171(2)(g) and (h).
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

Interpretation of statutes – *interpretation of section 162 of the Penal Code -where section 162 provided for unnatural offences - whether the use of the words "any person who has carnal knowledge of any person" "against the order of nature" in section 162 included female same-sex relationships as unnatural - Penal Code, cap 63, section 162.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*)
[2023] KESC 17 (KLR) 322

Interpretation of statutes – *interpretation of section 19 of the Non-Governmental Organizations Co-ordination Act - provision for an internal dispute resolution mechanism - whether the refusal to approve the reservation of names of a proposed non-governmental organization was subject to the dispute resolution mechanism under section 19 - Non-Governmental Organizations Co-ordination Act, cap 134, section 19; Non-Governmental Organizations Coordination Regulations, 1992 (cap 134B Sub Leg), regulation 8.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*)
[2023] KESC 17 (KLR) 322

Interpretation of statutes – *section 7 of the Public Appointments (Parliamentary Approval) Act, cap 7F – procedure to be followed by the National Assembly in vetting persons nominated for appointment to the Judicial Service Commission - whether the National Assembly followed the correct legal procedure to confirm the appointment of the respondents as Judicial Service Commissioners - whether to the extent that the National Assembly failed to interrogate the 6th and 7th respondents, before confirming their appointment to the Judicial Service Commission the appointments were contrary to the requirements of section 7 of the Public Appointments (Parliamentary Approval) Act, cap 7F.*
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

Interpretation of the Constitution – *interpretation of article 48 of the Constitution of Kenya, 2010 – definition of the word 'fee' - whether the use of the word 'fee' in the wording of the right of access to justice extended to both filing fees and costs (inclusive of applications for additional security for costs).*
Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR) 450

WORD AND PHRASES – *appointed – definition - designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office - Black's Law Dictionary,9th Ed, p 116.*
Katiba Institute v Attorney General & 9 others [2023] KESC 47 (KLR) 52

WORDS AND PHRASES

Appoint – *definition of appoint - the designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office - Black's Law Dictionary, 9th Ed at page 116.*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Approval – *definition of approval - when a plan, decision, or person is officially accepted - Longman Dictionary.*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Approve – *definition of approve - to give formal sanction to; to confirm authoritatively - Black's Law Dictionary 11th edition.*
Law Society of Kenya v Attorney General & 4 others [2023] KESC 19 (KLR) 174

Bona fide purchaser – *definition of bona fide purchaser – one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims - Black's Law Dictionary 9th Edition.*
Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) 133

Comity – *definition of comity - a practice among political entities (as nations, states, or courts of different jurisdictions) involving esp. mutual recognition of legislative, executive and judicial acts - Black's Law Dictionary, 9th Edition.*
Ingang'a & 6 others v James Finlay (Kenya) Limited [2023] KESC 22 (KLR) 245

Commission – *definition of commission - a warrant or authority from the government or a court, that empowers the person named to execute official acts. The authority under which a person transacts business for another. A body of persons acting lawful authority to perform certain public services - Black's Law Dictionary, 9th edition.*
Ingang'a & 6 others v James Finlay (Kenya) Limited [2023] KESC 22 (KLR) 245

Constructive trust – *definition of - the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title - Black's Law Dictionary 9th Edition at pg 1649.*
MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (*Amicus Curiae*) [2023] KESC 2 (KLR) 628

Judicial review – *definition – court's power to review the actions of other branches of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional - constitutional doctrine providing for this power - court's review of a lower court's or an administrative body's factual or legal findings- Black's Law Dictionary, 9th Edition, Pg. 924.*
Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR) 548

Letter of intent – *definition of letter of intent - a written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a*

noncommittal writing preliminary to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent, and courts ordinarily do not enforce one, but courts occasionally find that a commitment has been made - Black's Law Dictionary, 11th Edition at page 1180.
Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) 1

Moot case – *definition of a moot case - a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights, and as a verb, as means to render a question as of no practical significance - Black's Law Dictionary, 9th edition.*
Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) 1

Retrospective – *definition of retrospective - a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred - Black's Law Dictionary (6th Edition).*
JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (*Amicus Curiae*) [2023] KESC 4 (KLR) 587

Security for costs – *definition of - money, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses - Black's Law Dictionary Ninth Edition at page 1478.*
Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR) 450

Sex – *definition of sex - the sum of features by which members of species can be divided into two groups—male and female—that complement each other reproductively - Britannica Online Encyclopaedia.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Sex – *definition of sex - the sum of the peculiarities of structure and function that distinguish a male from a female organism - Black's Law Dictionary, 9th Edition.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Sexual orientation – *definition of sexual orientation - a person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality or bisexuality - Black's Dictionary.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*) [2023] KESC 17 (KLR) 322

Sexual orientation – *definition of sexual orientation - the enduring pattern of an individual's emotional, sexual, and/or romantic attraction - Britannica Online Encyclopaedia.*
NGOs Co-ordination Board v EG & 4 others; Katiba Institute (*Amicus Curiae*)
[2023] KESC 17 (KLR) 322

Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & W Ouko, SCJJ

Neutral citation: [2023] KESC 38 (KLR)

Procurement Law *- procuring entities - nature of procuring entities - whether a State corporation qualified to be a procuring entity where it followed directives issued to it by the Executive and never allocated funds towards a project directly from the consolidated funds - whether procurement and contractual agreements between two State corporations of two countries was a government-to-government transaction and thus not subject to the provisions of the Public Procurement and Disposal Act, 2005 - Public Procurement and Disposal Act, No 3 of 2005 (repealed), section 26(6).*

Evidence Law *- evidence - irregularly obtained evidence - whether irregularly obtained public documents/information were admissible as evidence in court - whether documents obtained according to parliamentary processes mutated into public documents where parties to a suit got into possession of the documents through an opaque process - Constitution, 2010, articles 35 and 50(4); Evidence Act, (cap 80), sections 80 and 81.*

Constitutional Law *- fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to access information - when did the right to institute an action in a claim of violation of the right to access information crystallise - Constitution, article 35.*

Jurisdiction *- jurisdiction of courts in environmental matters - jurisdiction in matters relating to the issuance of environment impact assessment licenses - whether courts had the jurisdiction to determine matters relating to the issuance of environment impact assessment licenses when the same had not been challenged at the National Environment Tribunal - Environmental Management and Co-ordination Act, cap 387, sections 125 and 129(1).*

Civil Practice and Procedure *- appeals - appeals to the Supreme Court - appeals as of right in any case involving the interpretation or application of the Constitution - what were the requirements for one to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution - Constitution, article 163(4)(a).*

Civil Practice and Procedure *- doctrine of mootness - nature of the doctrine of mootness - what was the nature of the doctrine of mootness?*

Words and Phrases *- moot case - definition of a moot case - a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights, and as a verb, as means to render a question as of no practical significance - Black's Law Dictionary, 9th edition.*

Words and Phrases *- letter of intent - definition of letter of intent - a written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to*

be bound by a letter of intent, and courts ordinarily do not enforce one, but courts occasionally find that a commitment has been made - Black's Law Dictionary, 11th Edition at page 1180.

Brief facts

On August 12, 2009, the Ministry of Transport executed a memorandum of understanding (MOU) with the 4th respondent, China Road and Bridge Corporation (CRBC), a state-owned corporation of the People's Republic of China. Under the MOU, CRBC was to undertake, at its own cost, a feasibility study of the construction of phase 1 of the standard gauge railway (SGR) and come up with a preliminary design for the project. The feasibility and preliminary design report was approved by the 1st appellant, Kenya Railways Corporation (KRC) with revisions on June 26, 2012. KRC and CBRC executed commercial contracts. In a bid to meet its portion of the funding of the project, the Government introduced a railway development levy at the rate of 1.5% of the customs value of imported goods to be charged on all imports.

The 1st, 2nd and 3rd respondents filed petitions at the High Court challenging the procurement process for the construction of the SGR and the resultant contracts in favour of CRBC. In their petition, the 1st and 2nd respondents urged that there was a lack of due diligence on the part of the Government. The 1st and 2nd respondents argued that single sourcing or direct procurement for a mega project such as the SGR was illegal. Consequently, they sought among other orders; a declaration that there was no valid contract between the Government of Kenya and CRBC; and a declaration that the railway should be procured through competitive bidding.

The petition by the 3rd respondent (LSK) challenged the procurement process of the SGR project on largely similar grounds as those raised by the 1st and 2nd respondents, the only addition being that KRC should have ensured public participation in the procurement. LSK sought among other orders; an order of *certiorari* to quash the award of contract for the supply and installation of facilities, locomotives, and rolling stock for the SGR or any agreement for the supply of the same. KRC lodged a cross-petition challenging the reliance by the 1st, 2nd, and 3rd respondents on documents that were produced contrary to articles 31 and 35 of the Constitution of Kenya, 2010 (Constitution) and section 80 of the Evidence Act.

The High Court dismissed the consolidated petitions and allowed the cross-petition to the extent of expunging documents it had found inadmissible. The High Court found that the project was funded by a loan from China through Exim Bank and as such, the procurement in question was not subject to the Public Procurement and Disposal Act, 2005 (PPDA, 2005), but was governed by the terms of the negotiated loan. The court found that an autonomous environmental impact assessment (EIA) was conducted and an EIA license issued and that the respondents failed to challenge the EIA license issued to CRBC for the project at the National Environment Tribunal (the Tribunal). The High Court also found that the SGR was not a World Bank-funded project and therefore the blacklisting of CBRC was not an automatic bar to participation of CRBC in any other project.

Aggrieved, the 1st, 2nd and 3rd respondents filed appeals at the Court of Appeal which upheld the High Court's decision save for setting aside the finding that the procurement of the SGR project

was exempt from the provisions of PPDA, 2005. It substituted the same with a declaration that KRC, as the procuring entity, failed to comply with, and violated the provisions of article 227 (1) of the Constitution and sections 6(1) and 29 of the PPDA, 2005, in the procurement of the SGR project. Aggrieved by the Court of Appeal's decision, the appellants filed the instant appeal.

Issues

i. Whether a State Corporation qualified to be a procuring entity where it followed directives issued to it by the Executive and never allocated funds towards a project directly from the consolidated funds.

ii. Whether procurement and contractual agreements between two State Corporations of two countries was a government-to-government transaction and thus not subject to the provisions of the Public Procurement and Disposal Act, 2005.

iii. Whether irregularly obtained public documents/information were admissible as evidence in court.

iv. Whether documents obtained pursuant to parliamentary processes mutated into public documents where parties to a suit got into possession of the documents through an opaque process.

v. Whether courts had the jurisdiction to determine matters relating to the issuance of environment impact assessment licenses when the same had not been challenged at the National Environment Tribunal.

vi. What were the requirements for one to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution?

vii. What was the nature of the doctrine of mootness?

viii. When did the right to institute an action in a claim of violation of the right to access information crystallize?

Relevant provisions of the Law

Constitution of Kenya

Article 227 - Procurement of public goods and services

1. *When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.*

Held

1. The issues identified revolved around the interpretation and application of provisions of the Constitution. In the premises, the issue of certification under article 163(4)(b) of the Constitution did not arise. The court was clothed with jurisdiction under article 163(4)(a) of the Constitution to determine the three identified issues, namely;

    a. determination on compliance with the provisions of article 227(1) of the Constitution and sections 6(1) and 29 of the PPDA, 2005 in the procurement of the SGR project;

b. the question of the environmental considerations of the SGR project under articles 42, 69 and 70 of the Constitution; and,
c. issue relating to expunging documents in support of the petitions filed at the High Court and consideration of its detrimental effect to the administration of justice against the principle underlying article 50(4) of the Constitution

2. Mootness of a matter arose where a live controversy no longer existed between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquired whether events after the filing of a suit would have eliminated the controversy between the parties. The orders sought at the High Court, seeking to restrain the appellants from contracting with CRBC, and to ensure that there was no single sourcing in the procurement of the SGR were moot as they were overtaken by events, the contracts having been executed.
3. Completion of the construction of the SGR project did not render moot the consideration and determination of the remaining issues as to whether the SGR project complied with article 227 of the Constitution and section 6(1) of the PPDA, 2005; whether the 1st, 2nd and 3rd respondents could rely on evidence provided by whistleblowers in support of their petitions, and the environmental considerations under the Constitution. Those were live issues that remained available for the court's consideration. Further, they raised matters of public importance owing to the sheer enormity of the project, the public finance expended and the project being for public use. In any event, the operative law surrounding the litigation remained unsettled.
4. The SGR project, though completed continued to raise questions, especially concerning the constitutionality of the project and the surrounding procurement process. The matters which the Court of Appeal dealt with were not moot.
5. From the pleadings filed at the High Court, the 1st, 2nd and 3rd respondents did not disclose their source for the documents in support of the petitions at the High Court. The Evidence Act applied to all proceedings, including constitutional petitions save for the exceptions set out therein. The Evidence Act provided for admissibility of evidence with section 80 setting out how public documents may be produced in court. That procedure ensured the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the Evidence Act allowed the production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purported to be copies.
6. Public documents could only be produced in court as evidence through the procedure set out. They could be produced as evidence in court by way of producing the original document or a copy that was duly certified. The documents having been adduced in evidence without adhering to the rather straightforward provisions, were outrightly rendered inadmissible.

7. Article 35 of the Constitution provided for the right to access information held by the State, including that held by public bodies. The Access to Information Act, cap 7M, was enacted to give effect to article 35 and set out the procedure to be followed when requesting information including the mandate of the Commission on the Administrative Justice. Under that provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency. The right to institute an action in court only crystallized once a citizen had requested the information from the State and the request had been denied or not provided. The 1st, 2nd and 3rd respondents did not request to be provided with the information relied on.
8. To admit the illegally obtained information was detrimental to the administration of justice and the provisions of article 50(4) of the Constitution. Allowing such documents was akin to sanitizing illicit actions of the 1st, 2nd, and 3rd respondents of irregularly obtaining evidence, in violation of article 31 of the Constitution on the right to privacy including the privacy of communication. Further, such documents adduced by the 1st to 3rd respondents were of utmost confidentiality and related to communication within Government circles, between civil servants, relating to Government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the appellants, the production of such documents as evidence must be by the law. The documents were inadmissible for not having obtained and adduced in the manner set out under sections 80 and 81 of the Evidence Act or requested for under article 35 of the Constitution.
9. It did not matter that some of the documents in issue had been readily tabled before Parliament and were subjected to debate at the different committees. Parliamentary processes were subject to certain privileges and immunities. Article 117 of the Constitution provided for powers, privileges, and immunities. The objective of the powers, privileges, and immunities as set out in article 117(2) was for the orderly and effective discharge of the business of Parliament. Those powers, privileges, and immunities extended to the parliamentary committees, the chairpersons of committees, and Members of Parliament.
10. Parliament was empowered under article 125 of the Constitution to call for evidence including the production of documents. It could not be that documents obtained according to parliamentary processes mutated into public documents just because the respondents had the documents through an otherwise opaque process. The 1st to 3rd respondents had not demonstrated how they gained possession of the impugned documents that were otherwise within a constitutionally sanctioned parliamentary process, to which the respondents had not explained their role.
11. The National Environment Management Authority (NEMA), just like any other statutory regulator, only seized the documents in furtherance of its statutory mandate to grant a license. There existed a specific mechanism of dealing with and/ or relying upon information and documents availed to NEMA, bearing in mind the context within which NEMA received such documents. NEMA was not a party to the court proceedings subject to

the instant appeal. It was not enough for the 1st to 3rd respondents to allege that the documents were obtained from NEMA without the attendant contextualization especially when the respondents failed to invoke the mechanism provided under the Environmental Management and Co-Ordination Act, cap 387 (EMCA).

12. The burden of proof always lay with the claimant, that was to say, he who asserted. Indeed, the reading of sections 35, 107 and 109 of the Evidence Act together with rules 15 and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 revealed that newspaper articles were inadmissible as evidence in law. That was because facts contained in newspaper articles were merely hearsay.

13. In respect of corruption allegations complained of by the 1st and 2nd respondents, there were constitutional and statutory mandated bodies to address those. The Ethics and Anti-Corruption Commission Act No.22 of 2011 enacted under article 79 of the Constitution provided for the functions of the Ethics and Anti-Corruption Commission (EACC) in section 11(1) to include receiving complaints on the breach of the code of ethics by public officers, investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act or any other law enacted according to Chapter Six of the Constitution. Further, the Witness Protection Agency established under section 3A of the Witness Protection Act, cap 79, had its purpose set out under section 3B(1) as to provide the framework and procedure for giving special protection on behalf of the State, persons in possession of important information and who were facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

14. Whereas article 22 of the Constitution entitled every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights had been denied, violated or infringed or was threatened, and article 258 of the Constitution entitled every person to institute court proceedings claiming that the Constitution had been contravened or was threatened with contravention, those provisions ought not to be abused in the name of public interest. That was, more so, where the litigants sought to advance private or political interests or other considerations through proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law and must be aimed at addressing genuine public interests and not used for personal gain or vendetta.

15. Articles 22 and 258 of the Constitution were not an open-ended panacea or bogey provisions to be resorted to as a panacea to any person under the guise of public interest. Like any other well-intended provision of the Constitution, it was bound to be abused and when that happened, the courts should not hesitate to rein in on such abuses.

16. Article 69 of the Constitution set out the obligations of the State which included, eliminating processes and activities that were likely to endanger the environment and establishing systems of EIA, environmental audit, and monitoring of the environment.

Article 70 of the Constitution provided for the enforcement mechanism and provided that where there were allegations of violations of the rights under article 42 of the Constitution, or there was a likelihood of being denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that were available. The court may then make orders or directions appropriate to prevent, stop, or discontinue any act or omission that was harmful to the environment; compel the public officer to take measures to prevent or discontinue any act or omission that was detrimental to the environment or provide compensation for victims of violation of the right.

17. EMCA was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and matters connected therewith and incidental thereto. Section 58 of EMCA, made provision for the application of an EIA. Every proponent of a project specified under the Second Schedule to EMCA was required to conduct an EIA. Under Regulation 4 of the Environmental (Impact Assessment and Audit) Regulations of 2003, no licensing authority shall issue any license, permit, or approval before the issuance of an EIA.

18. From the EIA report on record, the scope of the report included the identification and discussion of any adverse negative impacts to the environment anticipated from the proposed project and mitigation measures set out therein, on the possible impacts on the environment including emissions to air and exhaust emissions. A notice of the EIA study report of the SGR project in accordance with the provisions of EMCA was published in the Kenya Gazette and a similar publication in a newspaper of wide circulation in Kenya. The gazette notice and the newspaper publication invited members of the public to give comments and/ or complaints within sixty days as required under EMCA. The 1st to 3rd respondents had neither rebutted that proposition nor indicated any attempts to react to that notice.

19. NEMA granted an EIA license to the CRBC. According to section 129(1) of EMCA, any person aggrieved by the grant of a license or permit or a refusal to grant a license or permit or the transfer of a license or permit under the Act may within sixty days appeal to the tribunal established under section 125 of EMCA. The 1st and 2nd respondents' grievances on the issuance of the license and the EIA therefore fell within the jurisdiction of the tribunal. They did not avail themselves their day before the tribunal, thereby taking a fatal step to the courts.

20. The bilateral agreement and the MoU were executed in 2009 before the promulgation of the Constitution in 2010, while the commercial contracts were signed in 2012. An MoU was preliminary to a contract and or agreement between parties and was characterized as non-binding and unintended to create any contractual obligations on either party. That did not mean that courts were not faced with the question of establishing the binding nature of an MoU. When that happened, a court considered the wording and the apparent intention of the parties.

21. The intention of the parties could be inferred from the wording of the MoU. The MoU was a precursor to the parties entering into legally binding agreements depending on the results of the feasibility study. It was those commercial contracts, once entered into that operationalized the SGR project. The contracts, signed in 2012 and 2014 created legally binding obligations and not the MoU. That was after the Constitution of Kenya, 2010 had been promulgated and operationalized.
22. The issue of retrospective application of the Constitution did not arise as the operationalization of the SGR project occurred under the dispensation of the Constitution. The petitions before the High Court were filed in 2014, four years into the 2010 constitutional dispensation invoking the High Court's jurisdiction under article 165 of the Constitution and under the Sixth Schedule to the Constitution of Kenya. Section 7 of the Sixth Schedule thereof allowed all law in force immediately before the effective date to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.
23. Article 227 of the Constitution, just like any other provisions of the Constitution was applicable. The applicability of the Constitution was not pegged on when and how the SGR project was conceptualized or the timing of the documents. The execution of the MoU was before promulgation of the Constitution in 2010 while the commercial agreements and the financing agreement were executed after the Constitution had already come into force.
24. Article 227(2) of the Constitution provided for the enactment of a statutory framework within which policies relating to procurement and asset disposal may be implemented to give effect to article 227. That resulted in the enactment of the Public Procurement and Asset Disposal Act, No 33 of 2015 (PPADA, 2015) which commenced on January 7, 2016, after procurement processes for the SGR. The effect of that enactment was that it repealed the PPDA 2005. Despite its repeal, the PPDA, 2005 applied to the instant dispute as it was the law in force at the time the petition was filed at the High Court.
25. Section 29 of the PPDA, 2005 dealt with the choice of procurement procedure and allowed a procuring entity to use open tendering or an alternative procurement procedure under Part VI which included restricted tendering, direct procurement, request for proposals, request for quotations, low-value procurement, and specially permitted procurement procedure. Section 26 of the PPDA set out the threshold matrix and segregation of responsibilities that any procurement entity needed to have in place to ensure that its decisions were made in a systematic and structured way. Part of such responsibilities was to ensure sufficient funds had been set aside in the budget to meet the obligations.
26. The provisions of the PPDA, 2005 could be ousted under section 6(1) of the PPDA, 2005 where any provision of the Act conflicted with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya was a party, the Act shall prevail except in instances of negotiated grants or loans.

27. KRC was not the procuring entity but merely an implementing entity. That was because it only followed directives issued to it by the Executive. KRC, despite being a State corporation, was never allocated funds towards the project directly from the consolidated funds as the Government itself opted to implement the financing model. KRC could not and did not therefore qualify as a procurement entity under the provisions of section 26(6) of the PPDA 2005.

28. The procurement and contractual agreements between KRC and CRBC, which were both State corporations, were done by the two entities in furtherance of government-to-government understandings for and on behalf of those two governments. That squarely brought the arrangement within the realm of a government-to-government transaction that was not subjected to the provisions of the PPDA, 2005 as stipulated by section 6(1) of PPDA, 2005. The 1st to 3rd respondents, perhaps appreciating the nature of the procurement- as being government to government, never challenged the Ministry's actions before the 3rd appellant.

29. The position that KRC should have undertaken a limited tender process inviting other Chinese firms with the necessary expertise to bid was untenable as it was no longer upon KRC to undertake any tender process, the Government having intervened and done government-to-government agreements. The procurement of CRBC was not undertaken by KRC but by the Government through the Ministry of Transport. As the Ministry was not included in the proceedings both before the 3rd appellant and before the instant court, it would be academic for the court to interrogate the issue further. In any event, the provisions of the PPDA 2005 were ousted in the SGR project.

30. Procurement must conform to the provisions of article 227 of the Constitution even when done according to the obligations of a treaty or agreement or any other procedure. The use of any procurement method including direct procurement did not exclude the principles of fairness, equitability, transparency, competitiveness, and cost-effectiveness as provided for under article 227(1). The legality of the Executive's actions and directives could only be interfered with by the courts when it was in breach of the Constitution.

31. It had not been demonstrated how KRC, acting not as the procuring entity, but on the directives of the Executive, failed to comply with the provisions of article 227(1) of the Constitution. In any event, government-to-government procurement was permissible under section 6 of the PPDA 2005. None of the respondents were challenging the constitutionality of that statutory provision. There were avenues such as public participation during the enactment of section 17 of the Customs Tax Act that introduced the railway development levy; the challenge of the constitutionality of the provision of section 6 of the PPDA 2005, and the challenge of the environmental concerns at the licensing stage of the project before the National Environment Tribunal according to EMCA to name just but a few of them. None of the respondents and/or the members of the public pursued such avenues before resorting to court litigation.

32. The SGR project was subject to interrogation before Parliament in two committees and none of the respondents opted to be involved. That parliamentary process, which was open to the public, cleared the projects. Under Kenya's constitutional design, the people had the power to exercise their oversight power through elected representatives who were domiciled in Parliament. Whether a citizen agreed with or was satisfied with what was undertaken was a matter of conjecture provided that the laid-out procedure was followed. Like in every democracy, the concept of representing the people or public interest remained a hydra-headed mongrel that could not be defined with certainty as it was never possible to get a homogenous viewpoint from the populace. The procurement process for the SGR project met the requirements of article 227 of the Constitution as read together with the provisions of the PPDA, 2005.

Appeal partly allowed; cross-appeal dismissed.

Orders

i. *The Court of Appeal judgment dated June 19, 2020, was set aside.*
ii. *The superior courts' decision on the expunging of documents was affirmed.*
iii. *The procurement process for the SGR project was undertaken in conformity with the provisions of article 227 of the Constitution.*
iv. *The SGR procurement was undertaken as a government-to-government contract hence exempt from the provisions of the PPDA, 2005 by virtue of section 6(1) of that Act.*
v. *Each party to bear its own cost.*

Citations

Cases

Kenya

1. *In the Matter of the Interim Independent Electoral Commission* [2013] 2 KLR 32 - (Explained)
2. *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* Petition 1 of 2018; [2022] KESC 39 (KLR) - (Explained)
3. *Joho & another v Shahbal & 2 others* [2014] 1 KLR 111 - (Explained)
4. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Mentioned)
5. *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* Civil Appeal 153 of 2019; [2020] KECA 875 (KLR) - (Explained)
6. *Lekalhaile, Kahindi & 4 others v Inspector General National Police Service & 3 others* Petition 25 of 2013; [2014] eKLR - (Explained)
7. *Macharia & another v Kenya Commercial Bank & 2 others,* Application No 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
8. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & County Assembly of Embu* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)

9. *Mue, Njonjo & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* Election Petition 4 of 2017; [2017] KESC 28 (KLR) - (Mentioned)
10. *Mumba, Albert Chaurembo & 7 others v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] eKLR - (Explained)
11. *Musimba, Patrick v National Land Commission & 4 others* Petition 613 of 2014; [2016] KEHC 5956 (KLR) - (Mentioned)
12. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Mentioned)
13. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013; [2013] KESC 5 (KLR) (Consolidated) - (Explained)
14. *Ombija, Nicholas Randa Owano v Judges and Magistrates Vetting Board* Civil Appeal 281 of 2015; [2015] eKLR; [2015] KECA 129 (KLR) - (Explained)
15. *Republic v National Environmental Management Authority* Civil Appeal 84 of 2010; [2011] eKLR - (Followed)
16. *Republic v NEMA ex parte Sound Equipment Ltd* Civil Appeal 84 of 2010; [2011] eKLR - (Explained)

South Africa

AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006) - (Explained)

United Kingdom

1. *HH Humphrey Lloyd QC in ERDC Group v Brunel University* [2006] EWHC 687 (TCC) - (Explained)
2. *United Kingdom in R TS Flexible Systems v Molkerei Alois Muller GmbH & Co. KG* [2010] UKSC 14 & 38 - (Explained)

India

1. *Ashok Kumar Pandey v State of West Bengal* (2004) 3 SCC 349 - (Explained)
2. *Laxmi Raj Shetty and another v State of Tamil Nadu* 1988 AIR 1274, 1988 SCR (3) 706 - (Explained)
3. *Sachidananda Pandey vs State of West Bengal & Ors* 1987 AIR 1109; 1987 SCR (2) 223 - (Explained)

United States

Williams v Shaffer 385 US 1037 (1967) - (Mentioned)

Canada

Re: Opposition by Quebec to a Resolution to amend the Constitution [1982] 2 SCR 793 - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

2. Garner, BA., (Ed) (2011), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 11th Edn p 1180
3. Owour, M., (Ed) (2023), *International Commission of Jurists: Election Technology and Electoral Justice in Kenya* p 77

Statutes

Kenya

1. Access to Information Act (cap 7M) In general- (Cited)
2. Constituency Development Fund Act (cap 414) In general - (Cited)
3. Constitution of Kenya article 2, 3, 6(1); 10; 19; 22; 29; 31; 35; 42; 46; 47; 50(4); 69; 70; 73(2); 79; 80; 117; 125; 163(3)(b)(1); 163 (4)(a); 201; 214; 220; 226(5); 221; 227(1)(2)(d); 232; 258; 259 - (Interpreted)
4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 15, 20 - (Interpreted)
5. Customs and Excise Act (cap 472) section 117A - (Interpreted)
6. Environmental (Impact Assessment and Audit) Regulations, 2003 (cap 387 Sub Leg) regulation 4 - (Interpreted)
7. Environmental Management and Co-Ordination Act (cap 387) sections 58, 125, 129(1) - (Interpreted)
8. Evidence Act (cap 80) sections 58, 125, 129(1) - (Interpreted)
9. Independent Electoral and Boundaries Commission Act (cap 7C) section 27 - (Interpreted)
10. National Government Constituency Development Fund Act (cap 414A) In general- (Cited)
11. Official Secrets Act (cap 187) In general - (Cited)
12. Public Finance Management Act (cap 412A) In general- (Cited)
13. Public Officer Ethics Act (cap 185B) In general- (Cited)
14. Public Procurement Disposal Act (Repealed) (Act No 3 of 2005) sections 6(1); 29; 87; 115; 116 - (Interpreted)
15. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)
16. Witness Protection Act (cap 79) sections 3A, 3B(1) - (Interpreted)

Instruments

United Nations Convention Against Corruption, 2003, article 33

Advocates

1. *Prof. Albert Mumma SC, Mr. Charles Agwara & Ms. Lilian Koech for the 1st appellant*
2. *Mr. Thande Kuria for the 2nd & 3rd appellants*
3. *Mr. Okiya Omtatah, the 1st respondent (In person)*
4. *Ms. Christine Nkonge & Mr. Ochiel Dudley, for the 2nd respondent*
5. *Mr. Philip Omoiti for the 3rd respondent*
6. *Mr. Kiragu Kimani, SC for the 4th respondent*

June 16, 2023, the Court delivered the following Judgment:

Introduction

1. Before this court are two appeals, as consolidated by the consent order dated December 7, 2020.The first appeal is by Kenya Railways Corporation, the 1st appellant herein (KRC) and the second one is by the Attorney General and the Public Procurement Oversight Authority (the 2nd and 3rd appellants respectively). Both appeals are anchored on article 163(3)(b)(1) and 163(4)(a) of the *Constitution* as well as section 15(2) of the *Supreme Court Act, 2011*.

2. The appeals challenge a portion of the judgment of the Court of Appeal delivered on June 19, 2020 in Civil Appeal No 13 of 2015 as consolidated with Civil Appeal No 10 of 2015. In particular, the appellants are aggrieved by the finding by the appellate court that the 1st appellant failed to comply with and violated article 227(1) of the *Constitution* and sections 6(1) and 29 of the repealed *Public Procurement Disposal Act, 2005* (PPDA, 2005) in the procurement of the Standard Gauge Railway (SGR) project.

3. The 1st and 2nd respondents Okiya Omtatah Okoiti and Wyclife Gisebe Nyakina, cross appealed challenging portions of the impugned judgment principally relating to documentary evidence that was expunged by the High Court as affirmed by the Court of Appeal.

B. Background

4. On October 28, 2008the then President of Kenya, HE Mwai Kibaki, and the President of Uganda, HE Yoweri Museveni, issued a joint communiqué committing that both countries would replace the Mombasa-Kampala metre gauge railway line constructed during the colonial period and dubbed, "the lunatic express." The lunatic express was facing a number of technical and capacity challenges and limitations. The communiqué intentioned the change of the outdated metre gauge system with a high-capacity railway system, that is, Standard Gauge Railway (SGR) line linking the Port of Mombasa to Kampala, with a branch line to Kisumu and Pakwach in Uganda.

5. This commitment was based on the understanding that each country would develop the portion of the SGR line falling within its border under unified technical standards and identify financing for the construction of its portion. About a year later, the two countries reduced their commitment into a bilateral agreement signed on October 1, 2009. Kenya's portion of the SGR line was to be constructed in two phases - phase 1 covering Mombasa to Nairobi while phase 2 would extend to Malaba from Nairobi with a branch line to Kisumu.

6. On August 12, 2009 the Ministry of Transport executed a Memorandum of Understanding (MOU) with China Road and Bridge Corporation (CRBC), a state- owned corporation of the People's Republic of China. Under the MOU, CRBC was to undertake, at its own cost, a feasibility study of the construction of phase 1 covering 500 kilometres and come up with a preliminary design for the project. This included consideration of the technical details, the financing required and the legal implementation of the project. In the event the results of the study were approved, CRBC would be the sole agent to design, construct and supervise all works of the project. Further, upon agreement of the design, parties were to negotiate a commercial contract with CRBC required to source funding for the project.

7. CRBC submitted the feasibility study report in February 2011, which KRC, the statutory body mandated with the responsibility of the railway network in the country, being tasked with the responsibility to review. The feasibility and preliminary design report was approved by KRC with revisions on June 26, 2012. The approved scope of works included construction of a single-track railway, stations, workshops and freight exchange depots as well as supply and installation of facilities (signalling, communication for trains control, electricity and water supply to each station), locomotives and passenger coaches.

8. According to KRC, following numerous deliberations between the Government of Kenya through the National Treasury and the Government of China, it was agreed that the Government of China would finance the project through Exim Bank of China, a state-owned financing institution. Thus, Exim Bank would finance 85 % of the costs for the project while Kenya would meet the remaining 15% as a counterpart funding. Additionally, part of the financing by Exim Bank would be issued as a concessional loan while the other part would be a commercial loan.

9. KRC and CBRC executed commercial contracts. The first one was executed on August 11, 2012 for the construction of the SGR line (civil works). A subsequent commercial contract was executed on October 4, 2012for the supply and installation of facilities, locomotives and rolling stock. The totality of the two contracts was that CRBC was engaged as an engineering, construction and design contractor for the project.

10. In a bid to meet its portion of the funding of the project, the government introduced a railway development levy at the rate of 1.5% of the customs value of imported goods to be charged on all imports. This levy was introduced by the Finance Bill of June 18, 2013, which is currently provided for under section 117A of the *Customs and Excise Act*.

C. Litigation History

i. Proceedings at the High Court

11. Two petitions were filed at the High Court challenging the procurement process for the construction of the SGR and the resultant contracts in favour of CRBC. The 1st and 2nd respondents filed High Court Petition No 58 of 2014 on February 5, 2014 while the Law Society of Kenya (LSK), the 3rd respondent, filed High Court Petition No 209 of 2014 on May 14, 2014.

12. In their petition, the 1st and 2nd respondents urged that there was lack of due diligence on the part of the government as, firstly, it failed to independently carry out a feasibility study and design of the project before seeking a contractor to implement it. As such, it had no independent benchmarks against which to assess whether it was getting value for money. Secondly, that the government entered into contracts with CRBC which had been blacklisted by the World Bank in January, 2009 from participating in any road and bridge projects financed by the bank for a period of 8 years. The embargo was based on CRBC's implication in collusive practices in a roads project financed by World Bank in the Philippines.

13. The 1st and 2nd respondents argued that single sourcing or direct procurement for a mega project such as the SGR was illegal. In their view, at the very least, the government ought to have issued a restricted/limited tender inviting other Chinese firms with requisite expertise to bid. They urged that even procurements under concessional loans are not exempted from competitive bidding and gave examples of previous procurements involving concessional loans between Kenya and China. In that regard, they referred to a concessional loan for the Kenya Rural Telecommunication Development Project Phase II 2007 and the 2011/2012 concessional loan for the supply, installation, testing and commissioning of the national surveillance communication, command and control system in the National Police Service which were awarded on competitive restricted bidding basis.

14. It was their further case that awarding the contracts to CRBC which had conducted the feasibility study and developed the preliminary design for the project gave rise to a conflict of interest contrary to section 87 of the PPDA, 2005. They contended that construction of railways was not within CRBC's expertise. To them, it was not only ill-advised but also wasteful to source for locomotives and other rolling stock from CRBC, which does not manufacture the same as opposed to purchasing directly from the manufacturer.

15. They added that there were violations of the provisions of the *Public Finance Management Act* on two fronts. Firstly, that Parliament's approval was not obtained prior to execution of the commercial contracts and secondly, that the National Treasury was not involved in

the management of funds committed to the project as funds were paid to CRBC directly instead of the Consolidated Fund. Moreover, that the loan from Exim Bank had not been included in any national budget or Appropriation Act.

16. The 1st and 2nd respondents were unconvinced that the then ongoing probe of the SGR project by two parliamentary committees (the Public Investments Committee and the Departmental Committee on Transport and Infrastructure) would yield any useful results. This is due to the fact that the President's unequivocal statement of January 28, 2014 that the project would be implemented, pre-empted the outcome of the probes. Besides, in the unlikely event the probes yielded a different outcome, they argued that the Executive was known to ignore recommendations from Parliament.

17. Their sum contention was that the appellants' actions and omissions were a collusive scheme designed to procure the construction of an SGR line at artificial and non-competitive price levels, with the procurement and contracting of CRBC to implement the SGR project in flagrant violation ofarticles 10, 73(2), 201, 227(1), (2)(d) and 232 of the *Constitution* as well as Statute. Consequently, the 1st and 2nd respondents sought inter alia:

    a. A declaration that there is no valid contract between the Government of Kenya and CRBC.

    b. A declaration that the appellants were required to but failed to safeguard the public interest and the common good by ensuring the procurement for the railway was done according to the law.

    c. A declaration that the Government should not conduct business with CRBC because it is an entity blacklisted along with its subsidiaries by the World Bank.

    d. A declaration that the railway should be procured through competitive bidding as required by the Laws of Kenya.

    e. An order of injunction restraining the appellants, by themselves or through their agents or representatives or any persons claiming through them, from transacting any business with CRBC until the Chinese corporation is cleared by the World Bank.

    f. An order of injunction restraining the appellants, by themselves or through their agents or representatives or any persons claiming through them, from continuing with the contract awarded to CRBC.

    g. A mandatory order directing the police to investigate and if found culpable, criminally prosecute any public officers and officers of the appellants and CRBC's officers who were involved in the procurement process.

h. A mandatory order directing the appellants to ensure that there will be no single sourcing in the procurement of the Mombasa-Nairobi- Malaba/Kisumu standard gauge railway.

18. The petition by LSK, likewise, challenged the procurement process of the SGR project on largely similar grounds as those raised by the 1st and 2nd respondents, the only addition being that KRC should have ensured public participation in the procurement since it involved expenditure of a colossal amount of public funds and secondly, that the change from an electric powered to a diesel engine for the SGR, as had been proposed by KRC and accepted in the revised feasibility report, posed a danger to the environment contrary to articles 42 and 69 of the *Constitution* . Equally, LSK relied on correspondence between public institutions and officers which it annexed to its pleadings. On its part, LSK sought the following orders:

a. A declaration that KRC as a state entity is subject to the provisions ofarticle 42, 46 and 70 of the *Constitution* .

b. A declaration that the award of contract for the supply and installation of facilities and diesel-powered engines which are outdated and pollute the environment violates articles 42 and 49 of the *Constitution* .

c. A declaration that the award of the contract for the supply and installation of facilities, locomotives and rolling stock for the SGR to CRBC violates articles 10, 201 and 207 of the *Constitution* .

d. An order of certiorari to remove to the High Court and quash the award of contract No KRC/PLN/31/2012 for the supply and installation of facilities, locomotives and rolling stock for the SGR or any agreement for the supply of the same.

19. By consent of the parties, the petitions were consolidated on June 27, 2014.

20. In response to LSK's petition, KRC averred that following the joint communiqué, it developed a master plan from the beginning of the year 2009 and embarked on the procurement of consultants to undertake a feasibility study for the project through an open international tender, Tender No KR/PLM/28/10. Unfortunately, the process was frustrated by litigation before the Public Procurement Administrative Review Board and the High Court for a period of two years. By the time the litigation was concluded, the Ministry of Transport had entered into an MOU with CRBC. The Ministry of Transport and the Attorney General approved the two commercial contracts which were subsequently executed between itself and CRBC.

21. According to KRC, Kenya had entered into a financing agreement with Exim Bank within a Government-to-Government framework. Thus, the engagement of CRBC was on the basis

of a negotiated loan between the two countries and exempted from the provisions of *PPDA*, 2005 by section 6(1) thereof. Moreover, that the commercial contracts in favour of CRBC were a pre-condition to the financing agreement and only became effective upon execution of the said financing agreement. Plus, prior to the engagement of CRBC, the Government of Kenya had taken all the necessary steps to ascertain the technical, financial and legal capacity of CRBC to undertake the implementation of the project and had also compared the costs of the project with other current railway projects in the country as well as in the region (Ethiopia and Uganda) and found the costs of the project to be reasonable.

22. KRC contended that while an electric powered railway is more efficient and environmentally friendly, it was certainly not cheap, and Kenya does not generate sufficient electricity to run an electric railway. Additionally, KRC averred that in awarding CRBC the contract, it ensured that the project design complied with all the environmental requirements and concerns addressed in an environmental and social impact assessment study for the project that had been carried out in 2012.

23. KRC challenged the competency of the petitions as, firstly, the matters raised therein were subject of ongoing investigations and inquiries by constitutionally established bodies namely, the Parliamentary Investments Committee, Departmental Committee on Transport and infrastructure, the Auditor General, and the Ethics and Anti-Corruption Commission. For this reason, the 1st, 2nd and 3{{^rd respondents ought to have exhausted the afore-mentioned avenues before lodging their petitions. KRC urged that the two committees of Parliament subsequently cleared the procurement process of the SGR project. Secondly, KRC contended that the consolidated petitions did not set out the manner in which the rights of the 1st, 2nd and 3rd respondents were allegedly threatened to be violated.

24. KRC also lodged a cross petition on July 7, 2014 challenging the reliance by the 1st, 2nd and 3rd respondents on documents that were produced contrary to articles 31 and 35 of the *Constitution* and section 80 of the *Evidence Act*.

25. The Attorney General and PPOA joined KRC in opposing the consolidated petition on similar grounds and supported the cross petition. They added that allowing the orders sought would violate the doctrine of separation of powers. To them, the prayers were tantamount to asking the court to interfere with powers vested in the executive arm of Government.

26. On its part, CRBC averred that it had undertaken several railway construction projects and had established itself as a top international contractor. It urged that it had not been barred or disqualified by PPOA from participating in procurement under Part XI of the PPDA, 2005. In any case, the blacklisting covered projects funded by the World Bank and not a blanket debarment against all its undertakings. CRBC justified its award of the contract

for the supply of locomotives and rolling stock on the fact that the project was being undertaken under the Engineering Procurement and Construction (EPC) model, which ensures that the final product is delivered to the owner in a fully functional state. It also urged that it was issued with an Environment Impact Assessment (EIA) license by the National Environment and Management Authority (NEMA) upon satisfaction that the SGR project was environmentally friendly.

27. In response to the cross petition, the 1st, 2nd and 3rd respondents maintained that the documents in issue had been lawfully obtained from conscientious citizens and public officers who were in lawful possession of the same. Besides, KRC had not established that the documents were false, the makers of the same had denounced them or that the information therein is protected under the *Official Secrets Act*.

They further argued that exposing the source or identity of persons who availed the documents would silence whistle blowers who act in public interest and good faith. Consequently, they asked the court to admit the documents as they would give a candid exposition of the issues in dispute and enable the court to determine lawfulness of the procurement.

28. The High Court (Lenaola, J, as he then was) in a judgment dated 21st November, 2014 dismissed the consolidated petitions and allowed the cross petition to the extent of expunging documents it had found inadmissible. The court held that it had jurisdiction, the petitioners having invoked article 165(3) of the *Constitution* , to interpret and determine whether the acts of the appellants violated the *Constitution* . The argument that the complaints ought to have been lodged before the Public Procurement Administrative Review Board was therefore irrelevant. The court found that the appropriate body to undertake investigations into the allegations of corruption in the SGR project is the Ethics and Anti-Corruption Commission.

29. On whether the consolidated petitions were supported by valid documentary evidence, the court noted that while article 35 of the *Constitution* grants every citizen the right to information held by the State, the right is not absolute and there is a procedure for obtaining such information. It found that the manner in which the 1st, 2nd and 3rd respondents obtained the documents relied on violated KRC's right to privacy and privacy of communication between KRC and Exim Bank provided under article 31 of the *Constitution* . The court also found that the public servants who availed the documents to the 1st, 2nd and 3rd respondents acted in violation of their Code of Conduct and the Public Officers Ethics Act. Consequently, the court held that the 1st 2nd and 3rd respondents could not rely on such documents and proceeded to expunge them from the record.

30. The court found that the project was funded by a loan from China through Exim Bank and as such, the procurement in question was not subject to the PPDA, 2005 by dint of section 6(1), but was governed by the terms of the negotiated loan. The court held that the *Public Finance Management Act* had not been violated since Parliament was involved in the budgeting of the funds to be utilized in the SGR project, and as evinced by the introduction of the railway development levy in section 117A of the *Customs and Excise Act*. The court also held that apart from alleging violation of the provisions of the *Public Officer Ethics Act*, the 1st and 2nd respondents had not established the manner of violation.

31. On environmental considerations in undertaking the project, the court found that an autonomous environmental impact assessment was conducted by the Government and an Environmental Impact Assessment license issued. The court noted that upon publication of the feasibility study report in the Kenya Gazette as well as a newspaper of wide circulation in Kenya, as required by the *Environment Management and Co-ordination Act* (EMCA), members of the public were invited to give their comments or complaints within 60 days. However, the 1st, 2nd and 3rd respondents did not do so. Further, that they failed to challenge the EIA license issued to CRBC for the project at the National Environment Tribunal.

32. As to whether the appellants had put in place mechanisms to ensure value for money, the court found that this was an argument related to policy and not clear issues of law, hence beyond the court's mandate to direct the Executive on the manner in which the project is to be managed. The court's further view was that the SGR was not a World Bank funded project and therefore the blacklisting of CBRC is not an automatic bar to participation of CRBC in any other project. Additionally, that CRBC had not been debarred by the Director General of PPOA in line with sections 115 and 116 of the *PPDA*, 2005.

i. At the Court of Appeal

33. Aggrieved, the 3rd respondent filed Civil Appeal No 10 of 2015 at the Court of Appeal raising five grounds of appeal. Likewise, the 1st and 2nd respondents lodged Civil Appeal No 13 of 2015, raising a total of fifty-one grounds of appeal. Both appeals were consolidated on November 8, 2016 with Civil Appeal No 13 of 2015 designated as the lead file. In considering the grounds of appeal, the appellate court condensed the issues for determination to four: whether the appeal is moot; whether the learned Judge erred in expunging documents in support of the petitions; whether the learned Judge erred in concluding that the procurement did not contravene the *Constitution* ; and whether the learned Judge erred in holding that the *PPDA*, 2005 did not apply to the procurement.

34. The Court of Appeal, in its judgment delivered on June 19, 2020 partly allowed the appeal and set aside a portion of the decision of the High Court. On mootness, the court of Appeal

held that the reliefs in the nature of orders of injunctions to restrain the implementation of the impugned contract or to quash the award of the contract were no longer within reach. The court, however, found that the issues relating to the constitutionality of the procurement; the interpretation and applicability of section 6 of the *PPDA*, 2005; and expungement of annexures to the petition remained for consideration by the court.

35. On the expunged documents, the court agreed with the High Court that it would be detrimental to the administration of justice and against the principle underlying article 50(4) of the *Constitution* to countenance illicit actions by admission of irregularly obtained documents. The appellate court was also not persuaded that the procurement process of the SGR project, was unconstitutional. The court held that the absence of competition in a direct procurement does not, in itself, render that procedure unconstitutional.

36. On the applicability of the PPDA, the appellate court held that section 6 of the *PPDA*, 2005 did not intend that the identification of a supplier of goods and services (in effect the procurement) would precede the loan agreement which would oust the procurement procedures under the Act. It found that it was the procurement procedure that dictated the terms of the loan and not vice versa. Consequently, the appellate court, unlike the High Court, found that section 6(1) *PPDA*, 2005 did not oust the application of that Act from the procurement in issue.

37. The Court of Appeal therefore upheld the High Court's decision save for setting aside the finding that the procurement of the SGR project was exempt from the provisions of PPDA, 2005. It substituted the same with a declaration that KRC, as the procuring entity, failed to comply with, and violated the provisions of article 227 (1) of the *Constitution* , sections 6(1) and 29, of the PPDA, 2005 in the procurement of the SGR project.

D. Proceedings before the Supreme Court

38. KRC on the one hand and AG and PPOA on the other hand filed before us Petition No 13 of 2020, and Petition No 18 of 2020, respectively, against the decision of the Court of Appeal. By consent of the parties, the two appeals were consolidated. The appellants seek the following orders:

    i. The appeal be allowed.

    ii. The declaration by the Court of Appeal that KRC as the procuring entity, failed to comply with and violated provisions of article 227(1) of the *Constitution* and sections 6(1) and 29 of the *PPDA*, 2005 in the procurement of the SGR project be vacated and/or set aside.

    iii. The judgment and decree of the High Court delivered on November 21, 2015 be hereby reinstated.

iv. The 1st, 2nd and 3rd respondents do bear the costs of the proceedings before the superior courts below and this court.

39. The 1st and 2nd respondents filed a cross appeal on September 23, 2022 faulting the learned judges in:

i. Finding that Parliament played its role in the consideration of the SGR project.

ii. Failing to find that contrary to articles 10(2), 201(a), 221(5) and 232 (1)(d) of the *Constitution* and other laws, KRC failed to engage the public on the decision to acquire, install and implement the SGR project.

iii. Failing to hold that to the extent the SGR project was procured in a secretive manner, it violated the duty of the state to provide information to the public and the rights of the 1st and 2nd respondents as well as other Kenyans to information.

iv. Failing to hold that the SGR project was procured with scant regard for environmental rights of Kenyans.

v. Failing to find that by dint of article 1 and 2 of the *Constitution* as read with article 3, the 1st and 2nd respondents had a right to receive whistle blower evidence and to act upon it as they did.

vi. Failing to find that since the documents in issue were in free circulation, including having been tabled in Parliament, it was impossible for the documents to still be confidential and for the 1st and 2nd respondents to acquire them illegally.

vii. Failing to find that the High Court was biased in the manner it expunged the documents from its record which had been formally given to the 1st and 2nd respondents by NEMA and been sourced from extracts of newspapers.

viii. Finding that proceedings commenced under articles 22 and 258 can be limited by the rules of evidence.

40. Accordingly, the 1st and 2nd respondents urge the court to issue the following reliefs:

i. Dismiss the consolidated appeal and allow the cross appeal.

ii. Set aside paragraphs 83, 84, 110 and 111(a) of the impugned judgment.

iii. Direct each party to bear its own costs.

41. Paragraphs 83, 84, 110 and 111(a) of the Court of Appeal judgment state as follows:

83. We reiterate that the appellants claimed to have been supplied with the contentious documents by "conscientious citizens" and "whistle-blowers". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with article 35 of the *Constitution* . It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.

84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying article 50(4) of the *Constitution* to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "conscientious citizens" or "whistle-blowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.

110. In our view, the claims by the appellants that Parliament was by passed and that environmental considerations were not considered have no merit. Those claims were sufficiently countered. It was demonstrated that the project was deliberated upon by the National Assembly following which the *Customs and Excise Act* was amended through the Finance Act, 2013 by making provision for Railway Development Levy to fund the construction of the SGR. Equally it was also demonstrated that an environment impact assessment was undertaken and a licence granted in that regard.

111. The upshot, in conclusion, therefore is that:

    a. We uphold the decision of the learned judge ordering to be expunged from the record documents that had been presented by the appellants as evidence in support of the petitions.

42. The 1st and 2nd respondents also filed a notice of preliminary objection dated August 10, 2020 whose tenor is that the orders sought in KRC's appeal are not available in the absence of the certification process stipulated under article 163(4)(b) of the *Constitution* .

43. The 1st appellant opposes the cross petition contending that whereas article 35 of the *Constitution* guarantees the right of access to information held by the State, the manner of acquiring the said information should conform to the law. Further, that proceedings

commenced under articles 22 and 258 of the *Constitution* need to adhere to rules of evidence as prescribed in various Statutes including the *Evidence Act*.

a. 1st Appellant's submissions (KRC)

44. KRC filed two sets of submissions dated March 15, 2022 and January 10, 2023. It reiterates that the procurement in issue was based on a negotiated loan between Kenya and China. Therefore, the Court of Appeal erred in finding that section 6(1) of the PPDA, 2005 did not oust the application of the Act to the procurement of the project.

45. KRC submits that the Court of Appeal failed to take into account that firstly, following the approval of the feasibility study, the Cabinet approved the project on a Government-to-Government framework and directed the Ministry of Transport to request the National Treasury to approach China for financing. This rendered otiose the provisions in the MOU obligating CRBC to source for funding. Secondly, that the National Treasury was informed by Exim Bank that it required evidence of an executed contract between the Government of Kenya and a designate Chinese contractor prior to the appraisal of the financing/loan request. Thirdly, in fulfilment of the said condition, KRC executed two commercial contracts with CRBC for civil works and for supply of locomotives and rolling stock for the project. Nonetheless, the execution of the said contracts was on the condition that they would come into effect upon execution of the financing agreement. Accordingly, in considering these facts, the Court of Appeal would have concluded differently.

46. KRC urges that obligations arising from an MOU as well as commitments and undertakings of government officials in the course of negotiations leading to the conclusion of a loan agreement fall within the meaning of the words, "any obligations of the Republic of Kenya arising from a treaty or other agreements" used under section 6(1) of the PPDA, 2005. Further, it contends that a procurement undertaken pursuant to bilateral/multilateral agreements as envisioned under section 6(1) could not be termed as unconstitutional.

47. It submits that the 2010 *Constitution* could not be applied retrospectively as the Court of Appeal did, and that the applicable law at the time was the repealed Constitution and the PPDA, 2005. It relies on this court's decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others,* Sup Ct Application No 2 of 2011; [2012] eKLR to support this argument.

48. KRC takes issue with the Court of Appeal quoting at the onset of the impugned judgment an article published in the Daily Nation of May 27, 2020. This is because the article was not produced in court by any party and its reproduction suggested that the procurement in issue was illegal, giving rise to a reasonable apprehension in the mind of a reasonable fair minded and informed member of the public that the article influenced the appellate court in determining the appeal before it.

49. Relying on the doctrine of mootness, the 1st appellant contends that the declaration issued by the Court of Appeal was erroneous particularly, taking into account that the project had been implemented and the Government's obligation to repay the loan from Exim Bank had crystalised.

50. Lastly, with respect to the expunged documents, it submits that articles 31, 35 and 50(4) of the *Constitution* , section 80 of the *Evidence Act* as well as Sections 8 and 9 of the *Access to Information Act* proscribe the production of illegally obtained public documents as evidence before a court. In that regard, reliance is made on this Court's decision in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others*, Presidential Petition No 4 of 2017; [2017] eKLR.

b. The 2nd and 3rd appellants' submissions (Attorney General and PPOA)

51. In their written submissions dated March 7, 2022, the Attorney General and PPOA contend that the appellate court failed to consider their submissions on the issue of mootness. They aver that no practical significance was served by the issued declaration since the project had been completed. Further, according to them, the Court of Appeal offered no cogent reasons for overturning the High Court's finding on the applicability of the PPDA to procurement of the SGR project, which they deemed was the correct position.

c. The 1st respondent (Okiya Omtatah Okoiti)

52. The 1st respondent submits that the feasibility study was the preserve of KRC as the procuring entity, and not CRBC; and that the direct procurement of CRBC to implement the SGR project was to avoid competition. He submits that the date CRBC was procured as the EPC contractor of the SGR project is critical in determining the legal framework governing the procurement process at the time. In his view, the project commenced on August 12, 2009 when the MOU was executed and CRBC, contrary to the PPDA, 2005, was sourced directly as the contractor. However, as funding was yet to be identified at the MOU stage, there was no negotiated loan or grant that could trigger the exception under section 6(1), which ousts the application of the PPDA, 2005. The 1st respondent contends that the exception only applies where there is conflict between Kenya's obligations under a negotiated loan or grant and the provisions of the PPDA, 2005. Towards that end, the 1st respondent urges that the appellants did not provide any evidence of the conditions imposed by the external funding agencies, being Exim Bank of China, that they would only fund the SGR project if it was executed by the CRBC, to justify the single sourcing.

53. It followed therefore, as per the 1st respondent, that the procurement of CRBC to implement the SGR project by KRC was in violation of article 227 of the *Constitution* and

the *PPDA*, 2005. In any event, he submits, that the conditions under a negotiated grant or loan cannot override the provisions of the *Constitution* . Further, that the 2010 *Constitution* applies to the matter at hand because it was already in force at the time the commercial contracts and the financing agreement were executed. He submits that the introduction of the railway development levy by the Finance Act of 2013 did not cure the Government's failure to seek approval by Parliament and the people for the loan financing the SGR project.

54. The 1st respondent, in faulting the court for expunging the documents, reiterated, as he did at the appellate court, that the expunged documents were not confidential since they had not only been tabled before open sittings of two Committees of Parliament but also the reports of the said Committees were publicly debated. Moreover, some of the documents had been officially given to them by NEMA. In his view, the conduct of the two superior courts below was indicative of a deliberate mission to allow KRC's cross petition in the High Court.

55. He argues that whenever a court is called upon to uphold the *Constitution* it can never be termed as a moot process by dint of articles 2(4) and 3(1) of the *Constitution* and adds that a court cannot cause a constitutional crisis in upholding the *Constitution* . Rather, a constitutional crisis would occur where the court fails to uphold the rule of law. To that extent, he submits that the matter at hand could not be considered moot as it concerned the interrogation of misuse of public funds in the SGR project.

56. In conclusion, the 1st respondent claims that nothing turns on KRC's allegation of bias on the part of the Court of Appeal. To him, the court's reference to the article in question was to simply point out that at the time of writing the impugned judgment, the SGR project was still of great interest in the public domain.

d. 2nd respondent's submissions (Wycliffe Gisebe Nyakina)

57. The 2nd respondent supports the Court of Appeal's findings on the applicability of the *PPDA*, 2005 to the procurement in issue and violation of articles 227 of the *Constitution* and the *PPDA*, 2005 by KRC. Like the 1st respondent, the 2nd respondent urges that the 2010 Constitution is applicable to the procurement in issue for the reason that the agreements central to the dispute were executed after its promulgation. He urges that the doctrine of mootness is inapplicable to the matter at hand since the issues in dispute are of substantial public importance and are likely to arise again. He points to exceptions to the doctrine of mootness which include when its application would cause injurious consequences to continue and that the doctrine should not prohibit a court from ruling on a case that is of substantial public interest. To buttress his argument, he cites the decision of the United Nations Appeals Tribunal in *Kallon vs. Secretary General of the United Nations*, Judgment No 2017-UNAT-742 and United States Supreme Court in *Williams v Shaffer*, 385 US 1037, 1040.

58. On the expunged documents, the 2nd respondent contends that the case of *Njonjo Mue* case (*supra*) is distinguishable with the matter at hand. In the alternative, the 2nd respondent states that even if the decision is applicable, it represents the general rule which should be applied on a case-by-case basis. In his view, if courts were to hold that evidence that had not been obtained through prescribed legal channels was inadmissible in court, it would provide an untenable incentive for the state to hide information.

E. Issues for Determination

59. Having carefully considered and evaluated the consolidated appeals, cross petition, the responses, submissions filed and arguments by counsel, we are of the considered view that the following issues suffice to dispose of the appeal:

i. Whether the appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution* ;

ii. Whether the appeal before the Court of Appeal was moot;

iii. Whether the learned judges erred in expunging documents in support of the petitions filed by the 1st, 2nd and 3rd respondents at the High Court;

iv. Whether there were environmental considerations by the appellants in the SGR project; and

v. Whether the procurement of the SGR was in accordance with article 227 of the *Constitution* and the provisions of the PPDA, 2005.

A. Analysis and Determination

i. Whether the appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*

60. The 1st and 2nd respondents filed a notice of preliminary objection dated August 10, 2020 in response to the appeal filed by the 1st appellant, on the grounds that the orders sought are not available in the absence of a certification process stipulated under article 163(4)(b) of the *Constitution* . We, however, note that during the hearing, counsel for the 1st appellant and the 1st respondent indicated that there was no preliminary objection. Be that as it may, this court must satisfy itself of its jurisdiction to hear and determine the issues raised in the matter, in this case, under article 163(4)(a) of the *Constitution* .

61. As we stated in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* (*supra*) and several other decisions, a court's jurisdiction emanates from either the

Constitution or legislation or both, and a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. A court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by Law.

62. Under article 163(4)(a) of the *Constitution* , appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the *Constitution* . The guiding principles when invoking this provision were set out in cases that include *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* Sup Ct Petition No 3 of 2012 [2012] eKLR, *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* Sup Ct Petition No 10 of 2013 [2014] eKLR, where we held that for a litigant to invoke this court's appellate jurisdiction, it must be demonstrated that the matter in issue revolves around constitutional contestation that have come through the judicial hierarchy, and requiring this court's final input. Further, that at the very least, an appellant must demonstrate that the court's reasoning and conclusions which led to the determination of the issue, can properly be said to have taken a trajectory of constitutional interpretation or application. Each case must, however, be evaluated on its own facts.

63. The present appeals and cross appeals raise a multiplicity of issues. To determine whether this court has jurisdiction or not, we must establish whether each issue raised concerns the interpretation and application of the *Constitution*.

64. The appellants seek a determination on compliance with the provisions of article 227(1) of the *Constitution* and sections 6(1) and 29 of the *PPDA, 2005* in the procurement of the SGR project. We note that at the High Court, the 1st and 2nd respondents alleged that the appellants were in violation of articles 2, 3(1), 19, 46, 47, 201, 206, 214, 220, 221, 227 and 259 of the *Constitution* . The 3rd respondent on the other hand urged that the actions of the appellants were in violation of articles 201 and 227 of the *Constitution* in the award of the SGR contract to CRBC. This is an issue that transcended through the court hierarchy with the superior courts below making a determination on the allegation of contravention of the *Constitution* and the resulting statute, the *Public Procurement and Asset Disposal Act 2015*. In the same breadth, the question of the environmental considerations of the SGR project under articles 42, 69 and 70 of the *Constitution* arose before the superior courts below and is now rightly before us, on appeal.

65. The issue raised by the 1st and 2nd respondents in their cross petition relating to expunging documents in support of the petitions filed at the High Court also arose before the superior courts below. Its determination involved the application of articles 31 and 35 of the *Constitution* as well as section 80 of the *Evidence Act*. The appellate court affirmed the High Court's decision and considered its detrimental effect to the administration of justice against the principle underlying article 50(4) of the *Constitution* .

66. It is apparent that the aforementioned issues revolve around the interpretation and application of provisions of the *Constitution* . In the premises, the issue of certification under article 163(4)(b) of the *Constitution* does not arise. Having found that we are clothed with jurisdiction under article 163(4)(a) of the *Constitution* to determine the three identified issues, we now proceed to address them.

(ii) Whether the appeal before the Court of Appeal was moot

67. The mootness of this matter first arose at the Court of Appeal. The appellants, as they did at the Court of Appeal, insist that the appeal is overtaken by events and is therefore an academic exercise. This is because the construction of the SGR was substantially completed and commissioned, and the Government's obligation to repay the loan from Exim Bank had crystallised by the time of hearing the appeal, leaving no live controversy to be determined by this court.

68. The 1st respondent on the other hand argues that the matter cannot be considered moot as the SGR project contracts still impose a huge financial burden on Kenyans to-date comprising 15% of the cost of the railway and repayment of the loan used to finance the project. He asks the court to make a determination on the matter for the long-term especially concerning the imposed financial burdens. He submits that the contracts are tainted with illegality and are unconstitutional. He submits that by virtue of article 226(5) of the *Constitution* , the inquiry into the misuse of public funds in the SGR project by holders of public office cannot be moot and maintains that the matter remains live as the construction of the SGR did not resolve the dispute and the prayers sought at the High Court. On his part, the 2nd respondent points out that the issues being of such substantial public importance and likely to arise again, it is incumbent on the court to address the constitutional and statutory questions.

69. The *Black's Law Dictionary*, 9th Edition defines a "moot case" as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance". Mootness of a matter therefore arises where a live controversy no longer exists between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquires whether events subsequent to the filing of a suit would have eliminated the controversy between the parties. This therefore begs the question, did the completion of the construction of the SGR make the issues raised by the parties to be beyond the reach of the court or is there still a live controversy?

70. A perusal of the orders sought by the 1st and 2nd respondents on the one hand and by the 3rd respondents on the other hand, as enumerated earlier in this judgment, reveals that they

sought declaratory, injunctive, directive and an order of certiorari to quash the award of the contract to CRBC. The SGR project is now complete and was commissioned. It is for this reason that the appellate court appreciated that some of the reliefs that the 1st, 2nd and 3rd respondents sought before the High Court were no longer available. At the time the petitions were presented to the High Court, the construction was yet to commence. Parties, however, opted to forego applications seeking interim conservatory relief aimed at stopping the construction.

71. In focusing on instead, pursuing the hearing of the substantive petitions, it only means that the respondents were alive to the fact that execution of the contract would have an impact on their pending petitions. The orders sought at the High Court, seeking to restrain the appellants from contracting with CRBC, and to ensure that there was no single sourcing in the procurement of the SGR are moot as they were overtaken by events, the contracts having been executed, and we so find.

72. Completion of the construction of the SGR project, however, did not render moot the consideration and determination of the remaining issues as to whether the SGR project complied with article 227 of the *Constitution* and section 6(1) of the *PPDA*; whether the 1st, 2nd and 3rd respondents could rely on evidence provided by whistle blowers in support of their petitions, and the environmental considerations under the *Constitution* . As noted by the Court of Appeal, these are live issues that remain available for the court's consideration. Further, they raise matters of public importance owing to the sheer enormity of the project, the public finance expended and the project being for public use. In any event, the operative law surrounding the litigation remains unsettled.

73. The Supreme Court of Canada *In Re Opposition by Quebec to a Resolution to amend Constitution*, [1982] 2 SCR 793 held that in certain circumstances where desirable, the court may entertain an appeal which has become moot. It stated as follows:

> " While this court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this court. In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered."

74. Similarly, the Constitutional Court of South Africa in *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* (CCT51/05) [2006] ZACC 9 held that in deciding whether an issue is moot, what needs to be brought into the equation is whether deciding the matter is in the interests of justice. It held that whereas the issues may be moot, it would be necessary to proceed to hear the matter as it may have implications

on governance and future regulations particularly where the law on a particular issue is not settled.

75. This court interrogated the issue of mootness in *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) where we held at paragraph 56 that whereas a new legislation was enacted, being the *National Government Constituency Development Fund Act 2015*, there was still live controversy between the parties arising out of the *Constituency Development Fund Act 2013* that had been the subject of court challenge and therefore, it was in the public interest to have the questions that were still raging adjudicated and determined by the Court of Appeal.

76. The SGR project, though completed continues to raise questions especially in relation to the constitutionality of the project and the surrounding procurement process. We therefore have no hesitation in finding that the matters which the Court of Appeal dealt with are not moot. These are the matters that we shall quiz in the appeal and cross appeal before us.

(iii) Whether the learned judges erred in expunging documents in support of the petitions filed by the 1st, 2nd and 3rd respondents at the High Court

77. The 1st and 2nd respondents, in their cross-appeal, fault the superior courts' decision to expunge the documents annexed to the affidavits of Okiya Omtatah and Apollo Mboya in support of the petitions. The expunged documents comprised various correspondence between: officers of government institutions and Exim Bank of China; Ministry of Transport and CRBC; CRBC and the then Prime Minister's office; the Embassy of the People's Republic of China and Ministry of Transport; the Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People's Republic of China; the Attorney General's Office and the Ministry of Transport; KRC and Public Procurement and Oversight Authority; KRC and CRBC; the Ministry of Transport and KRC; Public Procurement and Oversight Authority and the Attorney General's office; and between the Office of the Deputy President and the Attorney General's Office. Apart from the correspondence, the additional documents expunged were Memorandum of Understanding between Ministry of Transport and CRBC; the feasibility study relating to the project; the commercial contracts between the KRC and CRBC for the construction of the railway and for supply and installation of facilities, locomotives and rolling stock; requests for, and legal advice from the Attorney General and the Solicitor General on the contracts and the SGR project and Cabinet Memorandum.

78. In expunging the documents, the High Court found that the public servants who provided the expunged documents to the 1st, 2nd and 3rd respondents did not fit the legal definition of whistle blowers under article 33 of the United Nations Convention Against Corruption.

This provision requires such persons to make reports in good faith and on reasonable grounds to competent authorities any facts of corrupt conduct. Secondly, it found the public servants who provided the documents to have breached the *Public Officer Ethics Act*, 2003 as the documents were confidential in nature. Further, that the documents were inadmissible under the *Evidence Act* and that admitting stolen or irregularly obtained documents infringes on the appellant's rights under article 31 of the *Constitution* . The High Court was of the position that the 1st, 2nd and 3rd respondents ought to have properly compelled the Government to provide the documents under article 35 of the *Constitution* . This position was affirmed by the Court of Appeal which added that admitting such documents would be detrimental to the administration of justice and against the principle underlying article 50(4) of the *Constitution* .

79. The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st, 2nd and 3rd respondents in support of their petitions at the High Court. We note from the pleadings filed at the High Court that the 1st, 2nd and 3rd respondents did not disclose their source for the documents. They averred that exposing the source or identity of persons who availed the documents would silence whistle blowers who act in public interest and good faith. They instead asked the court to admit the documents which they believed would give a candid exposition of the issues in dispute and enable the court to determine whether the procurement was lawful.

80. The *Evidence Act* cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that:

> Application.
>
> 1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.
>
> 2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

81. The *Evidence Act* provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states:

> Certified copies of public documents.
>
> 1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy

> of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
>
> 2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

82. This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the *Evidence Act* allows the production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.

83. From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby outrightly rendered inadmissible.

84. Article 35 of the *Constitution of Kenya 2010* provides for the right to access information held by the State, including that held by public bodies. The *Access to Information Act* No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency. In *Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others* Nrb Petition No 25 of 2013 [2013] eKLR, the High Court stated as follows:

> "However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. ... In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized."

85. The right to institute an action in court only crystallizes once a citizen has requested for the information from the State and the request has been denied or not provided. The 1st, 2nd and 3rd respondents herein did not make a request to be provided with the information relied on.

86. The Court of Appeal in *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* Civil Appeal No 281 of 2015 [2015] eKLR held as follows, on illegally obtained evidence:

> "What does the law state regarding illegally obtained evidence? In the case of *Karuma, Son of Kaniu v The Queen* [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that "the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained" In that case the Privy Council decision was supported by the decision in *Reg v Leatham* (1861) 8 Cox CCC 498 which was referred to in the judgment. In *Re v Leatham* (supra), it was said "it matters not how you get it if you steal it even, it would be admissible in evidence" In *Olmstead v United States* (1928) 277 US 438 the Supreme Court of the United States of America opined that "the common law did not reject relevant evidence on the ground that it had been obtained illegally." In Helliwell v Piggot-Sims [1980] FSR 356 it was held that "so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."

87. This court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in *Njonjo Mue case* (*supra*). In that case, we recognised that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information.

88. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the *Constitution* and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process. Applying that test to the obtaining facts, we summed up the position as follows:

> "(24) The petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the

> court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information."

89. The 2nd respondent submitted that the *Njonjo Mue case* (*supra*) is distinguishable from the instant case as it was an election petition wherein the *IEBC Act* and the *Elections Act* are the applicable laws unlike the case before this court. We note that the *Njonjo Mue case* (supra) concerned an application to expunge from the record various identified internal communication correspondence and memoranda between members of the Independent Electoral and Boundaries Commission. In the *Njonjo Mue case* (supra) it was urged that the memoranda were obtained unlawfully, contrary to section 27 of the *IEBC Act* which provides, inter alia, that the IEBC may decline to give information to an applicant where the information requested is at a deliberative stage by the Commission and article 50(4) of the *Constitution* which requires such evidence to be excluded.

90. Whereas the *Njonjo Mue case* related to an election petition, the issue before court, as is in the present case, is whether the evidence obtained in an unlawful manner may be admitted as evidence. The court interrogated the provisions of article 35 of the *Constitution* , the *Access to Information Act* and the *IEBC Act*, recognising at paragraph 22 that, whereas information held by the State ought to be freely shared except in exceptional circumstances, such information should flow from the custodian of such information to the recipients in a manner recognised under the law. The mere fact that the provisions of *IEBC Act* are not in issue in the present appeal, the legal principle enunciated in the Njonjo Mue case remains the same. We disagree with the 2nd respondent's contention that the present case is distinguishable. The High Court found that it was unacceptable to use 'self-help' or clandestine means to obtain information whereas there were clear constitutional mechanisms. To use such methods would indeed make otiose the provision of article 35 of the *Constitution* and why such provision was enacted as a mechanism for citizens to access information which is held by the state.

91. We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the provisions of article 50(4) of the *Constitution* . Allowing such documents is akin to sanitising illicit actions of the 1st, 2nd and 3rd respondents of irregularly obtaining evidence, in violation of article 31 of the *Constitution* on the right to privacy including privacy of communication. Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the

documents in the manner set out under sections 80 and 81 of the *Evidence Act* or requested for information under article 35 of the *Constitution* , the documents are inadmissible, we so declare.

92. It does not matter, in our view, that some of the documents in issue had been readily tabled before Parliament and were subjected to debate at the different committees. It is trite that parliamentary processes are subject to certain privileges and immunities. article 117 of the *Constitution* provides for powers, privileges and immunities. The objective of the powers, privileges and immunities as set out in article 117(2) is for the purpose of the orderly and effective discharge of the business of Parliament. These powers, privileges and immunities extend to the Parliamentary Committees, the chairpersons of committees and members of parliament. In the same breadth, Parliament is empowered under article 125 to call for evidence including the production of documents. Having said so, it cannot be that documents obtained pursuant to parliamentary processes mutate into public documents just because the respondents somehow are in possession of the said documents through an otherwise opaque process. The 1st to 3rd respondents have not demonstrated how they gained possession of the impugned documents that were otherwise within a constitutionally sanctioned parliamentary process, to which the said respondents have not explained their role.

93. The respondents have also alleged that some of the impugned documents were obtained from NEMA. Again, NEMA, just like any other statutory regulator, was only seized of the documents in furtherance of its statutory mandate to grant a licence. As we shall address later, there exists a specific mechanism of dealing with and/ or relying upon information and documents availed to NEMA, bearing in mind the context within which NEMA receives such documents. It is not difficult to note that NEMA was not party to the court proceedings now subject to this appeal. It is not enough for the 1st to 3rd respondents to allege that the documents were obtained from NEMA without the attendant contextualisation especially when the respondents failed to invoke the mechanism provided under EMCA.

94. The 1st to 3rd respondents also submitted that the evidence through newspaper reports and cuttings should be admissible. We reiterate that the burden of proof always lies with the claimant, that it to say, he who asserts. Indeed, the reading of sections 35, 107 and 109 of the *Evidence Act* together with rules 15 and 20 of the *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,* 2013 reveals that newspaper articles are inadmissible as evidence in law. This is because facts contained in newspaper articles are merely hearsay, as enunciated in *Laxmi Raj Shetty and another v State of Tamil Nadu* 1988 AIR 1274, 1988 SCR (3) 706. In Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) we were not persuaded

to interfere with the superior courts' disregard of newspaper cuttings to prove allegations of violations of constitutional rights beyond the evidential prism set out in the *Evidence Act*. In doing so, we stated as follows:

> " 69. It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others, SC Petition No 12 of 2019; [2020] eKLR."

95. The 1st respondent urges that whistle blowers who enable others or work with the civil society or with public spirited members of the public to cause the courts to be moved by dint of article 22 and 258(1) of the *Constitution* to discharge the obligation under article 3(1) of the *Constitution* , must be deemed to have made reports in good faith and on reasonable grounds to competent authorities. He further states that if the High Court judgment is allowed to stand, it means that, "an exposed public servant unless s/he puts his/her neck on the guillotine, cannot discharge his/her duties under article 3(1) of the *Constitution* through tipping off a 'secure' member of the public to take action to prevent cascading of a crime." He also expresses fears that if the courts are to render evidence that had not been obtained through specifically prescribed legal channels as inadmissible, it would provide an untenable incentive for the State to hide information.

96. It is imperative to note that in respect of corruption allegations complained of by the 1st and 2nd respondents, there are constitutional and statutory mandated bodies to address those. The *Ethics and Anti-Corruption Commission Act* No 22 of 2011 enacted pursuant to article 79 of the *Constitution* provides for the functions of the EACC at section 11(1) to include receiving complaints on the breach of the code of ethics by public officers, investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to chapter six of the *Constitution* . Further, the Witness Protection Agency established under section 3A of the *Witness Protection Act* No 16 of 2006 has its purpose set out under section 3B(1) as to provide the framework and procedure for giving special protection on behalf of the State, persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

97. We find it necessary to caution that, whereas article 22 of the *Constitution* entitles every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and article 258 entitles every person to institute court proceedings claiming that the *Constitution* has been contravened or is threatened with contravention, these provisions ought not to be abused in the name of 'public interest.' This is, more so, where the litigants seek to advance private or political interests or other considerations through proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law, and must be aimed at addressing genuine public interests and not used for personal gain or vendetta.

98. The Indian Supreme Court in *Ashok Kumar Pandey v State of West Bengal* (2004) 3 SCC 349 stated as follows concerning public interest litigation:

> " Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuse averted it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of a knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a *locus standi* and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration... The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

99. As noted by the Supreme Court of India in *Sachidananda Pandey v State of West Bengal & ors* 1987 AIR 1109, 1987 SCR (2) 223, per Khalid J (concurring) today public-spirited litigants rush to courts to file cases in profusion under the attractive name of public interest litigation. They must however inspire confidence in courts and amongst the public, and most importantly, be above suspicions. Easy access to courts under article 22 and 258 should therefore not be misused as a license to file frivolous claims disguised as public interest. Articles 22 and 258 of the *Constitution* are not open-ended panacea or bogey provisions to be resorted to as a panacea to any person under the guise of public interest. Like any other well

intended provision of the *Constitution* , it is bound to be abused and when that happens, the courts should not hesitate to rein in such abuses. We think that the litigation herein in the guise of Public Interest Litigation fits in the above description. How else would one explain blatant non-compliance with the clear dictates of procedures of obtaining information in the possession of the State or State organs.

v. Whether there were environmental considerations by the appellants in the SGR project

100. The 1st and 2nd respondents urge in their cross-appeal that this court sets aside paragraph 110 of the appellate court's judgment and instead find merit that there were no environmental considerations by the appellants in the SGR project. The 1st respondent's case is that the SGR project was procured with scant regard to environmental rights, including, in procuring polluting diesel locomotives and a sloppy Environmental Impact Assessment.

101. In response, the 1st appellant maintains that the SGR project was implemented with due regard to environmental rights and the 4th respondent was issued with an Environmental Impact Assessment license on February 5, 2013 in accordance with section 58 of the *Environmental Management and Coordination Act* (EMCA). It adds that the Government conducted an autonomous environment impact assessment on the project and allowed it to proceed. Additionally, it urges that the procuring entity engaged the public in the decision to implement the SGR, and that the 1st and 2nd respondents had sixty days to lodge complaints and or comments upon publication of the SGR study report in accordance with section 59 of EMCA. It postulates that any concerns by the said respondents ought to have been ventilated in the statutory mandated bodies. In support of this argument, it cites this court's decision in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* Sup Ct Petition No 3 of 2020 [2020] eKLR. The 1st appellant further posits that the SGR has been in full operation for the past seven years and no major environmental concerns have arisen from its continued operations.

102. Article 42 of the *Constitution*entitles every person to the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69 and to have obligations relating to the environment fulfilled under article 70 of the *Constitution* .

103. Article 69 sets out the obligations of the State which include, to eliminate processes and activities that are likely to endanger the environment and establishing systems of environmental impact assessment, environmental audit and monitoring of the environment. Article 70 provides for the enforcement mechanism and provides that where there are allegations of violations of the rights under article 42, or there is a likelihood of being denied, violated, infringed or threatened, the person may apply to a court for redress

in addition to any other legal remedies that are available. The court may then make orders or directions appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; compel the public officer to take measures to prevent or discontinue any act or omission that is detrimental to the environment or provide compensation for victims of violation of the right.

104. The *Environmental Management and Co-Ordination Act* No 8 of 1999 (EMCA) is the legislation enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Section 58 of *EMCA*, makes provision for the application of an Environmental Impact Assessment. Every proponent of a project specified under the second schedule of EMCA is required to conduct an environmental impact assessment (EIA). Under regulation 4 of the *Environmental (Impact Assessment and Audit) Regulations of 2003*, no licensing authority shall issue any license, permit or approval prior to the issuance of an EIA.

105. The 1st respondent's environmental concerns relate to the procurement of highly polluting diesel locomotives and a 'shoddy' Environmental Impact Assessment done for the SGR project. He also states that key stakeholders such as the Kenya Wildlife Service were not involved in the study.

106. From the EIA report on record, we note that the scope of the report included the identification and discussion of any adverse negative impacts to the environment anticipated from the proposed project and mitigation measures set out therein, on the possible impacts on the environment including emissions to air and exhaust emissions. We are persuaded that a notice of the EIA study report of the SGR project in accordance with the provisions of *EMCA* was published in the Kenya Gazette and a similar publication in a newspaper of wide circulation in Kenya. The Gazette Notice and the newspaper publication invited members of the public to give comments and/ or complaints within sixty days as required under *EMCA*. The 1st to 3rd respondents have neither rebutted this proposition nor indicated any attempts to react to this notice. Kenya Wildlife Service being a statutory body mandated to conserve and manage wildlife in the country, was at liberty to engage its appropriate mechanism. As it is not a party to the present proceedings, we need not discuss the issue further.

107. The National Environmental Management Authority (NEMA) granted an Environmental Impact Assessment (EIA) Licence to the CRBC. Pursuant to section 129(1) of *EMCA*, any person aggrieved by the grant of a license or permit or a refusal to grant a license or permit or the transfer of a license or permit under the Act may within sixty days appeal to the Tribunal established under section 125 of *EMCA*. The 1st and 2nd respondents' grievances on the issuance of the license and the EIA therefore fell within the jurisdiction of the Tribunal.

They did not avail themselves their day before the Tribunal, thereby taking a fatal step to the courts.

108. The superior courts have on several occasions held that challenges to licenses issued and the EIA ought to be made before the National Environment Tribunal (NET) including in, *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR and *Republic v National Environmental Management Authority* [2011], eKLR and not to the regular courts and that the NET should be accorded the first opportunity to consider the matter. The Court of Appeal in *Republic v NEMA ex parte Sound Equipment Ltd* CACA No 84 of 2010 [2011] eKLR on the same issue reiterated the position noting that the Tribunal is the specialized body with the capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licences." This doctrine of exhaustion of existing statutory mechanism is the import of our decision in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Pet 3 of 2016 [2019] eKLR where we stated as follows:

> "(119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

109. We note that the High Court succinctly addressed this grievance and see no reason to disturb the finding in this regard. The complaints by the 1st and 2nd respondents relating to the EIA and the issuance of the license issued by NEMA fall squarely within the jurisdiction of the NET pursuant to section 129 of *EMCA* which clearly spells out the appellate functions of the Tribunal. The 1st and 2nd respondents having failed to invoke it, we find no merit in this ground of appeal and the same is declared lost.

v. Whether the procurement of the SGR complied with article 227 of the *Constitution* as read together with the provisions of the *PPDA,2005*

110. The appellants' contention is that the MoU which conceptualized the SGR preceded the 2010 Constitution, having been signed in 2009. That, the language in article 227(1) of the *Constitution* does not imply retrospective application of the constitutional provision. This interpretation is refuted by the 1st and 2nd respondents who instead submit that section 2 of the the *PPDA, 2005* provides governing principles and values that are in tandem with article 227(1) of the *Constitution* . These respondents further argue that the appellants have not disproved that the SGR contracts and financial agreement were signed in 2012 and 2014 respectively bringing them within the ambit of the *Constitution* , 2010.

111. As we perceive it, this issue involves two facets: (i) the applicability of article 227 of the *Constitution* 2010; and (ii) If in the affirmative, whether the procurement of the SGR complied with article 227 of the *Constitution* as read together with the provisions of the PPDA, 2005.

a. Whether article 227 of the *Constitution 2010* is applicable?

112. To put the issue in perspective, interrogation of the series of events that led to the signing of the contracts suffices. From what is before us, we decipher that following the joint communique by the presidents of Kenya and Uganda on the commencement of the SGR project, the first phase, covering Mombasa and Nairobi, started with the signing of the MoU on August 12, 2009. This MoU was between the government of Kenya through the Ministry of Transport (hereinafter the Ministry) and the CRBC. Under the MoU, the Ministry agreed to CRBC's proposal to undertake a feasibility study including the preliminary design of the project at no cost to the Ministry. The study was to include, but not limited to, the assessment of the financial and legal viability of the project including technical feasibility and cost estimates taking into consideration the requirements of related financial institutions and/or the 4th respondent. On completion of the feasibility study, the MoU indicates that:

> "Completion of the Study. After completion of the study, the parties hereto will conduct consultation on the result of the study and explore in good faith the possibilities of the parties having a meaningful participation in undertaking the Project in accordance with laws of Kenya. If the Study was approved by Ministry of Transport, CRBC would be the sole agent to design (Engineering, Procure and Contract), construct and supervise all the works of the Project."

113. KRC and CRBC then executed a commercial contract for the construction of the SGR line on August 11, 2012. Subsequently, a second commercial contract was executed between the

two for the supply and installation of facilities, locomotives and rolling stock on October 4, 2012. From the MoU, the government had agreed to accept technical and financial assistance offered by various financial institutions through CRBC to undertake design, construction and supervision of the project.

114. Following deliberations between the Government of Kenya through the National Treasury, and the Government of China, it was agreed that the Government of China would finance the project through Exim Bank of China, a state-owned financing institution. The extent of the financing was that Exim Bank would finance 85% of the costs for the project while Kenya would meet the other 15% of the costs as a counterpart funding. In addition, the terms of the financing from Exim Bank were that part of it would be issued as a concessional loan while the other part would be a commercial loan. This agreement was reduced into a financial agreement and signed on May 10, 2014.

115. It is evident that the Bilateral Agreement and the MoU were executed in 2009 prior to the promulgation of the the *Constitution of Kenya, 2010* while the commercial contracts were signed in 2012. The question that now begs response is, what is the effect of that MoU in relation to the procurement process? The *Black's Law Dictionary* 11th Edition at page 1180 elucidates an MOU under letter of intent as:

> "A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent, and courts ordinarily do not enforce one; but courts occasionally find that commitment has been made."

116. From the above definition, an MoU is preliminary to a contract and or agreement between parties and is characterized as non-binding and unintended to create any contractual obligations on either party. This does not mean that courts are not faced with the question of establishing the binding nature of an MoU. When that happens, a court considers the wording and the apparent intention of the parties. In stating so, we are persuaded by the findings of *HH Humphrey Lloyd QC in ERDC Group v Brunel University* [2006] EWHC 687 (TCC) in the following words:

> "Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letter of intent' have or have

not been used. The phrase 'letter of intent' is not a term of art. Its meaning and effect depend on the circumstances of each case."

117. In establishing the intent of the parties, we are further persuaded by the Supreme Court of the *United Kingdom in RTS Flexible Systems v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14 & 38 where it expressed itself as follows:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

118. Back to the MoU at hand. The intention of the parties can be inferred from the wording. The first task was for CRBC to undertake a feasibility study. At that point, this was but a non-binding intention by the parties as any resulting obligations would only be firmed up once the report was undertaken and approved. The study was duly undertaken and submitted by CRBC in February 2011. Once the report was approved, as was the case on June 26, 2012, the MoU stipulated that CRBC "would be the sole agent to design (Engineering, Procure and Contract), construct and supervise all the works of the Project." This condition in our view paved way for the preparation and execution of the commercial contracts between KRC and CRBC.

119. We take cognizance of our findings in *Samuel Kamau Macharia & Another v KCB & 2 others*, SC Application No 2 of 2011 [2012] eKLR where this court did not indubitably rule out the retrospective application of the *Constitution, 2010*. It is our considered opinion therefore that the MoU was a precursor to the parties entering into legally binding agreements depending on the results of the feasibility study. It is these commercial contracts, once entered into, that, in our view, operationalized the SGR project. The contracts, signed in 2012 and 2014 created legally binding obligations and not the MoU. This was after the *Constitution of Kenya. 2010* had been promulgated and operationalized.

120. However, from our findings above, we are of the further considered opinion that the issue of retrospective application of the *Constitution* as raised by the appellants does not arise, as first, the operationalization of the SGR project occurred under the dispensation of the

Constitution of Kenya, 2010. Secondly, the petitions before the High Court were filed in 2014, four years into the new constitutional dispensation invoking the High Court's jurisdiction under article 165 of the *Constitution* and thirdly, under the sixth schedule to the *Constitution of Kenya, 2010*, section 7 thereof allows all law in force immediately before the effective date to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the *Constitution*.

121. Accordingly, article 227, just like any other provisions of the *Constitution of Kenya 2010* were applicable in any of the manners explained above. We reject the appellant's argument to the contrary and add that the applicability of the Constitution of Kenya 2010 is not pegged on when and how the SGR project was conceptualized or the timing of the documents. We note that the execution of the MoU was before the *Constitution of Kenya 2010* while the commercial agreements and the financing agreement were executed after the Constitution of Kenya had already come into force. With this finding, we now proceed to examine whether the SGR project complied with the constitutional and statutory imperatives in view of the findings by the superior courts below.

b. Whether procurement of the SGR complied with article 227 of the *Constitution* as read together with the provisions of the *PPDA, 2005*

122. The appellants fault the appellate court's declaration that the 1st appellant violated article 227 of the *Constitution* and sections 6(1) and 29 of the *PPDA, 2005*. They submit that the assumption that there must be an already negotiated treaty or agreement prior to procurement for section 6(1) to apply, ousting the provisions of *PPDA, 2005* is, in our view, misguided. The 1st appellant contends that it was just but an implementing entity of the Cabinet's decision directing it to enter into contractual agreements with CRBC. Moreover, it argues that owing to insufficient funds to carry out a competitive tendering process, it would be in breach of section 26(6) of the *PPDA, 2005*. CRBC supports the appellant's position and affirms that the procurement of the SGR complied with article 227 of the *Constitution* and the *PPDA, 2005*. It adds that its procurement, as the contractor, happened after the financing agreement between Kenya and Exim Bank was executed.

123. On their part, the 1st and 2nd respondents affirm the findings of the appellate court. They assert that the procurement process was flawed by single-handedly selecting CRBC to conduct the feasibility study, design and implement the project, instead of undertaking a competitive bidding.

124. Article 227(1) of the *Constitution* provides that:

> " When a State organ or any other public entity contracts goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."
>
> Article 227(2) of the *Constitution* provides for the enactment of a statutory framework within which policies relating to procurement and asset disposal may be implemented to give effect to article 227 of the *Constitution* . This resulted in the enactment of the *Public Procurement and Disposal Act,* No. 33 of 2015 which commenced on 7th January 2016, after procurement processes for the SGR. The effect of this enactment is that it repealed the PPDA 2005. Needless to state, despite its repeal, the PPDA 2005 applies to the present dispute as it was the law in force as at the time the petition was filed at the High Court.

125. Section 29 of the *PPDA, 2005* deals with choice of procurement procedure and allows a procuring entity to use open tendering or an alternative procurement procedure under Part VI which includes restricted tendering, direct procurement, request for proposals, request for quotations, low-value procurement, and specially permitted procurement procedure. And, section 26 sets out the threshold matrix and segregation of responsibilities which any procurement entities need to have in place for the purpose of ensuring that its decisions are made in a systematic and structured way. Part of such responsibilities is to ensure sufficient funds have been set aside in the budget to meet the obligations. Section 26(6) of the *PPDA 2005* stipulates that:

> (6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract."

126. However, the provisions of the *PPDA 2005* could be ousted under section 6(1) of the *PPDA, 2005* "where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans." (Emphasis ours) The appellate court found that to invoke section 6(1) of the *PPDA 2005*, the identification of a supplier of goods and services would have to precede the loan agreement. According to the appellate court, CRBC was contracted long before the financing agreement was entered into by virtue of the MoU.

127. The appellant maintains that it was not the procuring entity but merely an implementing entity. This is because it only followed directives issued to it by the Executive. We find this correct in several respects. First, the appellant conceded that while it had initially attempted to competitively secure firms to undertake feasibility studies before the commencement

of the project sometimes in the beginning of 2009, the process was frustrated by the ensuing litigation. The procurement was challenged through litigation both at the Public Procurement and Administrative Review Board and at the High Court. The litigation took about two years to conclude.

128. By the time the litigation was concluding, the government had through the Ministry of Transport intervened by entering into an MoU with the CRBC- owing to the urgency of the project. This is well captured in the recital of the MoU which provides:

> " Whereas, the Kenyan Government realizes the urgency and necessity of the construction and completion of the Project and has agreed to accept the technical and financial assistance offered by various financial institutions and/ or China Road and Bridge Corporation through CRBC to undertake Design, Construction, and supervision of the Project;" (Emphasis ours)
>
> It is based on the terms of the MoU that CRBC was tasked to undertake a feasibility study, and if the same was approved (by the Ministry) then CRBC would be procured as the sole party to undertake the SGR project. This in our view is the import of the relationship of the Government of Kenya vide the Ministry and the CRBC.

129. Secondly, the commercial agreements entered into between the 1st appellant and the CRBC could only have been in furtherance of the directive by the Ministry of Transport. The 1st appellant had abandoned the procurement process and was now engaging with CRBC at the behest of the Ministry under which the appellant resides. KRC is a state-owned corporation charged with the mandate, inter alia, of planning and development of rail transport systems and promotion, facilitation and implementation of national railway network development in Kenya.

130. Thirdly, the 1st appellant was no longer financing the project as CRBC had been tasked to source for financing from China. This was aptly captured in the MoU, at sub clause III 'Financing of the Project' which states:

> " After the signing of the commercial contract of the Project, CRBC shall try its best to look for the sources for the funding of the Project In this regard, the supply and installation of the facilities, locomotives and rolling stocks agreement dated October 4, 2012, states that:
>
> " The Government of Kenya and the Financial Institution of China have entered into the necessary financing agreement relating to provision of financing for the

> supply and installation of the facilities, locomotives and rolling stocks for the Mombasa-Nairobi Standard Gauge Railway Project.
>
> The duly signed financing agreement entered into by the Government of Kenya and the Financial Institutions of China has been endorsed and certified by the State Law Office of Kenya."
>
> This financing arrangement was actualized in the financing agreement executed on May 10, 2014.

131. The local financing on the other hand was done by the Government through the Railway Development Levy, introduced by the enactment of section 117A of the *Customs and Excise Act* cap 472. KRC was therefore, despite being a state corporation, never allocated funds towards this project directly from the consolidated funds as the government itself opted to implement the financing model. KRC could not and did not therefore qualify as a procurement entity under the provisions of section 26(6) of the *PPDA 2005*.

132. The above state of affairs demonstrates that the procurement and contractual agreements between the 1st appellant and the 4th respondent, who are both state corporations, were done by the two entities in furtherance of government to government understandings for an on behalf of those two governments. This squarely brings the arrangement within the realm of a government to government transaction that is not subjected to the provisions of the *PPDA, 2005* as stipulated by section 6 (1) of *PPDA, 2005*,. The 1st to 3rd respondents, perhaps appreciating the nature of the procurement- as being government to government, never challenged the Ministry's actions before the 3rd appellant.

133. This is not the first time that the government has intervened and undertaken direct government to government procurement. In 2013, with the impending general election and due to constitutional timelines, Independent Electoral and Boundaries Commission (IEBC) was embroiled in legal battles over the procurement of voting materials. This led to government intervention as was eventually argued in the resulting presidential election petition in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition Nos 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment). For instance, the 1st petitioner's argument in this regard was captured as follows:

> " 108. On the BVR, the 1st petitioner makes the claim that due to a botched procurement process, procurement was taken over by Government. This, he states, led to the loss of independence from the Executive by IEBC. With regard to EVID (Electronic Voter Identification), he claims that the procurement of the kits was the result of an illegal procurement process; ..."

134. This is also reported in *International Commission of Jurists (2023): Election Technology and Electoral Justice in Kenya* p 77 in the following manner:

> " 63. In 2013, the IEBC's failure to procure the election technology led it to ceding the procurement to the Kenyan executive...This act resulted in the 'government to government' deal between Kenya and Canada to purchase the election materials through a Canadian company - Safran Morpho."
>
> The merits of that action by the government is beyond the scope of the present case.

135. The 1st respondent put up the case that KRC should have undertaken limited tender inviting other Chinese firms with the necessary expertise to bid. They gave the example of the tender for the Kenya Rural Telecommunication Development Project Phase II 2007 and 2011/2012 concessional loan for supply, installation, testing and commissioning of the national surveillance communication, command and control system in the National Police Service. In our view, this position is untenable as it was no longer upon KRC to undertake any tender process, the government having intervened and done government to government agreements.

136. Again, we note that the procurement of CRBC was not undertaken by KRC but by the Government through the Ministry of Transport. As the Ministry was not included in the proceedings both before the 2nd appellant and before us, it would be academic for the court to interrogate the issue further. In any event, we have already established that the provisions of the *PPDA 2005* were ousted in the SGR project, for the reasons stated earlier herein.

137. At any rate, procurement must still conform to the provisions of article 227 even when done pursuant to the obligations of a treaty or agreement or any other procedure. The use of any procurement method including direct procurement does not exclude the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as provided for under article 227(1) of the *Constitution* . As we expressed *In re the Matter of Interim Independent Electoral Commission* SC Constitutional Application No 2 of 2011 [2011] eKLR and in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* SC Petition No 32 of 2014 [2017] eKLR, legality of the Executive's actions and directives can only be interfered with by the courts when it is in breach of the *Constitution* .

138. In these circumstances we find, that it has not been demonstrated how the 1st appellant, acting not as the procuring entity, but on the directives of the Executive, failed to comply with the provisions of article 227(1) of the *Constitution*. In any event, government to government procurement is permissible under section 6 of the *PPDA 2005*. We did not

understand any of the respondents to be challenging the constitutionality of the said statutory provision because that they did not do. There were avenues such as public participation during the enactment of section 17 of the *Customs Tax Act* that introduced the Railway Development Levy; the challenge of the constitutionality of the provision of section 6 of the *PPDA 2005* and challenge of the environmental concerns at the licensing stage of the project before the National Environment Tribunal pursuant to EMCA to name just but a few of them. None of the respondents and/or the members of the public pursued such avenues before resorting to court litigation.

139. In addition, the SGR project was subject to interrogation before Parliament in two committees and none of the respondents opted to be involved. The said parliamentary process, which is open to the public, cleared the projects. Under our constitutional design, the people have the power to exercise their oversight power through elected representatives who are domiciled in Parliament. Whether a citizen agrees with or was satisfied with what was undertaken is a matter of conjecture provided that the laid-out procedure was followed. Like in every democracy, the concept of representing the people or public interest remains a hydra headed mongrel which cannot be defined with certainty as it is never possible to get a homogenous view point from the populace.

140. In the premises, we respectfully disagree with the appellate court and hold that the procurement process for the SGR project met the requirements of article 227 of the *Constitution* as read together with the provisions of the *PPDA, 2005*.

141. As for costs, while we appreciate the general principle that costs follow the event, we are satisfied that the nature of the dispute warrants each party to bear its own costs, even if we raised our concern as to the genuineness of the reasons for bringing the instant litigation. The appellants being public bodies were merely defending their obligations as we expressed in *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment).

Orders

142. In the end, we find merit in the appeal to the extent set out here below and issue the following orders:

i. The Court of Appeal judgment dated June 19, 2020 is hereby set aside.

ii. The cross appeal dated September 23, 2022 be and is hereby dismissed.

iii. We affirm the superior courts' decision on the expunging of documents.

iv. The procurement process for the Standard Gauge Railway project was undertaken in conformity with the provisions of article 227 of the *Constitution* .

v. The Standard Gauge Railway procurement was undertaken as a government to government contract hence exempt from the provisions of the *Public Procurement Disposal Act, 2005* by virtue of section 6(1) of the said Act.

vi. Each party bears their own costs. It is so ordered.

Katiba Institute v Attorney General & 9 others (Petition 17 of 2020)
[2023] KESC 47 (KLR) (16 June 2023) (Judgment) (with dissent - N Ndungu, SCJ)

Supreme Court of Kenya

MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 47 (KLR)

Constitutional Law *– Judicial Service Commission – appointment of commissioners – representatives of the Public Service Commission – representative of the public/people - whether there was a requirement for merit and fair competition in appointment of Commissioners to the Judicial Service Commission who represented the Public Service Commission and the people - Constitution, articles 10, 73(2)(a), 171(2)(g) and (h) and 250; Judicial Service Act, cap 8A, section 15(2).*

Constitutional Law *– Public Service Commission –members – qualifications – where an appointed member was a retiree - whether it was a disqualifying factor for a member of the Public Service Commission to be a retired public servant - Constitution, article 233(3).*

Constitutional Law *– separation of powers – judiciary vis-à-vis the National Assembly – role in appointment of commissioners to the Judicial Service Commission – where it was contended that a nominee approved by the National Assembly for appointment had integrity issues – where a petitioner sought for the court to revoke the appointment due to integrity issues - whether the court had powers to revoke the appointment of a Judicial Service Commission Commissioner on grounds of lack of integrity where the National Assembly had considered the issues of integrity and confirmed the nominee for appointment - Constitution, articles 10, 73(2)(a), 171(2)(g) and (h) and 250; Judicial Service Act, cap 8A, section 15(2); Public Appointments (Parliamentary Approval) Act, cap 7F, section 7.*

Constitutional Law *– Executive – Office of the President – powers – role in the appointment of commissioners of chapter fifteen commissions – role in the appointment of Judicial Service Commission Commissioners - what was the role of the President in the appointment of commissioners to the Judicial Service Commission - Constitution, articles 10, 73(2)(a), 171(2)(g) and (h) and 250; Judicial Service Act, cap 8A, section 15(2).*

Statutes *– interpretation of statutes - section 7 of the Public Appointments (Parliamentary Approval) Act, cap 7F – procedure to be followed by the National Assembly in vetting persons nominated for appointment to the Judicial Service Commission - whether the National Assembly followed the correct legal procedure to confirm the appointment of the respondents as Judicial Service Commissioners - whether to the extent that the National Assembly failed to interrogate the 6th and 7th respondents, before confirming their appointment to the Judicial Service Commission the appointments were contrary to the requirements of section 7 of the Public Appointments (Parliamentary Approval) Act, cap 7F.*

Statutes *– constitutionality of provisions of a statute – Judicial Service Act – section 15(2) - whether section 15(2) of the Judicial Service Act was unconstitutional in so far as it failed to prescribe merit, diversity and fair competition as prerequisites for appointment of one person to represent the Public Service Commission and one woman and one man to represent the public in the Judicial Service Commission - whether section 15(2) of the Judicial Service Act was inconsistent with the provisions*

of article 171(2) of the Constitution in so far as it assigned the President the role of appointing elected and nominated members of the JSC - Constitution, articles 171(2)(g) and (h).

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction – where an appellant raised matters not canvassed at the High Court or Court of Appeal - whether the Supreme Court when acting as a second appellate court could determine an issue that was not canvassed before the superior courts below it - Constitution, article 163(4)(a).*

Word and Phrases *– appointed – definition - designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office - Black's Law Dictionary,9th Ed, p 116.*

Brief facts

The appellant together with the 8th, 9th, and 10th respondents contested the nomination of the 5th respondent at the High Court as being invalid for the reasons that it was done by the President as opposed to the Public Service Commission contrary to article 171(2)(g) of the Constitution. It was also contended that the 5th respondent's appointment was illegal as the 5th respondent was irregularly vetted by the National Assembly. Further, it was alleged that the nomination of the 6th and 7th respondents nomination was not based on fair competition or merit and that the 6th respondent failed to meet the integrity test under Chapter Six of the Constitution. The nomination of the 7th respondent was also contested on grounds that the National Assembly disregarded the fact that the 7th respondent's nomination was made before his predecessor resigned from office.

Issues

i. Whether there was a requirement for merit and fair competition in the appointment of Commissioners to the Judicial Service Commission who represented the Public Service Commission and the people.

ii. Whether section 15(2) of the Judicial Service Act was unconstitutional in so far as it failed to prescribe merit, diversity and fair competition as prerequisites for the appointment of one person to represent the Public Service Commission and one woman and one man to represent the public in the Judicial Service Commission.

iii. Whether section 15(2) of the Judicial Service Act was inconsistent with the provisions of article 171(2) of the Constitution in so far as it assigned the President the role of appointing elected and nominated members of the JSC.

iv. Whether the nomination and subsequent appointment of the 5th, 6th and 7th respondents were valid.

v. Whether it was a disqualifying factor for a member of the Public Service Commission to be a retired public servant.

vi. Whether to the extent that the National Assembly failed to interrogate the 6th and 7th respondents, before confirming their appointment to the Judicial Service Commission was contrary to the requirements of section 7 of the Public Appointments (Parliamentary Approval) Act, cap 7F.

vii. Whether the court had powers to revoke the appointment of a Judicial Service Commission Commissioner on grounds of lack of integrity where the National Assembly had considered the issues of integrity and confirmed the nominee for appointment.

viii. What was the role of the President in the appointment of commissioners to the Judicial Service Commission?

ix. Whether the Supreme Court when acting as a second appellate court could determine an issue that was not canvassed before the superior courts below it.

Relevant provisions of the Law

Constitution of Kenya

Article 171 - Establishment of the Judicial Service Commission

1. *There is established the Judicial Service Commission.*
2. *The Commission shall consist of—*
   a. *the Chief Justice, who shall be the chairperson of the Commission;*
   b. *one Supreme Court judge elected by the judges of the Supreme Court;*
   c. *one Court of Appeal judge elected by the judges of the Court of Appeal;*
   d. *one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;*
   e. *the Attorney-General;*
   f. *two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;*
   g. *one person nominated by the Public Service Commission; and*
   h. *one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.*

Held

1. The appeal was brought as of right pursuant to aticle 163(4)(a) of the Constitution. From the petition in the High Court, the arguments before both superior courts below as well as the judgments of the two courts, the subject matter involved the interpretation and application of articles 171 and 250 of the Constitution.
2. The Constitution by force of article 2 declared itself the law which bound all persons and all State organs; whose validity or legality was not subject to any kind of challenge. Any law that was inconsistent with it was void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution was invalid, while every person was under obligation to respect, uphold, and defend it.
3. The exercise of sovereign power of the people delegated to State organs, the Legislature, the Executive, the Judiciary, and independent tribunals was constrained by the principle that those organs may exercise no powers and perform no functions beyond those conferred

upon them by law. The Constitution entrenched the principle of legality and provided the foundation for the control of public power.

4. Article 259 of the Constitution provided that the Constitution must be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, permitted the development of the law and contributed to good governance. The entire Constitution had to be read as an integrated whole, because the Constitution embodied certain fundamental values and principles which required that its provisions be construed broadly, liberally and purposely to give effect to those values and principles. Where words used in any provision of the Constitution were precise and unambiguous, then they had to be given their natural and ordinary meaning.

5. Article 171(2)(g) and (h) of the Constitution when read together with articles 10 and 73(2)(a) required merit and fair competition in appointments to the JSC. Those two articles dealt with the application of national values and principles of governance, integrity, fairness, transparency and accountability in selection, election or implementation of public policy decisions.

6. Membership to the JSC was four-pronged; by virtue of office, for example the Chief Justice and the Attorney General; through elections by peers, namely, representatives of the Supreme Court, Court of Appeal, High Court, the Magistracy and the advocates; by nomination by the PSC, and the fourth category was through appointment by the President.

7. The nominating entity was the PSC. A nominee of the PSC to the JSC had traditionally been a serving member. The Constitution of Kenya, 2010 simply stated a nominee of the PSC to the JSC shall be that one person nominated by the Public Service Commission. It did not state the person must be a member or chairperson of the PSC. One person was just one person, who must be nominated by the PSC.

8. It was not a disqualifying factor under article 233(3) of the Constitution for a member of the PSC to be a retired public servant. By section 8(2) of the Public Service Act, a member of the PSC was only required to be a citizen of Kenya; a holder of a degree from a university recognized in Kenya; with at least ten years' experience in their respective profession; and met the requirements of leadership and integrity in Chapter Six of the Constitution.

9. Whether or not the 5th respondent had retired was a question of fact, the consideration of which the Supreme Court was precluded by the terms of article 163(4) of the Constitution from entertaining because the superior courts below did not express any opinion on the matter.

10. Article 171(2)(g) of the Constitution provided that the JSC shall consist of, among other members, 'one person nominated by the Public Service Commission.' No evidence was tendered to show that the appointment of the 5th respondent was made by President. Instead, the evidence on record demonstrated fairly clearly the steps taken upon declaration by the JSC of the vacancy for the representative of the PSC. The plain language of article 171(2)(g) simply required the PSC to present a nominee. The article, however, did not make

provision of the mechanism and procedure of such nomination. Since the procedure for identifying its nominee was an internal affair, determined at the discretion of the PSC itself, the method adopted was consultative and inclusive.

11. One of the values and principles of public service in terms of article 232 of the Constitution was fair competition and merit as the basis of appointments and promotions in the service. PSC was entrusted to nominate one person to represent it in the JSC. The PSC Act under section 46(1) prescribed that where the PSC was required by the Constitution or any legislation to nominate or recommend a person for appointment, the Commission shall abide by the Constitutional requirement of fair competition and merit as a basis of appointment and ensure that the appointment facilitated achievement of a representative public service. PSC in identifying its nominee internally was guided by the values and principles espoused in the Constitution and the law. The fair competition and merit requirement must be seen in that context and circumstances. The commissioners themselves, as opposed to the members of the public or any other entity, including the court, were more qualified to determine the question of merit in the nomination. No member of the PSC complained of unfair treatment or discrimination.

12. Whereas the vetting of the 5th respondent by Parliament was not prejudicial to him or any party, the constitutional edict was that state organs could only exercise the powers and perform the functions conferred upon them by the Constitution and the law. Thus, it was contrary to and inconsistent with the Constitution for Parliament to purport to vet the 5th respondent given the plain language of article 171(2)(g) of the Constitution that membership of the JSC included one person nominated by the Public Service Commission.

13. Article 250(2) of the Constitution which provided for approval of Commissioners by the National Assembly was a provision of general application to all chapter fifteen commissions and offices, except to the extent that the Constitution provided otherwise. Apart from Chapter Fifteen, the Constitution made specific and distinct provisions for each of the ten Chapter Fifteen Commissions. They were constituted differently. Some had no set number of members, yet some had no procedures for appointment of the members.

14. Had the framers of the Constitution intended that the nominee of the PSC be vetted by Parliament, just like the two members representing the public under article 171(2)(h) of the Constitution they would have expressly made a similar provision. Where the framers required approval by Parliament of any appointment, they expressly said so in the Constitution.

15. There was no merit in the argument that the National Assembly disregarded the memorandum which had raised integrity issues against the 6th respondent. The National Assembly considered the complaints, invited the 6th respondent to respond and, in the end, expressed satisfaction with the explanation proffered. It was the duty of the court to ensure that State organs complied with the Constitution, its values and principles and the law, when discharging their functions to obviate any danger of constitutional violation; and to

determine whether anything said to be done under the authority of the Constitution or of any law was inconsistent with or in contravention of the Constitution. The only caveat was that in reviewing the administrative actions of those organs, the court must not substitute itself into the organs whose actions or decisions were the subject of review or substitute the impugned decision with its own decision.

16. The court's concern was limited to confirming and being satisfied that the National Assembly acted in accordance with the Constitution and the law. The record vindicated the conclusion by both courts. The National Assembly, relying on its own procedures and the Public Appointments (Parliamentary Approval) Act conducted an inquiry before satisfying itself that there were no impediments at that stage to disqualify the 6th respondent. It was not for the court, in the absence of any violations by the National Assembly to review its decision. The Court of Appeal properly applied its mind to the law, the evidence and reached the correct decision.

17. While fair competition and merit were values and principles of public service, not all cases of appointment to a public office must be based on fair competition. It depended on the language of the provision of the Constitution under which the appointment was to be made. Article 171(2)(h) of the Constitution only required that for a person to be appointed to represent the public in the JSC, that person had to be either a woman or man, and the person must not be a lawyer. In nominating the person, those were the attributes that the President, acting in good faith and in the best interest of the public, must take into account. He must also consider merit, national values and principles, integrity and national diversity. Nomination by the President was not the end of the process.

18. In approving the nominee, the National Assembly was required to ascertain whether in making the appointments, the President took those factors into account. The suitability of the nominee was further tested by vetting by the Legislature. Members of the public had the opportunity to raise any issues on the candidates' suitability to hold a public office. All of the 11 members of the JSC, that was the only category where approval by the National Assembly was required before appointment.

19. A purposive and harmonious construction of articles 171, 248 and 250 of the Constitution left no doubt that the framers intended article 171(2) of the Constitution to apply exclusively to the process of appointment of members of JSC, separate and distinct from that of other Commissions and independent offices. Article 250 was a general provision dealing with Commissions and independent offices generally. Article 171 was an exception to article 250, in many instances.

20. Just as the Constitution conferred discretion on the President to nominate the Attorney-General and Cabinet Secretaries, subject only to approval by the National Assembly, so did it permit the President to nominate a man and a woman, not lawyers, to represent the public in the JSC after approval by the National Assembly. As far as the nomination of two members of JSC under article 171(2)(h) was concerned, fair competition was not

a mandatory requirement. Where the Constitution itself made provision on the manner and process of identification and appointment of members, the court may not question the exercise of discretion in the appointment as long as it was exercised in accordance with the Constitution and the law.

21. Section 15(2) of the Judicial Service Act was enacted to give effect to the provisions of article 171(2) of the Constitution. There was a general presumption that every Act of Parliament was constitutional, and the burden of proof lay on the person who alleged otherwise.

22. Section 15 could not prescribe prerequisites for the nomination of a representative of the PSC and the two representatives of the public that exceeded the constitutionally prescribed requirements. Fair competition in the identification and nomination of a representative of the PSC was not a constitutional imperative specified in that regard. Fair competition was not a mandatory requirement.

23. Only under article 171(2)(h) of the Constitution did the President have the mandate to nominate two persons, a man and a woman, who were not lawyers, to represent the public. That was the scope of the President's role regarding the JSC and its membership. To the extent, therefore that section 15(2)(a) and (b) required that the names of all the other nominees who were not representatives of the public but were elected by their peers through their professional bodies, or nominated by the PSC, to be submitted to the President for appointment; the section was *ultra vires* to the express provisions of the Constitution. The section donated to the President functions that went beyond his powers under article 171(2)(h) of the Constitution.

24. The appointment envisaged in article 250(2) of the Constitution could only apply and was limited to the two members representing the public. The only time the word 'appointed' was used in the entire article 171, was in relation to those two members. For the elected members, the appointment was concluded upon the declaration of the results of the election. The next phase of gazettement of names and the taking of the oath were only final formalities before the assumption of the office.

25. The Court of Appeal erred in holding that section 15(2) of the Judicial Service Act merely replicated the requirements of the Constitution. Section 15(2) contradicted article 171 of the Constitution. It directed the nominating bodies of members under article 171(2)(b), (c), (d), (f) and (g) to submit the names of their nominees to the President; and the President to appoint the nominees as members of the Commission within three days of receipt of the names, while nowhere in article 171 was there a requirement to submit the names to the President or for the President to appoint the concerned members. Once elected by different entities under (b), (c), (d) and (f) or nominated by the PSC under (g), those persons became members of JSC. It was a contradiction of terms to suggest that elected members were also at the same time appointed.

26. Section 15(2) of the Judicial Service Act was inconsistent with the provisions of article 171(2) of the Constitution in so far as it purported to assign the President the role of

appointing elected and nominated members of the JSC. It infracted the spirit and letter of articles 1(3) and 2(2) of the Constitution; that sovereign power delegated to State organs must be exercised strictly in accordance with the Constitution; and, that no person may claim or exercise State authority except as authorized under the Constitution.

27. The only instance where approval of the National Assembly was required in section 15(1) of the Judicial Service Act, was in relation to the two members under article 171(2)(h) of the Constitution, to represent the public. The only member of the JSC who the National Assembly irregularly vetted was the 5th respondent. That vetting was superfluous, void and of no legal effect since it was not done in accordance with the Constitution.

28. Section 15 of the Judicial Service Act did not violate article 250(2)(a) and(3) of the Constitution in so far as it did not prescribe merit, diversity and fair competition as prerequisites for the appointment of a representative of the PSC and the two members to represent the public in the JSC under articles 171(2)(g) and (h), respectively.

29. The 5th, 6th and 7th respondents were duly nominated and in the case of the 6th and 7th respondents, approved by the National Assembly, after satisfying itself as to their suitability for appointment. The approval of the 5th respondent by the National Assembly was however not necessary.

Dissenting opinion

Per N Ndungu, SCJ (Dissenting)

1. The President as the Head of State and Government derived his powers from article 131 of the Constitution. In that regard, article 1(1) of the Constitution provided that all sovereign power belonged to the people of Kenya and was to be exercised only in accordance with the Constitution. The people could exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power under the Constitution was delegated to among other State organs, the National Executive (headed by the President) and Parliament.

2. Article 132(2)(f) of the Constitution provided that the President shall nominate and, with the approval of the National Assembly, appoint and may dismiss in accordance with the Constitution, any other State or public officer whom the Constitution required or empowered the President to appoint or dismiss. Under article 260, a State officer was interpreted to mean a person holding a State office. Article 260 also interpreted a State Office to mean, among other offices, a member of a commission to which Chapter Fifteen applied. Article 248(2)(e) stipulated that the JSC was one of the Commissions to which Chapter Fifteen of the Constitution applied, except to the extent that the Constitution applied otherwise. Therefore, all Commissioners of the JSC were State officers.

3. Article 250 of the Constitution made general provisions on the composition, appointment, and terms of office of Chapter Fifteen Commissions. The appointment process of members of Chapter Fifteen Commissions was in three stages, unless provided for otherwise

elsewhere in the Constitution. Those stages pursuant to article 250(2) were identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President. The three stages were mandatory.

4. An appointment could not be concluded at the first stage of identification and recommendation, without going through the second step of parliamentary approval and the third step of appointment by the President. To do so would be to disregard the carefully woven constitutional architectural design of separation of powers, and constitutional checks and balances between the arms of Government and the different State organs.
5. An interrogation of articles 171 and 172 of the Constitution did not reveal any provisions disallowing the President from appointing elected JSC Commissioners, being State officers as Commissioners. The approval of the 5th respondent by Parliament and his subsequent appointment by the President was proper and well-founded in the law.
6. Section 15(2) of the Judicial Service Act was inconsistent with the Constitution only in as far as it purported to direct a specific timeline in which the President appointed individuals selected under article 171; that was, to appoint within three (3) days. That timeline, other than being extremely short and limiting, did not take into account any other necessary constitutional processes that the Executive and Parliament must carry out before such an appointment.

Appeal partially allowed.

Orders

i. *There was no requirement for fair competition in appointments to the Judicial Service Commission under article 171(2)(g) and (h) of the Constitution.*
ii. *Section 15(2) of the Judicial Service Act was, to the extent, that it conferred on the President the authority to appoint members elected and nominated to the Judicial Service Commission under article 171(2), (b), (c), (d), (f) and (g) of the Constitution, unconstitutional.*
iii. *The approval by the National Assembly of the 5th respondent was irregular and unnecessary.*
iv. *To the extent that section 15(2) conferred on the President power to appoint the 5th respondent, it was inconsistent with article 171 of the Constitution and therefore invalid. But it was in harmony with article 171 in so far as it did not prescribe merit, diversity and fair competition as prerequisites for appointment of a representative of the PSC and the two members to represent the public in the JSC under articles 171(2)(g) and (h), respectively.*
v. *Parties to bear their own costs.*
vi. *Direction that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal was to be refunded to the appellant.*

Citations

Cases

Kenya

1. *Attorney General v Law Society of Kenya & another* Civil Appeal 133 of 2011; [2017] KECA 176 (KLR) [2017] eKLR - (Applied)
2. *Council of Governors & 47 others v Attorney General & 3 others (interested parties); Katiba Institute & 2 others (amicus curiae),* Reference No 3 of 2019; [2020] eKLR - (Applied)
3. *In the Matter of Interim Independent Electoral Commission* [2011] 2 KLR 223 - (Applied)
4. *In the Matter of Kenya National Commission on Human Rights* Reference No 1 of 2012; [2014] eKLR - (Explained)
5. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,* Advisory Opinion No 2 of 2012; [2012] eKLR - (Explained)
6. *Judicial Service Commission v Speaker of the National Assembly & 8 others* Petition 518 of 2013; [2014] eKLR - (Explained)
7. *Kenya Youth Parliament & 2 others v Attorney General & another* Constitutional Petition No 101 of 2011; [2012] eKLR - (Explained)
8. *Kina, Tukero v Attorney General & another* Petition 6 of 2018; [2019] KEHC 4244 (KLR) [2019] eKLR - (Applied)
9. *Law Society of Kenya v Attorney General & 4 others* Petition 45 of 2019; [2023] KESC 19 (KLR) - (Applied)
10. *Law Society of Kenya v Attorney General & Central Organisation of Trade Unions* Petition 4 of 2019; [2019] KESC 16 (KLR) [2019] eKLR - (Explained)
11. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) [2017] eKLR - (Applied)
12. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) [2013] eKLR - (Explained)
13. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Applied)
14. *Ngaywa, Kizito Mark v Minister of State for Internal Security and Provincial Administration & another MI* Petition 4 of 2011; [2011] KEHC 3869 (KLR) [2011] eKLR - (Applied)
15. *Rawal, Kalpana & 2 others v Judicial Service Commission & 2 others* Civil Applications 11 & 12 of 2016; [2016] KESC 1 (KLR) [2016] eKLR (Consolidated) - (Explained)
16. *Speaker of the Senate & another v Attorney General & 4 others* Reference No 2 of 2013; [2013] eKLR - (Applied)

United Kingdom

Warburton v Loveland (1832) 2 Dow & Cl 480 - (Applied)

India

Hamdarddawa Khana v Union of India & others [1960] AIR 554; [1960] SCR (2) 671 - (Applied)

Canada

Queen v Big M Drug Mart Ltd [1985] 1 SCR 295 - (Applied)

Regional Court

1. *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 - (Explained)
2. *Olum & another v Attorney General* [2002] EA 508 - (Applied)

Texts

Garner, BA. (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 116

Statutes

Kenya

1. Constitution of Kenya articles 10, 27, 73(2)(a); 88(4); 160(1); 163(4)(a); 165(3)(ii); 171(2)) (b)(c)(d)(g)(h); 172; 231(1)(g); 232; 233(2); 234(2)(c); 248(1); 250(2)(a)(3); 251; Chapter 6; Schedule 3 - (Interpreted)
2. Independent Electoral and Boundaries Commission Act (cap 7C) section 6 - (Interpreted)
3. Judicial Service Act (cap 8A) section 15(2) - (Interpreted)
4. Public Appointments (Parliamentary Approval) Act (cap 7F) sections 5, 6, 7 - (Interpreted)
5. Public Service Commission Act (cap 185) sections 8, 36, 46 - (Interpreted)
6. Public Service Commission Regulations, 2005 (cap 185, Sub Leg) regulation 3 - (Interpreted)
7. Teachers Service Commission Act (cap 212) section 8(9) - (Interpreted)

Advocates

1. *Mr. Ochiel Dudley* for the appellant
2. *Mr. Ogosso & Mwangi* for the 1st, 2nd and 5th respondents (Attorney General's Chambers)
3. *Mr. Mbarak Awadh Ahmed* for the 3rd respondent
4. *Ms. Munyingi Diana* h/b for *Mr. Isaac Wamaasa* for the 4th respondent
5. *Mr. Njoroge Regeru* (Nyiha, Mukoma & Company Advocates) for the 6th respondent
6. *Mr. Dulo Charles* (Dulo & Company Advocates) for the 7th respondent
7. *Mr. Ochiel Dudley* h/b for *Mr. Odongo* (Chiggai, Alakonya, Lusigi & Odongo LLP) for the 8th respondent
8. *Ms. Shumila* h/b for *Dr. Khaminwa* (Khaminwa & Khaminwa Advocates) for the 9th & 10th respondents

June 16, 2023, the Court delivered the following Judgment:

A. Introduction

1. This appeal concerns the nomination and subsequent appointment of three members of the Judicial Service Commission (the JSC/Commission) under article 171(2)(g) and (h) of the *Constitution*; the questions being whether the nomination and appointment of Patrick Gichohi (the 5th respondent), Olive Mugenda (the 6th respondent) and Felix Koskei (the 7th

respondent) as members of the JSC was valid. Secondly, whether section 15 of the *Judicial Service Act, 2011* (JS Act) is inconsistent with the provisions of the *Constitution* for not providing for the qualifications of persons to be appointed under article 171(2)(h), for failure to provide for a competitive process of appointment and for purporting to give the President a role in the appointment of members of the JSC under article 171(2)(b), (c), (d), (f) and (g) of the *Constitution*.

2. In considering these questions, it will be relevant to look at the origin and history of the Commission. History is always important in determining questions like these because generally, legal decisions are deeply connected to the past – often to the recent past. Chapter Ten – section 184 of the *Constitution* of Kenya, which was Schedule Two to the Kenya Independence Order in Council, 1963, established the Commission for the first time under the Westminster Model Constitution with a slim membership of only five, comprising the Chief Justice as Chairman, two persons appointed by the Governor- General acting in accordance with the advice of the Chief Justice, from among the Justices of the Court of Appeal or the puisne Judges of the Supreme Court (equivalent of the High Court); and two persons appointed by the Governor General on the advice of the Chairman of the Public Service Commission.

3. Under the former Constitution, JSC again comprised five members, the Chief Justice as Chairman, the Attorney General, a representative from the High Court, a representative from the Court of Appeal and the Chairman of the Public Service Commission. The members of JSC were direct appointees of the President. See section 68(1).

4. As the Judiciary grew in its complement and expanded in its geographical spread, so did the need to expand the composition and functions of the Commission as reflected in various reports such as Report of the Committee to Inquire into Terms and Conditions of Service of the Judiciary, 1991-1992, the Report of the Committee on the Administration of Justice, 1998, and the Final Report of the Task Force on Judicial Reforms, 2009 - 2010. Although the latter Report advised against including a nominee of the PSC as a member of JSC and explained that following the de-linking of the Judiciary from mainstream civil service in 1993, the role of the PSC in the JSC would be superfluous, the final (present) *Constitution* retained its membership. In accordance with the aforementioned reports, the JSC's composition was expanded, and its functions enhanced.

B.Background

5. On February 9, 2018 the President nominated the 5th respondent as a representative of the PSC under article 171(2)(g) and the 6th and 7th respondents as representatives of the public to the JSC under article 171(2)(h). Thereafter, on February 13, 2018 the President

forwarded the names of the three respondent nominees to the National Assembly for vetting and approval.

6. Pursuant to section 6 of the *Public Appointments (Parliamentary Approval) Act*, the National Assembly, after giving public notice of the vetting exercise, conducted an approval hearing on February 21, 2018. In the process, it received three written objections on the suitability of the 6th respondent. Two of the objections, however, failed the criteria of admission and were struck out, leaving only one by Dr George Lukoye (the 8th respondent). The 8th respondent was the Secretary of the Kenyatta University Chapter of the Universities Academic Staff Union. He brought the complaint and swore an affidavit on behalf of the Union.

7. According to the affidavit, the 6th respondent was alleged to have occupied the office of the Vice Chancellor of Kenyatta University for 10 years without being lawfully appointed, a matter that was litigated in ELRC Petition No 128 of 2016, *Okiya Omtatah Okoiti v Kenyatta University Council & 6 others*. It was further claimed that she had influenced Kenyatta University Council and/or Council Committee to recommend a fraudulent exorbitant exit package payment in her favour. That exit package was the subject of another court case in ELRC Civil Case No 2010 of 2016, *Olive Mugenda v Kenyatta University & another*. She was also accused of financial misappropriation, corruption, abuse of office, irregular payment of allowances and irregular recruitment of staff.

8. The 6th respondent denied the allegations and maintained that the issues raised were *sub-judice* ELRC Petition No 128 of 2016 and ELRC Civil Case No 2010 of 2016 which were, at the time the complaints were lodged, pending conclusion before the Employment and Labour Relations Court. She, nonetheless, denied allegations of financial mismanagement and explained that the Ethics and Anti-Corruption Commission (EACC) which had conducted investigations in respect of these allegations found no evidence and closed the file.

9. Ultimately, after considering the complaints and substance of the complaints, the National Assembly rejected the complaints and approved the appointments of the three respondents, who were subsequently formally appointed as members of the Commission.

C. Litigation History

i. Before the High Court

10. Following the approval of the 5th, 6th and 7th respondents by the National Assembly, Katiba Institute (the appellant), a registered constitutional research, policy and litigation institute, petitioned the High Court in Constitutional Petition No 84 of 2018 to challenge the same.

11. As far as the appellant was concerned, the nomination of the 5th respondent was invalid for the reason that it was the President, and not the PSC that nominated him contrary to article 171(2)(g) of the *Constitution*. In addition, the 5th respondent's nomination was made outside the strictures of articles 73(2)(a), 232 and 234(2)(c) of the *Constitution* as well as section 46 of the *Public Service Commission Act, 2007* which underpin the requirement of fair competition and merit as a basis of nomination and/or appointment. The appellant was also concerned that the National Assembly had failed to vet the 5th respondent in accordance with section 7 of the *Public Appointments (Parliamentary Approval) Act*.

12. Regarding the 6th and 7th respondents, the appellant claimed that their nomination was contrary to articles 10 and 232(1)(g) of the *Constitution* on account of lack of fair competition and merit; that the National Assembly did not vet the candidates in accordance with section 7 of the *Public Appointments (Parliamentary Approval) Act*; and that the National Assembly disregarded the integrity questions raised against the 6th respondent by the 8th respondent.

13. In the appellant's view, the nomination of the 5th, 6th and 7th respondents blurs the separation of powers between the Executive and the Judiciary; and constitutes a direct threat to judicial independence enshrined under articles 160(1) and 172(1) of the *Constitution*. In any case, the appellant argued, the nomination was vitiated by the lack of public participation.

14. Finally, the appellant challenged the constitutionality of Section 15 of the *Judicial Service Act* on the grounds that it does not give legislative guidance on the qualifications and/or identification of persons to be appointed as representatives of the public in the JSC under article 171(2)(h) and therefore violates article 250(2)(a) and (3) of the *Constitution*; that it does not require merit or fair competition in the appointment of persons envisaged by article 171(2)(h) and for that reason, is inconsistent with articles 10 and 231(1)(g) of the *Constitution*; and that it purports to give the President a role in the appointment of members of the JSC under article 171(2)(b), (c), (d), (f) and (g) of the *Constitution* against the intent of the *Constitution*.

15. Dr George Lukoye, the Kenya National Commission on Human Rights and Africa Center for Open Governance, the 8th, 9th and 10th respondents, respectively supported the petition.

16. In opposition, the Attorney General and PSC (1st and 2nd respondents) challenged the competence of the petition on the basis that by dint of article 171(2)(g) and (h) as read together with section 15 of the *Judicial Service Act*, the 5th, 6th and 7th respondents were deemed to have been appointed the moment they were approved by the National Assembly; and as such, they could only be removed through the procedure prescribed under article 251 of the *Constitution*. They also argued that the High Court lacked the authority to review the

merits of the vetting and approval process of the 5th, 6th and 7th respondents by the National Assembly. Besides, they contended, the nomination and subsequent approval of the 5th, 6th and 7th respondents were above board.

17. The National Assembly's (3rd respondent) position was that it had carried out the vetting and approval process of the 5th, 6th and 7th respondents in strict conformity with the *Constitution* and all applicable laws; that it considered the integrity of the three respondents including the objection to the suitability of the 6th respondent; that there is no criteria for the appointment of the representatives of the public in the JSC under article 171(2)(h) except those spelt out in the article itself; and that article 232 of the *Constitution* was not applicable since it sets out the values and principles of public service as opposed to criteria for appointment of persons under article 171(2)(h).

18. The JSC did not take any position in these arguments opting to remain neutral and to watch from the sidelines.

19. The 5th, 6th and 7th respondents opposed the petition and urged that they were validly nominated and successfully vetted leading to their appointment.

20. Upon considering these arguments, the High Court (Mwita, J) by a judgment dated July 6, 2018 found, with regard to the 5th respondent, that article 171(2)(g) grants the mandate and discretion to PSC to designate its representative to JSC without any conditions; that from the evidence, it was the PSC and not the President that nominated the 5th respondent; and that there is no requirement for fair competition under article 171(2)(g) of the *Constitution*. Finally, the learned Judge noted that by virtue of article 171(2), the 5th respondent's nomination was not subject to approval by the National Assembly, and therefore the approval hearing conducted by the National Assembly was inconsequential, unconstitutional and a nullity.

21. The court found in respect of the 6th and 7th respondents, that article 171(2) confers discretion on the President to nominate a woman and a man who are not lawyers to represent the public; that apart from these requirements, the article does not place any additional conditions on the appointments, save for approval by the National Assembly; and that in discharging that mandate, the National Assembly did subject the appointments to public participation.

22. As to the allegations of corruption against the 6th respondent, the High Court held that those claims could only be determined in the two suits which were pending before the court. The court was also satisfied with the 6th respondent's explanation that the EACC by a letter dated October 1, 2013 confirmed that, having conducted full investigations, it found no incriminating evidence against the 6th respondent. In any event, the High Court considered

that on the basis of the doctrine of separation of powers, it was not open to it to involve itself in further interrogation of the allegations of the 6th respondent's integrity. The issue having been considered and determined by the National Assembly, that issue was spent and could not be raised before the High Court as though on appeal over the merit of the decision of the National Assembly. Rather, the court's mandate was limited to the determination of the question, whether the National Assembly, in approving the three candidates, acted in accordance with the *Constitution* and the law. The High Court ultimately found no fault in the approval process conducted by the National Assembly leading to the appointment of the 6th and 7th respondents.

23. On the constitutionality of section 15(2) of the *Judicial Service Act*, the High Court found no constitutional inconsistency to warrant the striking out of the provision.

24. In the end, the High Court partially allowed the petition by issuing a declaration that the approval of the 5th respondent by the National Assembly was of no effect as no such requirement is provided for under article 171(2)(g) of the *Constitution*. The rest of the prayers in the petition were, however, dismissed with no order as to costs.

ii. Before the Court of Appeal

25. With 5 grounds of appeal, the appellant sought to overturn the decision of the High Court before the Court of Appeal. On the other hand, the National Assembly filed a cross-appeal challenging that part of the judgment that declared that there was no requirement for it to approve the appointment of the 5th respondent under article 171(2)(g) of the *Constitution*. The National Assembly contended that this issue was neither pleaded nor canvassed before the High Court for determination.

26. In the main appeal, the appellant as well as the 8th, 9th and 10th respondents, who supported it, maintained the positions they held in the High Court but added that, at the time of the 7th respondent's nomination by the President on February 9, 2018, there was no vacancy in the JSC because the 7th respondent's predecessor in JSC, Kipng'etich Arap Korir Bett, had not resigned from that position.

27. Likewise, the 1st, 2nd, 3rd, 5th, 6th and 7th respondents maintained their grounds in opposing the appeal, while JSC maintained a neutral stance.

28. From the pleadings and arguments, the Court of Appeal framed the following 4 issues for determination:

    i. whether courts have the jurisdiction to review the merits or demerits of decisions made by the National Assembly;

    ii. whether section 15(2) of the *Judicial Service Act* is unconstitutional;

iii. whether articles 10, 232 and 234 of the *Constitution* applied to the 5th, 6th and 7th respondents' nomination and/or appointment; and

iv. whether the 5th respondent's appointment required vetting and approval/by the National Assembly.

29. The Court of Appeal dismissed the appellant's appeal and allowed the National Assembly's cross-appeal. In doing so, the court agreed with the High Court that its mandate did not include delving into the merits of the vetting and approval process and/or replacing the National Assembly's decision with its own; that there is no requirement for fair competition or merit-based selection in nomination of persons under article 171(2)(h); and that section 15(2) of the *Judicial Service Act* was not inconsistent with the *Constitution*. In allowing the cross-appeal, the court also agreed with the National Assembly that the High Court went off on a tangent by pronouncing itself on the question of whether the 5th respondent's approval by the National Assembly was necessary when that question had not been pleaded or addressed by the parties.

iii. Before the Supreme Court

30. This outcome, once more aggrieved the appellant who lodged this appeal as of right under article 163(4)(a) of the *Constitution* on seven grounds, which the court has further condensed into 3 as follows:

i. ' Whether there is a requirement for merit and fair competition in appointments to the JSC under articles 171(2)(g) and (h) as read with articles 10, 73(2) (a) and 250 of the *Constitution*;

ii. Whether section 15(2) of the *Judicial Service Act* was unconstitutional; and

iii. Whether the process of nomination and subsequent appointment of the 5th, 6th and 7th respondents was valid.

D. Parties' Submissions

i. The appellant's submissions (Katiba Institute)

31. In the written submissions, the appellant clustered and argued its appeal under various heads, the effect of which may be summarized as we have done above in paragraph 30;

i. Whether there is a requirement for merit and fair competition in appointments to the JSC under articles 171(2)(g) and (h) as read with articles 10, 73(2)(a) and 250 of the *Constitution*;

32. According to the appellant, the Court of Appeal erred by purporting to interpret article 171(2)(g) and (h) of the *Constitution* in isolation of articles 10 and 73(2)(a). In the appellant's opinion, article 10, as appreciated by Mutunga, CJ (Rtd) in *Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others*, SC Applic No 11 & 12 of 2016; [2016] eKLR, applies and binds all persons including members of the JSC being state officers. Consequently, in line with the rules of harmonious and holistic interpretation of the *Constitution*, article 171(2)(g) and (h) must be read alongside articles 10 and 73(2)(a) so as to meet the requirement of merit and fair competition in appointments to all state organs including the JSC. To support this proposition, the appellant cited the court's opinion in *Council of Governors & 47 others v Attorney General & 3 others (interested parties); Katiba Institute & 2 others (amicus curiae)*, SC Reference No 3 of 2019; [2020] eKLR.

33. Accordingly, the appellant posited that, apart from the Chief Justice and the Attorney General who are members of the JSC by virtue of the offices they hold, all the other members under articles 171(2)(b)(c)(d) and (f) are elected in free and fair elections, save for the members who are appointed or nominated under article 171(2)(g) and (h). Therefore, the judgment of the Court of Appeal immunizes the nomination and appointment of members under articles 171(2)(g) and (h) from the requirement of merit and fair competition, which in turn confers an untrammelled discretion that is incompatible with the *Constitution* and Kenya's international obligations under Principle V of the Commonwealth (Latimer House) Principles on the Three Branches of Government, to uphold merit and proven integrity as the criteria for eligibility for appointment to public office.

34. The appellant further contended that the 5th respondent was not validly nominated by the PSC as required under the *Constitution*, but was instead nominated by the President who has no role whatsoever in the nomination of a representative of the PSC; that the Court of Appeal ignored this evidence in its determination; and that the President forwarding the name of the 5th respondent to the National Assembly for approval, purportedly in exercise of his powers under article 171(2) as read with article 250(2)(b) of the *Constitution*. As a result, the 5th respondent's nomination was *ultra vires* article 171(2)(g), section 36 of the *Public Service Commission Act* and regulation 3 of the Public Service Commission Regulations 2005 (repealed).

35. For the 6th and 7th respondents, the appellant has invited us to find that the National Assembly failed to consider relevant factors that had been brought to its knowledge, namely, the serious unresolved questions of the 6th respondent's integrity and the irrationality of

the 7th respondent's nomination which occurred before a vacancy arose in the JSC and that consequently in those circumstances, the Court of Appeal ought to have nullified the appointments of the 5th, 6th and 7th respondents to the JSC for having failed to meet the standards of fairness, competition and merit.

ii. Whether Section 15(2) of the *Judicial Service Act* was unconstitutional.

36. The appellant maintained that section 15(2) of the Js Act is contrary to the provisions of articles 171(2)(g) and (h) of the *Constitution* for failing to provide for the requirement of merit and fair competition in appointment of members of the JSC; and that the section renders the vetting and approval by the National Assembly a hollow exercise devoid of constitutional meaning.

37. The appellant also claimed that the Court of Appeal failed to determine whether section 15(2) is also unconstitutional for requiring the names of the nominees under article 171(2)(b), (c), (d), (f) and (g) to be submitted to the President for appointment. Yet it is obvious that under article 171(2)(h) the President's role is limited to appointment of only two persons to represent the public. On account of the provisions of section 15(2), the appellant argued that the President may delay or refuse to appoint elected members of JSC, thereby impacting on the independence of the JSC and Judiciary.

iii. Whether the process of nomination and subsequent appointment of the 5th, 6th and 7th respondents was valid.

38. For all the reasons given, the appellant prays that the court finds that the process nomination and subsequent appointment of the 5th, 6th and 7th respondents was invalid.

39. The appeal is supported by the 9th and 10th respondents who have fully associated themselves with the appellant's submissions and equally prayed that this appeal be allowed, the judgment of the Court of Appeal set aside, and costs awarded to them.

ii. The 1st, 2nd and 5th Respondents' submissions (AG, PSC & Patrick Gichohi)

40. The appeal was opposed by the 1st 2nd and 5th respondents in their joint submissions. On the first question, they submitted that the nominees under article 171(2)(h) of the *Constitution* are only subject to the requirements that they are of the opposite gender, non-lawyers and approval by Parliament; that whereas fair competition is not a mandatory requirement, the 5th respondent's nomination was in strict conformity with articles 10, 27 and 73(2)(a) of the *Constitution*, sections 14(1), 36, 37 and 46 of the *Public Service Act* (PSC Act) as read with regulation 3 of the Public Service regulations 2005; that there was public participation in respect of the 5th respondent among the Commissioners of the PSC as a result of which

the commission identified him; that the 5th respondent was appointed as a member of PSC pursuant to articles 233(2) of the *Constitution* as read with sections 7(3), 8 and the first schedule to the PSC Act; that he was competitively nominated by PSC and approved by the National Assembly; and that he is a highly qualified and a decorated public servant having previously served in parliament for 33 years and 5 years at the PSC, thereby meeting both merit and relevant qualifications.

41. On the second question, the 1st, 2nd and 5th respondents submitted that the exercise of presidential powers of appointment under article 171(2)(h) is in the nature of executive authority and is discretionary; that the power can only be checked by a political organ such as Parliament. They gave the example of the exercise of that power by the President in nominating for appointment Cabinet Secretaries, which nominations do not require competitive selection, but is subject to approval by Parliament.

42. On the constitutionality of section 15(2) of the JS Act, they posited that the Act cannot fetter or qualify the *Constitution*; and it cannot restrict the power of nomination given to PSC under article 171(2)(g) and donated to the President under articles 172(2) as read with article 250(2)(c) of the *Constitution*. They urged this court to be persuaded by the decision of the Court of Appeal in *Mumo Matemu v Trusted Society of Human rights Alliance* , Civil Appeal No 290 of 2012; [2013] eKLR on the doctrine of separation of powers in a similar situation. They maintained that whereas courts have the power to nullify and revoke an appointment that violates the spirit and letter of the *Constitution*, the courts will hesitate to enter into the arena of merit review of a decision of another constitutional organ of the State that has been reached procedurally.

43. Regarding public participation, the 1st, 2nd and 5th respondents submitted that the requirements for public participation prior to and during the process leading to the nomination, vetting and approval of the nominees were satisfied strictly in accordance with article 171(2)(g) and (h) as read with article 250(2) of the *Constitution*, the *Public Appointments (Parliamentary Approval) Act*, *PSC Act* and PSC Regulations and Standing Order No 42(1) of the National Assembly Standing Orders.

ii. The 3rd respondent's submissions (National Assembly)

44. Though the 3rd respondent (the National Assembly) did not file submissions, counsel representing it indicated from the Bar that they opposed the appeal, relying on its grounds of objection dated October 12, 2020 and the replying affidavits sworn by Mr Jeremiah Ndombi before the High Court. We would wish to emphasize that pleadings filed before this court are independent of those filed before the courts below. It is absurd to suggest, as counsel in effect did, that we look for his objection and affidavit filed in the High Court. We shall consider only submissions made before us.

45. In the oral submissions made on its behalf, the National Assembly maintained that the appellant has not contested that there was an approval process in the National Assembly conducted in accordance with article 171 of the *Constitution* and sections 7, 5 and 6 of the *Public Appointments (Parliamentary Approval) Act*. That process, it added, was preceded by public participation where members of the public were invited to provide their views on the suitability of the nominees and upon receipt of three memoranda, which were all against the 6th respondent, the latter was invited to respond to only one as the other two were rejected by the House. In the end, the house was persuaded that the single remaining complaint was sub-judice and similarly dismissed it.

ii. The 4th Respondent's submissions (JSC)

46. Just like it did before both the superior courts below, the 4th respondent took a neutral position before us, maintaining that it was not a party to the circumstances leading to the appointment of the Commissioners.

ii. The 6th respondent's submissions (Prof. Mugenda)

47. Equally, opposing the appeal, the 6th respondent took the view that section 15 of the *JS Act*, merely mirrors article 171(2) of the *Constitution* and cannot provide for any more qualifications than are provided for in the article; that requirements like merit and fair competition are not part of the constitutional framework. She cited the cases of *Tukero Ole Kina v Attorney General & Anothe*, [2019] eKLR; *Olum & Another v Attorney General* [2002] EA 508 and *Queen v Big M Drug Mart Ltd* [1985] 1 SCR 295 to the effect that both purpose and effect are relevant in determining the constitutionality of legislation. She submitted that article 73(2) on the guiding principles of leadership and integrity, is distinct from article 171(2) and that the former does not constitute additional criteria to be imported into article 171(2).

48. The 6th respondent expressed satisfaction with the evaluation of evidence by the Court of Appeal and its conclusion on questions of her integrity; that the courts below were not at liberty to examine the merits of allegations that were pending before another court and in respect of which the National Assembly had made a determination.

ii. The 7th respondent's submissions (Felix Koskei)

49. On the unconstitutionality of section 15(2) of the JS Act, the 7th respondent submitted that there is a presumption of constitutionality of the provision which is grounded on realistic appreciation of the limits of judicial power. He urged the court to follow the persuasive pronouncements in *Attorney General v Law Society of Kenya & Another*, Civil Appeal 133 of 2011; [2017] eKLR, *Kizito Mark Ngaywa v Minister of State for Internal Security and*

Provincial Administration & another; HC Petition No 4 of 2011; [2011] eKLR, and the Indian case of *Hamdarddawa Khana v Union of India & others,* 1960 AIR 554, to hold that the legislative intent of the statute tilts towards constitutionality.

50. On the application of articles 171(2)(g) and (h) and 250 as read with articles 10 and 73(2)(a) on the requirement for merit and fair competition, the 7th respondent has submitted that the *Constitution* envisages appointments under article 171(2)(h) to be sui generis and distinct from ordinary appointments in the public service. Properly interpreted, article 171(2)(h) does not require fair competition; and that the words of articles 171(2)(h) and 250(2) of the *Constitution* are plain on the presidential powers to appoint persons to serve in the JSC and no more is required.

51. Further, the 7th respondent contended that article 171 is self-executing as it provides for the mode of identification, qualifications and the manner of appointment. Where the *Constitution* itself makes it clear how membership should be identified and how appointments should be made, including conferring discretion in certain instances, the court may not question that discretion as long as it is exercised in accordance with the *Constitution* and the law.

52. On whether there was irrationality in his vetting, the 7th respondent submitted that his nomination was not prejudicial to anybody; was subject to thorough vetting by Parliament and was in accordance with constitutional mandate and competence of the appointing authority.

ii. The 8th respondent's submissions (Dr Lukoye)

53. Though Mr Ochiel Dudley, holding brief for Mr Odongo, who is on record for the 8th respondent, indicated during the hearing that the 8th respondent would rely entirely on his written submissions, it has turned out that neither the hard nor online copies were filed by the 8th respondent.

E.Issues for Determination

54. We reiterate what we have stated in paragraph 30 above, that all these arguments, in our judgment, require answers to only three questions:

    i. 'Whether there is a requirement for merit and fair competition in appointments to the JSC under articles 171(2)(g) and (h) as read with articles 10, 73(2)(a) and 250 of the *Constitution*;

    ii. Whether section 15(2) of the *Judicial Service Act* was unconstitutional; and

iii. Whether the nomination and subsequent appointment of the 5th, 6th and 7th respondents were valid.

F. Analysis and Determination

Jurisdiction of this court

55. It is our responsibility, as a matter of practice, to independently satisfy ourselves that this appeal is properly before the court, even if the issue of jurisdiction has not been raised. In this appeal, however, the 6th respondent's objection to jurisdiction was limited to the argument by the appellant that the Court of Appeal drew inferences not supported by the evidence. According to the 6th respondent, this issue does not involve the interpretation or application of the *Constitution*.

56. The appeal is brought as of right pursuant to article 163(4)(a) of the *Constitution*. From the petition in the High Court, the arguments before both superior courts below as well as the judgments of the two courts, we have no doubt whatsoever that the subject matter involves the interpretation and application of articles 171 and 250 of the *Constitution*. The appeal, for these reasons, meets the principles enunciated in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another,* SC Pet No 3 of 2012; [2012] eKLR.

Turning to the first question,

i) Whether there is a requirement for merit and fair competition in appointments to the JSC under articles 171(2)(g) and (h) as read with articles 10, 73(2) (a) and 250 of the *Constitution*;

57. The arguments around this question relate to the nomination of the 5th respondent which the appellant together with the 8th, 9th and 10th respondents had challenged in the High Court as being invalid for the reasons that it was done by the President as opposed to the PSC contrary to article 171(2)(g) of the *Constitution*; that it was made outside the strictures of articles 73(2)(a), 232 and 234(2)(c); and that the 5th respondent was irregularly vetted by the National Assembly contrary to article 172(2)(g).

58. As for the 6th and 7th respondents, it was claimed that their nomination was also not based on fair competition or merit contrary to articles 10 and 232(1)(g) of the *Constitution* and that they failed to meet the integrity test under Chapter Six of the *Constitution*; and that the National Assembly disregarded the fact that the 7th respondent's nomination was made before his predecessor resigned from office.

59. The resolution of the opposing arguments lies in the interpretation and application of articles 171(2)(g) and (h) as read with article 250(2) of the *Constitution* and section 15(2) of the JS Act.

60. The *Constitution* by force of article 2 is declared the supreme law; the law which binds all persons and all State organs; whose validity or legality is not subject to any kind of challenge. It further declares that any law that is inconsistent with it, is void to the extent of that inconsistency. Further, any act or omission in contravention of the *Constitution* is invalid, while every person is under obligation to respect, uphold and defend it.

61. The exercise of sovereign power of the people, delegated to State organs, the Legislature, the Executive, the Judiciary and independent tribunals are constrained by the principle that these organs may exercise no powers and perform no functions beyond those conferred upon them by law. In this sense, the *Constitution* entrenches the principle of legality and provides the foundation for the control of public power.

62. While bearing these principles in mind, we turn to consider whether the *Constitution* requires merit and fair competition in the appointments to the JSC under articles 171(2)(g) and (h) as read with articles 10, 73(2)(a), 232(1)(g) and 250 of the *Constitution*. This issue turns on the construction of these articles.

63. The *Constitution* itself at article 259 provides for the manner of its construction. It must be interpreted in a manner that, among other things:

> ' (a) Promotes its purposes, values and principles;
>
> b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> c. Permits the development of the law; and
>
> b. Contributes to good governance.'

64. This article has been affirmed by the court; *In the Matter of Interim Independent Electoral Commission, SC Application No 2 of 2011; [2011] eKLR* and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, SC Advisory Opinion No 2 of 2012; [2012] eKLR, in a long line of many other cases. In the latter, the Court observed that:

> ' 8. In interpreting the *Constitution* and developing jurisprudence, the court will always take a purposive interpretation of the *Constitution* as guided by *Constitution* itself.'

65. Earlier, *In the Matter of Kenya National Commission on Human Rights*, SC Reference No 1 of 2012; [2014] eKLR, the court defined what it means to holistically interpret the *Constitution* as follows:

> ' But what is meant by a 'holistic interpretation of the *Constitution*'? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.'

66. To understand the import and tenor of a provision of the *Constitution*, the entire Constitution has to be read as an integrated whole, because the *Constitution* embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposely to give effect to those values and principles. Where words used in any provision of the *Constitution* are precise and unambiguous, then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because, to borrow the words of Burton, J in *Warburton v Loveland*, (1832) 2 D & Cl 480, the language used 'speak the intention of the legislature.'

67. Those values and principles reflect our historical and political realities and the people's aspirations for a democratic State, built on the rule of law and respect for human rights.

68. We reproduce below article 171(2)(g) and (h) to answer the question whether, when read together with articles 10 and 73(2)(a), it requires merit and fair competition in appointments to the JSC. These two articles deal with the application of national values and principles of governance, integrity, fairness, transparency and accountability in selection, election or implementation of public policy decisions.

69. Our focus turns to article 171 which reads as follows, with specific emphasis on (g) and (h):

> ' The Commission shall consist of
>
> a. The Chief Justice, who shall be the chairperson of the Commission;
>
> b. One Supreme Court judge elected by the judges of the Supreme Court;
>
> c. One Court of Appeal judge elected by the judges of the Court of Appeal;

d. One High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;

e. The Attorney-General;

f. Two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;

g. One person nominated by the Public Service Commission; and

h. One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.'

70. It is apparent from this provision that membership to the JSC is four- pronged; by virtue of office, for example the Chief Justice and the Attorney General; through elections by peers, namely, representatives of the Supreme Court, Court of Appeal, High Court, the Magistracy and the advocates; by nomination by the PSC, and the fourth category is through appointment by the President.

71. This ground concerns the third and fourth categories. It questions the validity of appointment of the 5th respondent, a nominee of the PSC to the JSC and the appointment of the 6th and 7th respondents to represent the public. Paragraphs 6 and 7 of the Petition filed in the High Court, reproduced below summarise the appellant's case:

' First, the President's purported nomination of Patrick Gichohi as a member of the Judicial Service Commission is assailed as ultra vires article 171(2)(g) of the *Constitution*. Second, the nominations of Olive Mugenda and Felix Koskei as members of the Judicial Service Commission under article 172(2)(h) of the *Constitution* is impugned as having been bereft of competition or merit as the basis of appointment contrary to article 232(1)(g) of the *Constitution*. Third, the petitioner queries the constitutionality of section 15 of the *Judicial Service Act*, 2011 in so far as it does not proffer any legislative guidance the manner for identification or specific qualifications for appointment to represent the public, as a member of the Judicial Service Commission under article 172(2)(h).'

Claims against the 5th Respondent.

72. According to the particulars contained in paragraphs 47 to 65 of the High Court petition, the nomination of the 5th respondent was challenged for being *ultra vires* article 171 as it was made by the President, as opposed to the PSC; and secondly, that at the time of his nomination, he had retired from the public service.

73. The nominating entity is the PSC. From the history we have given in paragraphs 2,3 and 4 above, it is apparent to us that a nominee of the PSC to the JSC has traditionally been a serving member. section 184(1)(c) of the 1963 Constitution, for instance, stipulated, among other things, that Judicial Service Commission shall consist of:

> ' (c) Two persons who are for the time being designated in that behalf by the Governor-General, acting in accordance with the advice of the Chairman of the Public Service Commission, from among the members of that Commission'
>
> This was later amended. Section 68(1)(d) of the former Constitution replaced the two members with the chairman of the Public Service Commission.

74. Today the *Constitution* simply states a nominee of the PSC to the JSC shall be that 'one person nominated by the Public Service Commission'. It does not state the person must be a member or chairperson of the PSC. One person is just one person, who must be nominated by the PSC.

75. It is not a disqualifying factor under article 233(3) for a member of the PSC to be a retired public servant. Indeed, by section 8(2) of the *Public Service Act*, a member of the PSC is only required to be a citizen of Kenya; a holder of a degree from a university recognized in Kenya; with at least ten years' experience in their respective profession; and meets the requirements of leadership and integrity in chapter six of the *Constitution*.

76. We note that although the appellant pleaded before the High Court that the 5th respondent had retired, no such evidence was presented, and more importantly the question was neither addressed nor determined by the learned Judge. Similarly, the issue was neither canvassed by the parties nor resolved by the Court of Appeal. For us, in the first place, whether or not the 5th respondent had retired is a question of fact, the consideration of which we are precluded by the terms of article 163(4) of the *Constitution* from entertaining, and particularly so now, because the superior courts below did not express any opinion on the matter. We say no more on this question.

77. On the claims that the 5th respondent was nominated by the President and not the PSC, our perusal of the record and the sequence of events leading to the submission of the 5th respondent's name to the National Assembly prove this assertion to be inaccurate. What is on record is a letter from the Office of the President dated February 9, 2018 to the Speaker of the National Assembly enclosing the instrument for the nomination of the 5th, 6th and 7th respondents. This alone does not, in our opinion, amount to an appointment or nomination by the President.

78. In her replying affidavit, Alice Otwala, who is described as the Secretary/CEO of PSC, deposed that on January 30, 2018, the PSC received from the Secretary of the JSC a notification of the vacancy of its representative to JSC and requested it to present a nominee for appointment; that pursuant to regulation 3 of the *Public Service Commission Regulations 2005* which allows the Commission to make decisions through consultations, such consultations were held among the commissioners, and the 5th respondent nominated; that subsequently, the PSC held a special board meeting on Monday February 12, 2018 where the 5th respondent's nomination was ratified and the name forwarded to the office of the President for appointment. On March 2, 2018, by Gazette Notice No 2091, the President, citing articles 171(2) and 250 as the basis of his action, appointed the three respondents as members of the JSC. We confirm, however, that although the notice makes reference to article 250, it is article 171(2)(g) and (h) that was expressly and specifically relied on in the notice.

79. Article 171(2)(g) is crisp and laconic; that the JSC shall consist of, among other members, 'one person nominated by the Public Service Commission.' Nothing has been shown to us to suggest that the appointment of the 5th respondent was made by President. Instead, the evidence on record demonstrates fairly clearly the steps taken upon declaration by the JSC of the vacancy for the representative of the PSC. The plain language of article 171(2) (g) simply requires the PSC to present a nominee. The article, however, does not make provision of the mechanism and procedure of such nomination. We are satisfied that since the procedure for identifying its nominee is an internal affair, determined at the discretion of the PSC itself, and in view of the uncontroverted evidence of Alice Otwala, the method adopted was consultative and inclusive.

80. The third reason for challenging the appointment of the 5th respondent was that he was nominated outside the strictures of article 232 and 234(2)(c), section 46 of the *Public Service Commission Act*, 2017, all of which, underpin *inter alia*, the constitutional requirement of fair competition and merit as a basis of appointment.

81. One of the values and principles of public service in terms of article 232 of the *Constitution* is fair competition and merit as the basis of appointments and promotions in the service.

We have in the previous paragraphs noted that article 171(2)(g) does not give any criteria for arriving at the nominee of the PSC but concluded that the nomination is at the discretion of the PSC. The sovereign people of Kenya deliberately entrusted the PSC to nominate 'one person' to represent it in the JSC. We also note that the PSC Act under section 46(1) prescribes that where the PSC is required by the *Constitution* or any legislation to nominate or recommend a person for appointment, the Commission shall abide by the Constitutional requirement of fair competition and merit as a basis of appointment and ensure that the appointment facilitates achievement of a representative public service. PSC in identifying its nominee internally, we have noted, was guided by the values and principles espoused in the *Constitution* and the law. The fair competition and merit requirement must be seen in this context and circumstances. The commissioners themselves, as opposed to the members of the public or any other entity, including the court, are more qualified to determine the question of merit in the nomination. No member of the PSC complained of unfair treatment or discrimination.

82. The appointment of the 5th respondent has also been opposed on the ground that the National Assembly, in vetting the 5th respondent, failed to interrogate whether the PSC complied with the mandatory considerations and the procedure to arrive at the nominee under section 7 of the *Public Appointments (Parliamentary Approval) Act*. For this alleged failure, the appellant prayed for a finding that the approval of the 5th respondent by the National Assembly was ultra vires section 7 of the *Public Appointments (Parliamentary Approval) Act*, 2011 and therefore did not meet the standard of strict scrutiny, hence invalid.

83. The High Court found that the National Assembly had no constitutional or legal mandate to approve a nominee under article 171(2)(g). This conclusion was the subject of cross-appeal by the National Assembly. On this, the Court of Appeal faulted the High Court, holding that the issue was not pleaded or canvassed before the learned Judge, for which reason the cross-appeal was allowed.

84. It is common factor that after being nominated by the PSC, the 5th respondent's name was forwarded by the President to the National Assembly for vetting before appointment to the JSC. The 5th respondent did not resist this process but indeed successfully went through it.

85. Though the Court of Appeal, in allowing the cross-appeal, held that the vetting of the 5th respondent was neither pleaded nor canvassed before the learned Judge of the High Court, from our own examination of the record, we note that in the appellant's submissions dated April 27, 2018 before the High Court, it addressed the irrationality of the vetting of the 5th respondent. Before the High Court, Mr Ochiel highlighting the 5th ground submitted on the need of a rationality test arguing that the National Assembly ought to have applied strict scrutiny in approving any action of the Executive and where the action involves appointment

to public posts, all relevant factors must be considered by the National Assembly. Clearly, the issue was squarely before the High Court and the learned Judge was justified to determine it.

86. Although we too agree, with respect, that the vetting of the 5th respondent by Parliament was not prejudicial to him or any party, it is important to always bear in mind the constitutional edict that state organs can only exercise the powers and perform the functions conferred upon them by the *Constitution* and the law. It is our considered view that it was contrary to and inconsistent with the *Constitution* for Parliament to purport to vet the 5th respondent. Again, we resort to the plain language of article 171(2)(g), that membership of the JSC includes 'one person nominated by the Public Service Commission.'

87. Article 250(2) that provides for approval of Commissioners by the National Assembly is a provision of general application to all Chapter Fifteen Commissions and independent offices, 'except to the extent that this Constitution provides otherwise'. See article 248(1). Apart from Chapter Fifteen, the *Constitution* makes specific and distinct provisions for each of the ten Chapter Fifteen Commissions. They are constituted differently. Some have no set number of members, yet some have no procedures for appointment of the members. For example, under article 88, the *Constitution* interestingly only provides for those who do not qualify for appointment to the Independent Electoral and Boundaries Commission, without stating the numbers or the procedure for their appointment. It is section 6 of the *Independent Electoral and Boundaries Commission Act* (IEBC Act) that sets out the qualification for the chairperson or members. The *IEBC Act* defines the chairperson and members as those appointed 'in accordance with article 250(2)'. It specifically provides, in the First Schedule that the President shall, within seven days of receipt of the names approved by the National Assembly, by notice in the Gazette, appoint the Chairperson and the members of the Commission.

88. Similarly, apart from establishing the Teachers Service Commission, article 237 does not specify the membership or the procedure for appointment. Section 8(9) of the *Teachers Service Commission Act* confers on the President, after approval of the National Assembly, the power to appoint members of the TSC. In the same vein, article 67 establishes the National Land Commission and only prescribes its functions, just as article 59 does with respect to the Kenya National Human Rights and Equality Commission. In both situations, the President, through the enabling legislation, appoints the chairpersons and members. All the statutes relating to these commissions attribute the process and the power of appointment to article 250. Article 250, as a general provision is called to aid to fill up the lacuna where there are no express constitutional provisions. Article 171 is a self- executing provision, complete with the mode of identification, the nature of qualifications and the manner of appointment of members of the JSC.

89. Had the framers intended that the nominee of the PSC be vetted by Parliament, just like the two members representing the public under article 171(2)(h) they would have expressly made a similar provision. Where the framers required approval by Parliament of any appointment, they expressly said so in the *Constitution*. For example, under article 215, the chairperson of the Commission on Revenue Allocation is nominated by the President and approved by the National Assembly. The chairperson, vice chairperson and seven members of the Public Service Commission are appointed by the President with the approval of the National Assembly under article 233. Outside the Chapter Fifteen commissions, the appointment of the Chief Justice and the Deputy Chief Justice under article 166, (and not of any other Judge) after the recommendation of the JSC, is subject to the approval by the National Assembly. Clerks of the Houses of Parliament are appointed by the Parliamentary Service Commission under article 128 but with the approval of the relevant House. Under article 152, the President nominates and, with the approval of the National Assembly, appoints Cabinet Secretaries.

90. These examples are enough to show that article 171(2)(g) does not envisage or indeed require a nominee of the PSC to the JSC to be approved by Parliament and that the approval of the 5th respondent by the National Assembly was a bonus had no consequence, therefore null and void.

The decision of the Court of Appeal on this aspect of the appeal is set aside.

Claims against the 6th and 7th Respondents.

91. The challenges against the appointment of the 6th and 7th respondents are to the effect that, contrary to the provisions of article 232 and the relevant implementing statutes as specifically required by article 232(1)(g), the nomination of the 6th and 7th respondents were not based on fair competition or merit, and therefore unconstitutional and invalid. In addition, it was pointed out that the 7th respondent's nomination was made before his predecessor resigned from office, a fact the National Assembly ought to have inquired into, it was submitted.

92. To the extent that the National Assembly failed to interrogate the two, their appointment was contrary to the mandatory requirements of section 7 of the *Public Appointments (Parliamentary Approval) Act*, 2011; and that the National Assembly failed to satisfy itself that the procedure used to arrive at the nominees was in consonance with section 7 of the *Public Appointments (Parliamentary Approval) Act*, 2011.

93. The National Assembly was accused of disregarding all the integrity questions that were raised against the 6th respondent; that it did not consider at all the investigation and prosecution of the 6th respondent on allegations of criminal impropriety.

94. The two questions posed by these claims are, whether the 6th and 7th respondents were required, before their nomination, to satisfy the fair competition and merit criteria; and whether the 6th respondent was disqualified from nomination for failing to meet the integrity test.

95. Starting with the latter question, it is common ground that two suits were instituted against the 6th respondent in the Employment and Labour Relations Court, ELRC Petition No 128 of 2016 and ELRC Civil Case No 2010 of 2016 in which allegations of fraud, financial misappropriation, corruption, abuse of office, irregular payment of allowances and irregular recruitment of staff were made.

96. The 6th respondent denied the allegations in her defence before the Employment and Labour Relations Court, the National Assembly and the two superior courts below. She maintained that these issues were sub-judice; and that at any rate, the allegations were investigated by the Ethics and Anti-Corruption Commission (EACC) which upon finding no evidence closed the file. EACC by a letter dated October 1, 2013 confirmed this, and both superior courts below were satisfied that the matter, having been investigated, a decision made by EACC and Parliament having given the 6th respondent a clean bill of health, it was not open to the courts to conduct a merit review of those decisions. The superior courts below noted, though, that the civil actions before the Employment and Labour Relations Court were still pending hearing and determination.

97. For our part, while agreeing with the concurrent conclusions of both the High Court and the Court of Appeal, we find no merit in the argument that the National Assembly disregarded the memorandum which had raised integrity issues against the 6th respondent. It is clear to us from the record that the National Assembly considered the complaints, invited the 6th respondent to respond and, in the end, expressed satisfaction with the explanation proffered.

98. It is now settled on the authority of article 165(3)(d) (ii) and numerous judicial pronouncements, that it is the duty of the court to ensure that State organs comply with the *Constitution*, its values and principles and the law, when discharging their functions to obviate any danger of constitutional violation; and to determine whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with or in contravention of the *Constitution*. The only caveat to this constitutional proclamation is that, in reviewing the administrative actions of these organs, the court must not substitute itself into the organs whose actions or decisions are the subject of review or substitute the impugned decision with its own decision. That is what the doctrine of separation of powers demands. See the persuasive decision in *Kenya Youth Parliament & 2 others v AG & another*, Constitutional Petition No 101 of 2011; [2012] eKLR, our own, in the case of *Judicial*

Service Commission v Speaker of the National Assembly & 8 Others [2014] eKLR, where we restated that:

> ' The *Constitution* disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the *Constitution*, then the Courts are empowered by article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of the *Constitution*.'

See also our decisions in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* SC Petition No 32 of 2014; [2017] eKLR and *Speaker of the Senate & Another v Attorney General & 4 Others* Reference No 2 of 2913; [2013] eKLR.

99. In the instant matter, the court's concern was limited to confirming and being satisfied that the National Assembly acted in accordance with the *Constitution* and the law. The record vindicates the conclusion by both courts. The National Assembly, relying on its own procedures and the *Public Appointments (Parliamentary Approval) Act* conducted an inquiry before satisfying itself that there were no impediments at that stage to disqualify the 6th respondent. It was not for the court, in the absence of any violations by the National Assembly to review its decision.

100. With nothing to show that the National Assembly failed to comply with the *Constitution* and the law in approving the appointment of the 6th respondent, or that the High Court erred in its determination of this issue, the Court of Appeal properly applied its mind to the law, the evidence and reached the correct decision.

101. The next and final front of this set of grounds of appeal is the interpretation of article 171(2)(g) and (h) as read with articles 10, 73(2)(a) 232(2)(a) and 250 of the *Constitution* and also with Section 7 of the *Public Appointments (Parliamentary Approval) Act*. The question being whether there is a requirement for merit and fair competition in appointments to the JSC under article 171(2)(g) and (h)?

102. For the umpteenth time, we remind ourselves that under article 171(2)(h) the membership of the JSC consists of:

> ' (2)
>
> (h). one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly'.

103. We have emphasized that the two members are of opposite gender; they represent the public; they must not be lawyers; appointed by the President and approved by the National Assembly.

104. How does the President identify the candidates to fill the two positions? What criteria does he use to ascertain their suitability, qualification, disposition and experience? Was it the intention of the people of Kenya to entrust the President with full and unfettered discretionary powers to make the appointments of persons to represent them in the JSC on their behalf?

105. It has been suggested that the procedure used to arrive at the nominees was *ultra vires* section 7 of the *Public Appointments (Parliamentary Approval) Act*, 2011, hence invalid; that the guiding principles of leadership and integrity which include selection on the basis of personal integrity, competence and suitability, under article 73(2)(a) was not met; and further, that the values and principles of public service which include fair competition and merit as the basis of appointments were ignored.

106. In short, the only broad issue here is whether the appointment of the 6th and 7th respondents met the test of fair competition and merit. While we entertain no doubt that fair competition and merit are values and principles of public service, we do not think all cases of appointment to a public office must be based on fair competition. It will all depend on the language of the provision of the *Constitution* under which the appointment is to be made. We have said in paragraph 103 above that article 171(2)(h) only requires that for a person to be appointed to represent the public in the JSC, that person has to be either a woman or man, and the person must not be a lawyer. In nominating the person, these are the attributes that the President, acting in good faith and in the best interest of the public, must take into account. He must also consider merit, national values and principles, integrity and national diversity. Nomination by the President is not the end of the process.

107. In approving the nominee, the National Assembly is required to ascertain whether in making the appointments, the President took these factors into account. The suitability of the nominee is further tested by vetting by the Legislature. Members of the public have the opportunity to raise any issues on the candidates' suitability to hold a public office. We may add, by way of observation, that of all the 11 members of the JSC, this is the only category in the entire article 171 where approval by the National Assembly is required before appointment.

108. By way of contrast, the appointment of Principal Secretaries under article 155 or of judges pursuant to article 166 are, respectively, based on the recommendation of the PSC and JSC. Through a competitive process, the two Commissions identify suitably qualified candidates to recommend to the President for appointment. In the case of the former, the nominees

of the President must be approved by the National Assembly, and this is explicitly provided for by the *Constitution*, just as the requirement for fair competition. To import into article 171(2)(h) fair competition is to add an additional layer of requirements over and above those provided by the *Constitution*.

109. A purposive and harmonious construction of articles 171, 248 and 250 of the *Constitution* leaves no doubt in our minds that the framers intended article 171(2) of the *Constitution* to apply exclusively to the process of appointment of members of JSC, separate and distinct from that of other Commissions and independent offices; that article 250 is a general provision dealing with Commissions and independent offices generally. This is gathered from the tenor of article 248(1) of the *Constitution* which relates to the application of Chapter Fifteen and states that;

> ' 248.
>
> (1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise'.

From our plain reading of this article, we conclude that article 171 is an exception to article 250, in many instances.

110. Just as the *Constitution* confers discretion on the President to nominate the Attorney-General and Cabinet Secretaries, subject only to approval by the National Assembly, so does it permit him to nominate a man and a woman, not lawyers, to represent the public in the JSC after approval by the National Assembly.

111. For these reasons, we respectfully agree that, as far as the nomination of two members of JSC under article 171(2)(h) is concerned, fair competition is not a mandatory requirement; and that where the *Constitution* itself makes provision on the manner and process of identification and appointment of members, the court may not question the exercise of discretion in the appointment as long as it is exercised in accordance with the *Constitution* and the law.

That should be sufficient to dispose of this ground. It has no merit. To the main second ground of appeal,

ii. Whether section 15(2) of the *Judicial Service Act* is unconstitutional

112. A separate petition before this Court, SC Petition No 45 of 2019, *Law Society of Kenya v Attorney General & 4 others*, which was heard earlier, on July 7, 2022 and our decision rendered on March 31, 2023, which had also sought a declaration that section 15(2) of the

JS Act is inconsistent with the *Constitution*, but for different reasons from those proffered in this appeal.

113. Section 15(2) of the JS Act was enacted to give effect to the provisions of article 171(2) of the *Constitution*. It provides:

> ' (2) Where the nominations are to be made by bodies specified under article 171(2)(b), (c), (d), (f) and (g) of the *Constitution*—
>
> a. The respective nominating body shall submit the name of its nominee to the President; and
>
> b. The President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.'

114. The two main answers this ground seeks to establish are, whether section 15 violates article 250(2)(a) and (3) in so far as it fails to prescribe merit, diversity and fair competition as prerequisites for appointment of one person to represent the PSC and one woman and one man to represent the public in the JSC under articles 171(2)(g) and (h), respectively; and whether the President's role in the appointment, and the National Assembly's approval of the members of the JSC under section 15(2) of the JS Act are inconsistent with article 171(2)(b),(c), (d), (f) and (g) of the *Constitution*.

115. There is a general presumption that every Act of Parliament is constitutional, and the burden of proof lies on the person who alleges otherwise. This principle enunciated in the Tanzanian case of *Ndyanabo v AG of Tanzania [2001] EA 495*, which has been repeatedly applied with approval by the superior courts below. This Court, for its part, in the case of *Law Society of Kenya v Attorney General & another, SC Petition No 4 of 2019; [2019] eKLR*, after reviewing many decisions from this and outside jurisdictions, restated that principle, which requires that, in determining whether a statute or a provision is constitutional or not, the court must ascertain the object, purpose and effect of that statute; to discern the intention expressed in the statute itself.

116. The simple answer to the first limb of this ground, is found in the preceding paragraphs where we have considered the question and concluded that the duty to nominate one person under article 171(2)(g) to the JSC is in the exclusive province of the PSC; and finally, that, in its absolute discretion, the PSC identifies a suitable candidate, based on merit and through consultation. It is emphasized that, under article 233(3) of the *Constitution* and section 8 of the *Public Service Commission Act* it is imperative that members of the PSC possess the specified qualification for appointment, as explained in paragraph 75 above.

117. Section 15 cannot prescribe prerequisites for the nomination of a representative of the PSC and the two representatives of the public that exceed the constitutionally prescribed requirements. Fair competition in the identification and nomination of a representative of the PSC is not a constitutional imperative specified in this regard. Similarly, as explained in paragraphs 108 and 111 above, as far as the two representatives of the public are concerned, fair competition is not a mandatory requirement, we conclude on this aspect.

118. Regarding the second limb of this ground, the question is, whether by requiring that the names of the nominees under article 171(2)(b), (c), (d), (f) and

> (g) Be submitted to the President for appointment, section 15(2) is inconsistent with the *Constitution*.

119. Section 15(2) requires that where the nominations are made by way of election by the Justices of the Supreme Court, Court of Appeal; by members of the association of judges and magistrates; by members of the statutory body responsible for the professional regulation of advocates; and after the PSC nominates its representative, these nominating bodies must submit the name of their nominee to the President. The President, upon receipt of the names, is required, within three days, to appoint the nominees as members of the Commission.

To what extent is this provision inconsistent with the *Constitution*?

120. We emphasize, that only under article 171(2)(h) does the President have the mandate to nominate two persons, a man and a woman, who are not lawyers, to represent the public. That is the scope of the President's role regarding the JSC and its membership. To the extent, therefore that section 15(2)(a) and (b) requires that the names of all the other nominees who are not representatives of the public but are elected by their peers through their professional bodies, or nominated by the PSC, to be submitted to the President for 'appointment', we find the section is ultra vires the express provisions of the *Constitution*. The section donates to the President functions that go beyond his powers under article 171(2)(h) of the *Constitution*. The appointment envisaged in article 250(2) can only apply and is limited to the two members representing the public. As a matter of fact, the only time the word 'appointed' is used in the entire article 171, is in relation to those two members. For the elected members, the appointment is concluded upon the declaration of the results of the election. The next phase of gazettement of names and the taking of the oath are only final formalities before assumption of the office.

121. By article 88(4) of the *Constitution* as read with section 4 of the Independent and Electoral Boundaries Commission Act, the IEBC has the mandate to 'conduct or supervise' referenda and 'elections to any elective body or office established by this Constitution', and any other

elections as prescribed by an Act of Parliament. This mandate, going by previous elections by the nominating entities identified, includes conducting elections of members of the JSC under article 171(2)(b), (c), (d) and (f). Rules made by some of the nominating entities have recognized the role of the IEBC as the body to conduct their elections. For example, the Law Society of Kenya (General Regulations), 2020, is clear on this. It must of necessity follow, as is the norm with all elections conducted by the IEBC, that upon declaration of results, apart from issuing to the successful candidate a certificate, the IEBC gazettes the candidate as the duly elected representative, to mark the end of the election process.

122. In the case of a member nominated by PSC under sub- article (2)(g), the name ought to be forwarded, not to the President but to the JSC and a notice issued in the official gazette, to notify the public of the nomination and membership. As an alternative to IEBC gazetting the candidate duly elected, once the outcome of the election is communicated to the JSC, then like the Parliamentary Service Commission, the Secretary to the JSC may gazette the member or members declared as duly elected. In both instances, elected and nominated members take the oath prescribed under the Third Schedule to the *Constitution*, before the Chief Justice before assumption of office.

123. We do not, respectfully, agree with the conclusion of the Court of Appeal that section 15(2) merely replicates the requirements of the *Constitution*. On the contrary, as we have demonstrated, section 15(2) contradicts article 171 of the *Constitution*. It directs the nominating bodies of members under article 171(2)(b), (c), (d), (f) and (g) to submit the names of their nominees to the President; and the President to appoint the nominees as members of the Commission within three days of receipt of the names, while nowhere in article 171 is there a requirement to submit the names to the President or for the President to appoint the concerned members. Once elected by different entities under (b), (c), (d) and (f) or nominated by the PSC under (g), those persons become members of JSC. It is a contradiction of terms to suggest that elected members are also at the same time appointed. *Black's Law Dictionary,9th Ed* pg 116, aptly draws this distinction in the legal definition of the word 'appointment' to mean:

> ' The designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office'

124. In the circumstances and for all these reasons, we find that section 15(2) is inconsistent with the provisions of article 171(2) of the *Constitution* in so far as it purports to assign the President the role of appointing elected and nominated members of the JSC. It infracts the spirit and letter of Articles 1(3) and 2(2); that sovereign power delegated to State organs, must be exercised strictly in accordance with the *Constitution*; and that no person may claim or exercise State authority except as authorized under the *Constitution*.

125. On whether section 15(2) is contrary to article 171(2)(b), (c), (d), (f) and (g) for providing for the approval by the National Assembly of nominated and elected members of the JSC, we confirm that, quite in consonance with article 171(2)(h), the only instance where approval of the National Assembly is required in section 15(1) of the Act, is in relation to the two members under article 171(2)(h) of the *Constitution*, to represent the public. We note, however, that the only member of the JSC who was irregularly vetted by the National Assembly was the 5th respondent. That vetting was superfluous, void and of no legal effect since it was not done in accordance with the *Constitution*.

126. We have held earlier that section 15 does not violate article 250(2)(a) and

(3) In so far as it does not prescribe merit, diversity and fair competition as prerequisites for the appointment of a representative of the PSC and the two members to represent the public in the JSC under articles 171(2)(g) and (h), respectively.

ii. Whether the nomination and subsequent appointment of the 5th, 6th and 7th respondents were valid.

127. The final ground is itself our conclusion drawn from the examination of the arguments in the first two grounds regarding the validity of the nomination of the 5th, 6th and 7th respondents. We are satisfied that the three were duly nominated and in the case of the 6th and 7th respondents, approved by the National Assembly, after satisfying itself as to their suitability for appointment. The approval of the 5th respondent by the National Assembly, was however not necessary, as we have explained above.

128. Overall, the appeal fails but partially succeeds to the extent that section 15 of the *Judicial Service Act* contravenes article 171(2) by vesting in the President the power to appoint members elected or nominated under article 171(2)(b), (c), (d), (f) and (g) of the *Constitution*.

G. Costs

129. Costs follow the event but are at the discretion of the court. We take note that the appeal is of public interest nature, and the order that commends itself to us is to direct parties to bear their own costs.

Dissenting Opinion Of Njoki Ndungu, Scj

130. I have read the majority decision in this appeal, and whilst I agree with them on their finding on the issues of jurisdiction, the requirement for merit and fair competition in appointments to the JSC, and the validity of appointments of the 5th, 6th and 7th respondents; I am, however,

of a different opinion in response to the following issue: whether section 15 (2) of the *Judicial Service Act* is unconstitutional.

131. This court in SC Petition No 45 of 2019, *Law Society of Kenya v Attorney General & 4 others (LSK)* was seized with the issue of the constitutionality of section 15 the JS Act albeit for different reasons from those invoked in this appeal. In my dissenting opinion in that matter, which opinion, I still stand by, I was of the view that to determine whether section 15(2) of the JS Act is inconsistent with the *Constitution*, three questions that must be answered. Namely, does the President have a constitutional obligation to appoint JSC Commissioners? If this answer is in the affirmative, can the President do so without approval of the National Assembly? And, in appointing elected JSC members, will the President interfere with the independence of the JSC? I delivered myself thus on these questions at paragraphs 106-109 of my dissent:

(i) Can the President appoint elected JSC Commissioners?

'[106] The President as the Head of State and Government derives his powers from article 131 of the *Constitution*. In that regard, article 1(1) of the *Constitution* provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*. The people may exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power under the *Constitution* is therefore, delegated to among other State organs, the National Executive (headed by the President) and Parliament.

107. Article 132(2)(f) of the *Constitution* provides that 'the President shall nominate and, with the approval of the National Assembly, appoint and may dismiss in accordance with the *Constitution*, any other State or public officer whom the *Constitution* requires or empowers the President to appoint or dismiss'.

108. Pursuant to article 260 of the *Constitution*, a State officer is interpreted to mean 'a person holding a State office.' This same provision also interprets a State Office to mean, among other offices, a member of a commission to which Chapter Fifteen applies. Article 248(2)(e) of the *Constitution*, clearly stipulates that the JSC is one of the Commissions to which Chapter Fifteen of the *Constitution* applies, except to the extent that the *Constitution* applies otherwise. Therefore, all Commissioners of the JSC are State officers.

109. Article 250 of the *Constitution* makes general provisions on the composition, appointment, and terms of office of Chapter Fifteen Commissions. The appointment process of members of Chapter Fifteen

> Commissions is in three stages, unless provided for otherwise elsewhere in the *Constitution*. These stages pursuant to article 250(2) of the *Constitution* are: identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President.'

132. I am still of the considered view that the three stages pursuant to article 250 of the *Constitution*, as illustrated above, are mandatory. An appointment cannot be concluded at the first stage of identification and recommendation, without going through the second step of parliamentary approval and the third step of appointment by the President. I reiterate that to do so would be to disregard the carefully woven constitutional architectural design of separation of powers, and constitutional checks and balances between the arms of Government and the different State organs.

133. Additionally, as I held in LSK, an interrogation of articles 171 and 172 of the *Constitution* do not reveal any provisions disallowing the President from appointing elected JSC Commissioners, being State officers as Commissioners. For clarity, at paragraph 112, I stated:

> ' The President has a constitutional duty to appoint as Commissioner, individuals identified by the various bodies under article 171 of the *Constitution*. The President has a duty to appoint JSC Commissioners both under the powers conferred to him under article 132(4) of the *Constitution* and by virtue of section 15(2) of the JS Act. There is no express exception to article 132 of the *Constitution* that would exclude members of the JSC.'

134. I therefore find that the approval of the 5th respondent by Parliament and his subsequent appointment by the President is proper and well founded in the law.

135. I am still of the view that section 15(2) of the JS Act is inconsistent with the *Constitution* only in as far as it purports to direct a specific timeline in which the President appoints individuals selected under article 171; that is, 'to appoint within three (3) days'. This timeline, other than being extremely short and limiting, does not take into account any other necessary constitutional processes that must be carried out by the Executive and Parliament before such appointment. However, the Majority have a different view and as my views are in the minority, the decision of the court is that of the majority.

H. Disposition

136. Consequent, upon our conclusion above, the petition of appeal dated September 7, 2020 is disposed of by making the following orders in answer to the three issues framed for determination:

i. There is no requirement for fair competition in appointments to the JSC under article 171(2)(g) and (h).

ii. Section 15(2) of the *Judicial Service Act* is, to the extent, that it confers on the President the authority to appoint members elected and nominated to the JSC under article 171(2), (b), (c), (d), (f) and (g), unconstitutional.

iii. The approval by the National Assembly of the 5th respondent was irregular and unnecessary.

iv. To the extent that section 15(2) confers on the President power to appoint the 5th respondent, it is inconsistent with article 171 and therefore invalid. But it is in harmony with article 171 in so far as it does not prescribe merit, diversity and fair competition as prerequisites for appointment of a representative of the PSC and the two members to represent the public in the JSC under articles 171(2)(g) and (h), respectively.

v. Parties to bear their own costs.

vi. We hereby direct that the sum of Kshs 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the appellant.

137 It is so ordered.

Law Society of Kenya v Communications Authority of Kenya & 10 others (Petition 8 of 2020) [2023] KESC 27 (KLR) (21 April 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2023] KESC 27 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals involving constitutional interpretation or matters of general public importance – locus standi to institute such an appeal – where an appeal was instituted by a third party who was not a party to the proceedings at the trial court and the Court of Appeal - whether a person who was not part of the litigation at the High Court and Court of Appeal could file an appeal at the Supreme Court on grounds that the matter involved constitutional interpretation - whether the right to institute court proceedings claiming that a right had been infringed on behalf of others in public interest extended to appeals to the Supreme Court as of right in matter involving interpretation of the Constitution -Constitution, articles 22, 163(4)(a) and 258; Supreme Court Rules, 2020, rule 36.*

Statutes *- interpretation of statues – interpretation of rule 36 of the Supreme Court Rules - what was the definition of a 'person seeking to appeal' as used in the Supreme Court Rules, 2020.*

Brief facts

The subject matter of the instant appeal was the proposed installation of a device management system (DMS) on mobile networks by the 1st respondent, the Communication Authority of Kenya.

The appellant challenged the determination of the judgment of the Court of Appeal on the grounds that the learned judges erred in applying the wrong standard of review in appeals requiring constitutional interpretation and application. The appellant maintained that the Court of Appeal made inferences, findings and conclusions that were inconsistent with the evidence on record while ignoring pleadings, evidence and submissions. The appellant further contended that the Court of Appeal failed to find that the DMS to be rolled out by the 1st respondent limited the right to privacy and faulted the finding of the court that it was premature for the 1st respondent to adjudicate public participation. The appellant added that the issues for determination related to the application of the Constitution in relation to the installation of a DMS by the 1st respondent which would affect millions of mobile phone subscribers.

In opposition to the appeal, the 1st respondent filed grounds of objection to the petition dated June 22, 2020. The 1st respondent contended that the petition was a nullity for having wrongfully invoked the jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution. Further, the grounds of appeal neither involved constitutional interpretation or application nor had they taken a constitutional trajectory as provided for in article 163(4)(a) of the Constitution.

The 1st respondent also raised a preliminary objection in which it contended that the appellant, the Law Society of Kenya, was not a proper party before the Supreme Court and did not constitute a person who had *locus standi* to institute such an appeal.

Issues

i. What was the definition of a 'person seeking to appeal ' as used in the Supreme Court Rules?

ii. Whether a person who was not part of the litigation at the High Court and Court of Appeal could file for an appeal at the Supreme Court on grounds that the matter involved constitutional interpretation.

iii. Whether the right to institute court proceedings claiming that a right had been infringed on behalf of others in public interest extended to appeals to the Supreme Court in matters involving interpretation of the Constitution.

Held

1. The issue of *locus standi* raised a point of law which touched on the jurisdiction of the Supreme Court, and it should be resolved at the earliest opportunity. Appeals raising constitutional issues and filed by the appellant as a matter of right under article 163(4)(a) of the Constitution had to meet the constitutional threshold on the jurisdiction of the Supreme Court.
2. The Supreme Court's jurisdictional test considered various principles. They included whether an appeal raised a question of constitutional interpretation or application, whether the constitutional issues were canvassed in the superior courts and whether the determination of the constitutional issues had progressed through the normal appellate mechanism to reach the Supreme Court by way of an appeal filed under article 163(4)(a) of the Constitution.
3. Rule 36 of the Supreme Court Rules provided wide *locus* for any party to institute an appeal before the Supreme Court. Rule 36 stipulated that a person who intended to appeal to the Supreme Court was to file a notice of appeal within 14 days. The scope of who a person was, should mirror the jurisdiction of the Supreme Court. Article 163(3)(a) and (b) of the Constitution provided that the jurisdiction of the court was to be exclusive original jurisdiction to hear and determine disputes relating to elections to the office of the President and appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.
4. The definition of a person seeking to file an appeal only extended to a party who was aggrieved by a decision issued against him by the Court of Appeal and wished to prefer an appeal to the Supreme Court. The definition did not open the door for any passer-by who was disgruntled with a decision delivered by the appellate court to approach the court. That also extended to matters relating to public interest. There was difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the Superior Courts. A person in that context should therefore be a party with *locus standi* in the matter.
5. A proper party had a designed subsisting direct and substantive interest in the issues arising in the litigation which interest would be recognisable in the court of law being an interest, which the court would enforce. While the court recognised the objectives of the appellant

as provided for in section 4 of the Law Society of Kenya Act, it was not and could not be a proper party in the instant appeal.

6. While article 22 of the Constitution provided a pathway for parties to contest the denial, violation or infringement of a right or fundamental freedom, the proper avenue was at the High Court which granted that court jurisdiction to determine questions of denial, violation or infringement of a right or fundamental freedom. The Supreme Court did not have jurisdiction to hear and determine the appeal.

Appeal and cross appeal dismissed.

Orders

Appellant was to bear the costs.

Citations

Cases

Kenya

1. *Board of Management Visa Oshwal Primary School v Shree Visa Oshwal Community Nairobi Registered Trustees & 4 others; National Land Commission (Interested Party)* Application 32 (E043) of 2020; [2022] KESC 4 (KLR) - (Explained)
2. *Joho & another v Shahbal & 2 others* [2014] 1 KLR 111 - (Mentioned)
3. *Kingori v Chege & 3 others* [2002] 2 KLR 243 - (Explained)
4. *Kitarpei, Jennifer Koinante v Alice Wahito Ndegwa & another* Petition 32 of 2014; [2015] KESC 6 (KLR) - (Explained)
5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Mentioned)
6. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] 1 KLR 58 - (Explained)
7. *Ndutu & 6000 others v Kenya Breweries Limited & another* Civil Application 291 of 2011; [2012] KECA 8 (KLR); [2012] 2 KLR 804 - (Explained)
8. *Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates* [2013] 3 KLR 637 - (Explained)
9. *Sikona, Elijah & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others* Civil Case 37 of 2013; [2014] KEHC 4420 (KLR) - (Mentioned)
10. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* Civil Application 29 of 2014; [2014] eKLR - (Explained)

Uganda

Selle & another v Associated Motor Boat Co Ltd & others [1968] EA 123 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 10, 22(3)(b); 24; 31; 46; 47; 163(4)(a); 258 - (Interpreted)
2. Kenya Information And Communications Act (cap 411A) section 5A (2) - (Interpreted)
3. Law Society of Kenya Act (cap 18) section 4 - (Interpreted)
4. Statutory Instruments Act (cap 2A) section 5(2) - (Interpreted)
5. Supreme Court Act (cap 9B) sections 15(2); 36 - (Interpreted)
6. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 9(1); 33(2); 36 - (Interpreted)

Advocates

Mr. Ochiel Dudley, Ms. Ruth Ogolla & Ms. Ray Odanga for the Petitioner

Prof. Githu Muigai SC, Mr. Wambua Kilonzo & Mr. Dennis Nkarichia for the 1st Respondent

April 21, 2023, the Court delivered the following Judgment:

A. Introduction

1. The subject matter of this appeal is the proposed installation of a device management system on mobile networks by the 1st respondent, Communication Authority of Kenya.

2. The Law Society of Kenya, the appellant herein, has challenged the decision of the Court of Appeal in its judgment of April 24, 2020, which allowed the 1st respondent to continue developing the Device Management System hereinafter referred to as DMS on condition that the guidelines or regulations on its installation be subjected to public participation.

3. The appellant instituted the appeal pursuant to article 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act 2011* and rule 9(1), 33 (2) of the *Supreme Court Rules 2020*. The appellant also alleges infringement of rights as provided under articles 10, 22 (3) (b), 24, 31, 46 and 47 of the *Constitution*.

B. Background

4. In 2011, the East Africa Communications Organization, in a bid to counter the global theft of mobile devices and the proliferation of counterfeit or illegal devices recommended that the mobile service operators in the member countries would implement an Equipment Identification Register (EIR) which is an International Mobile Equipment Identification (IMEI). Following various stakeholder consultations, the 1st respondent implemented the first phase of its strategy to deal with stolen and counterfeit devices. Consequently, Mobile Service Providers, handset vendors and the 1st respondent entered into a memorandum of understanding on verification of genuine mobile handsets in Kenya which resulted in the switch off of 1.89 million illegal mobile handsets by September 30, 2012.

5. Despite the initial phase's success, counterfeit phone vendors grew more sophisticated and according to the submissions of the 1st respondent, this necessitated a more robust strategy to deal with the issue. In 2016, the 1st respondent rolled out steps towards the implementation of the Device Management System (DMS) which is a centralized Equipment Identification Register that would have access to the International Mobile Equipment Identification database by mobile network operators.

6. In undertaking the implementation of the Device Management System, the 1st respondent engaged with Mobile Network Operators on various dates and had a series of meetings to discuss the process of implementation. Following the meetings, there were a series of letters issued by 1st respondent to the Mobile Network Operators which included the 7th, 8th and 9th respondents. By letters dated January 31, 2017 and February 6, 2017, the 1st respondent requested the Mobile Network Operators to provide it with access to information on the International Mobile Equipment Identification (IMEI), International Mobile Subscriber Identity (IMSI) which is the number assigned by the 1st respondent for uniquely identifying the subscribers and Mobile Station Integrated Subscriber Directory number (MSISDN), a number assigned to each subscriber by a mobile service provider. The purpose of the request was for 1st respondent's technical team to conduct a survey and installation of the Device Management System. This precipitated the filing of a constitutional petition before the High Court and subsequently an appeal to this court.

C. Litigation History

i. Proceedings in the High Court

7. The 3rd respondent, Okiya Omtatah in the Constitutional Petition before the High Court contended that the DMS proposed by the 1st respondent, would allow Government to eavesdrop on its citizens private conversations, spy on calls and texts and examine all mobile money transactions. The 3rd respondent cited that the 1st respondent had violated a number of constitutional rights and freedoms: that the installation of the DMS would threaten the right to privacy under article 31, violate consumer rights under article 46 and the right to fair administrative action under article 47.

8. He also argued that the 1st respondent did not involve subscribers in public participation yet their data was affected. Further, he stated that the 1st respondent neither conducted a regulatory impact assessment nor presented its directive to Parliament as provided for under the *Statutory Instruments Act, 2013.*

9. The 7th, 8th and 9th respondents supported the petition contending that the 1st respondent had failed to address the issues they had raised concerning infringement of their consumers

right to privacy and also had not put measures into place to curb manipulation and interference of their mobile networks.

10. The 1st respondent in opposing the petition asserted that the petition was premature and hypothetical and that under the *Kenya Information and Communications Act*, it is mandated to monitor compliance and that the DMS was not a new policy but a continuation of a 2011 policy to stop proliferation of counterfeit or illegal devices into the country. The 1st respondent denied the alleged violation of constitutional rights.

11. In determining the case before it, the High Court, allowed the petition, in the following terms:

    a. A declaration be and is hereby issued that policy decisions or regulations affecting the Public must conform to the *Constitution* and the relevant statute in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, Regulation or guideline invalid.

    b. A declaration be and is hereby issued decreeing that the decision, policy or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the provisions of the *Constitution*, section 5 (2) of KICA and the *Statutory Instruments Act*, hence the said decision, policy and or regulation is null and void for all purposes.

    c. Further and or in the alternative a declaration be and is hereby issued decreeing that the decision, policy and or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the *Constitution*, section 5A (2) of *KICA* and the *Statutory Instruments Act* in that there was no adequate public participation prior to its adoption and implementation with the first, second and third interested parties and further the subscribers of the first, second and third interested parties were not engaged at all in the public consultations, hence the same is null and void for all purposes.

    d. A declaration be and is hereby issued decreeing that the first respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process leading to the decision, policy and or regulation or implementation of the DMS System.

    e. A declaration be and is hereby issued declaring that the first respondents request and or purported intention and or decision and or plan contained in its letter dated January 31, 2017 addressed to the first, second and third interested parties seeking to integrate the DMS to the first, second and third interested parties networks to inter alia create connectivity between the DMS and the first, second and third Interested

Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void.

f. A declaration be and is hereby issued declaring that the first respondents decision to set up connectivity links between the DMS and the first, second and third interested parties networks communicated in its letter dated February 6, 2017 is unconstitutional, null and void to the extent that it was arrived at unilaterally, without adequate public participation and that it a threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights.

g. An order of prohibition be and is hereby issued prohibiting the first respondent, its servant or agents from implementing its decision to implement the DMS system to establish connectivity between the DMS and the first, second and third interested parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network.

12. A separate constitutional petition, HC Petition No 86 of 2017, filed by the Kenya Human Rights Commission against the Communications Authority of Kenya, (which also challenged the implementation of the DMS) was similarly determined in a judgment delivered on the same day of April 18, 2018.

ii. Proceedings before the Court of Appeal

13. Aggrieved by the decision of the High Court, the 1st respondent filed an appeal before the Court of Appeal which framed 5 issues for determination as follows: whether the suit was hypothetical and or premature; whether there was adequate public participation in the proposed design and installation of the DMS; whether the installation of the DMS threatened the consumer's rights to privacy and therefore a breach of the *Constitution*; whether the pleadings disclosed any violation of the respondents' or consumers' rights or the Judge construed a different cause of action; and whether the mandate of the appellant as the communications regulator was misapprehended by the Judge and thereby curtailed.

14. Having heard submissions by all parties, the matter was determined and in allowing the appeal, the Court of Appeal set aside all the orders of the High Court.

ii. Proceedings before the Supreme Court

15. The Law Society of Kenya, the appellant herein being aggrieved by the decision of the Court of Appeal instituted an appeal before this court. The appellant was neither a party in the

proceedings before the High Court or Court of Appeal. In filing the petition of appeal, the appellant relied on articles 22 and 258 of the *Constitution* and rule 36 of the *Supreme Court Rules* which provides that "any person" who intends to make an appeal and is not limited to parties to the initial cause.

16. Additionally, the appellant also asserts that it has a perpetual statutory obligation provided for under section 4 of the *Law Society of Kenya Act, 2014* to uphold the *Constitution of Kenya* and advance the rule of law and the administration of justice" and "to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law."

17. The appellant prays for the following reliefs:

    a. An order setting aside the Court of Appeal decision and reinstating the High Court judgments of Mativo, J on April 19, 2018 or;

    b. In the alternative, a declaration that the 1st respondent's decision as communicated through the letters of January 31, 2017 and February 6, 2017 to procure and install the DMS is unconstitutional; and

    c. There be no orders as to costs.

18. The appeal is premised on the grounds that the Court of Appeal erred by applying the wrong standard of review to an appeal requiring constitutional interpretation and application and cited the cases of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 and *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR. That the Court of Appeal erred by drawing inferences, findings and conclusions inconsistent with the evidence on record; while ignoring evidence, submissions and pleadings on other issues raised. The appellant further raised the ground that the Court of Appeal erred by misapprehending epistolary jurisdiction, the law on judicial notice and presumption of genuineness of newspapers and the *dicta* in the case of *Anarita Karimi Njeru*.

19. Additionally, the appellant has raised the ground that the Court of Appeal erred by not finding that the DMS limits the right to privacy and subsequently it failed to conduct the article 24 test on limitation; it further disputed the courts finding that it was premature to adjudicate on the issue of public participation, even though the 1st respondent had already procured and was preparing to install the DMS from the 2nd respondent.

20. On its part, and in opposition to the appeal, the 1st respondent, filed grounds of objection to the petition dated June 22, 2020. The 1st respondent contends that the petition is a nullity for having wrongfully invoked the jurisdiction of this court under article 163(4)(a) of the *Constitution*. Further, that grounds of appeal neither involve constitutional interpretation or application nor have they taken a constitutional trajectory as provided for in article 163(4)

(a) of the *Constitution*. The 1st respondent cited, in support of its arguments, the cases of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR and *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others* [2014] eKLR. The 1st respondent further argued that the grounds of appeal are premised on factual findings by the Court of Appeal and that wrong standard of review, misapprehension of the principles of epistolary jurisdiction and the law of judicial notice were not matters canvassed before the High Court and Court of Appeal.

21. Okiya Omtatah, the 3rd respondent filed a Memorandum of Cross Appeal dated August 3, 2022. He prayed for the Court of Appeal judgment to be set aside, and for the court to allow both the appeal and cross appeal. The cross appeal intends to challenge the court of appeal's decision on the grounds that the learned judges erred in holding that the petition was hypothetical despite the provisions of article 22 and 258 of the *Constitution*, in failing to find that the DMS could access information on the IMEI, IMSI, MSISDN and CDRs of subscribers whereby this would constitute a threat to the right to privacy; and failing to hold that the limitation on the right to privacy was not by law, did not pursue a legitimate aim, and was not the least restrictive measure.

22. Additionally, the 3rd respondent urged that the Court of Appeal erred by failing to hold that, contrary to article 10, the 1st respondent has failed to engage the public on the decision to acquire, install and implement the DMS, failing to hold that the decision to implement DMS was subject to the *Statutory Instruments Act*, failing to hold that the claimed goal of the DMS to combat counterfeit and illegal devices was outside the statutory mandate of the 1st respondent. Further, that the learned judges of Appeal failed to determine the question of consumer rights raised in the appeal and find that CAK's conduct amounted to unfair administrative action.

23. The 1st respondent filed grounds of objection to the cross appeal dated August 25, 2020. The 1st respondent contends that the cross appeal is a nullity for failing to properly invoke the jurisdiction of this Court as provided for in article 163(4) of the *Constitution*. The 1st respondent contends that all the grounds of the cross appeal do not arise from a trajectory of constitutional interpretation or application taken by the Court of Appeal in its conclusion. It argued that the grievances raised in the grounds of the cross appeal were canvassed by the Court of Appeal under the question of ripeness of the petition at the High Court which is a question of fact that was determined based on the evidence before that court. Additionally, that the 3rd respondent's rights under article 22 and 258 were neither in issue before the Court of Appeal nor did the Court of Appeal make such finding on the violation of those rights. Lastly, the 1st respondent argued that the court's finding that the DMS was still in its architectural or configuration design stage, and that consultations were still ongoing cannot be faulted, as the same was based on evidence and averments of parties.

D. Preliminary Objection: Submissions

24. When this matter came before the court for formal hearing of oral submissions on October 19, 2022, Counsel for the 1st respondent Prof Githu Muigai raised a preliminary objection on the issue of jurisdiction. Having heard the submissions of all parties, it is the opinion of the court that the preliminary matter ought to be disposed of at this stage, before going into the merits or otherwise of the appeal itself.

25. The 1st respondent has stated that appellant has wrongfully invoked the jurisdiction of this court, stating it is not a proper party before this court and that even where the appellant claimed it is exercising its statutory mandate, a reading of the *Supreme Court Act* and regulations show that the appellant does not constitute 'a person' who has locus. The 1st respondent made reference to relevant case law, including, *Elijah Sikona and George Pariken Narok, on Behalf of Trusted Society of Human Rights Alliance v. Mara Conservancy and Five Others* [2014] eKLR and the case of *Mumo Matemu & Trusted Society of Kenya Rights Alliance* [2014] eKLR. The 1st respondent urged that the appellant had filed a fresh petition and not an appeal from the Court of Appeal; and further that it did not meet the requirements of article 163(4) of the *Constitution* as in any event it required certification.

26. The appellant has opposed the preliminary objection and filed written submissions on the same. The appellant submitted that article 22 and 258 of the *Constitution* was not only applicable to the High Court but also to the Supreme Court. The appellant argued there was a wide-ranging locus provided for in rule 36 of the Supreme Court Rules, that allowed for its participation in the appeal. Additionally, the appellant submitted that no law forbids a non-party like the appellant from appealing from a judgment in rem in public interest litigation. Counsel for the appellant further asserted that the petition which challenges the rights to privacy, is admissible under article 163(4)(a) of the *Constitution*. In support of its submissions, the appellant cited the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others* [2014] eKLR.

27. The appellant further distinguished this court's decision in the cases of *Jeniffer Koinante Kitarpei v Alice Wahito Ndegwa & another* [2015] eKLR and *Board of Management Visa Oshwal Primary School v Shree Visa Oshwal Community Nairobi Registered Trustees & 4 others* [2022] eKLR which neither involved an appeal as of right under article 163(4)(a) of *the Constitution* nor invoked article 22 and 258 of the *Constitution* or rule 36 of the *Supreme Court Rules* unlike in the instant appeal. The appellant further submitted that its mandate, under section 4 of the *Law Society of Kenya Act*, is to uphold the *Constitution* of Kenya and advance the rule of law and the administration of justice, and to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.

E. Finding

28. Upon considering the preliminary objection raised in limine by the 1st respondent and upon hearing the oral arguments by the parties in court, and the submissions in opposition filed by the appellant, the issue for determination is whether this court has jurisdiction to hear and determine this appeal and whether the appellant is a proper party before this court and has *locus standi* in this appeal. This court in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR held that the issue of *locus standi* raises a point of law which touches on the jurisdiction of the court, and it should be resolved at the earliest opportunity.

29. In filing the instant appeal, the appellant invoked the court's jurisdiction under article 163(4)(a) of the *Constitution* and rule 36 of the *Supreme Court Rules*. The appellant further invoked article 22 and 258 of the *Constitution* to give it a legal standing in this matter. We now turn to consider the jurisdictional ambit invoked by the appellant in filing the instant appeal.

30. Firstly, appeals raising constitutional issues and filed by the appellant as a matter of right under article 163(4)(a) of the *Constitution* must meet the constitutional threshold on jurisdiction of this court. In the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR the court's jurisdictional test was underscored giving rise to following principles for consideration. The principles being, whether an appeal raises a question of constitutional interpretation or application, whether the constitutional issues were canvassed in the superior courts and whether the determination of the constitutional issues has progressed through the normal appellate mechanism so as to reach this court by way of an appeal filed under article 163(4)(a) of the *Constitution*.

31. Additionally, in the cases of *Gitirau Peter Munya vs Dickson Mwenda & 2 others* [2014] eKLR and *Lawrence Nduttu & 6000 others v Kenya Breweries Limited & another* [2012] eKLR this court determined the question of jurisdiction and pronounced itself as follows:

> 'The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation.'

32. The crux of the appellant's case before us is that it challenges the determination of the judgment of the Court of Appeal on the grounds that the learned judges erred in applying the wrong standard of review in appeals requiring constitutional interpretation and application. The appellant maintained that the Court of Appeal made inferences, findings

and conclusions that were inconsistent with the evidence on record while ignoring pleadings, evidence and submissions. The appellant further challenged that the Court of Appeal failed to find that the DMS to be rolled out by the 1st respondent limits the right to privacy and faulted the finding of the court that it was premature for the 1st respondent to adjudicate public participation.

33. Gleaning from the record, we find that the issues for determination before the superior courts and more so the Court of Appeal relate to the application of the *Constitution* in relation to the installation of a Device Management System by the 1st respondent which will affect millions of mobile phone subscribers. And with this, came the challenge of the intent, utility, procurement and usage of the system. Be that as it may, the question that arises now before us, is whether the party adjudicating this matter is properly before this court.

34. The appellant relied on rule 36 of the *Supreme Court Rules* which provides wide locus for any party to institute an appeal before this court. Rule 36 stipulates that; 'A person who intends to make an appeal to the Court shall file a Notice of Appeal within fourteen (14) days from the date of judgment or ruling is which is the subject of appeal.' The scope of who 'a person' is, should mirror the jurisdiction of this court. Article 163(3)(a) and (b) of the *Constitution* provides that the jurisdiction of the court shall be exclusive original jurisdiction to hear and determine disputes relating to elections to the office of the President and appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.

35. Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of 'a person' seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.

36. The Court of Appeal in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR held as follows on the sanctity of a suit in court:

> 'A suit in court is a solemn process, owned solely by the parties. This is why there are laws and rules, under the Civil Procedure Code, regarding parties to suits, and who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined to a suit as an interested party, this new party cannot be heard to seek to strike out the suit on the grounds of defective pleadings.'

37. Further, in the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243 the High Court described a proper party in a suit as follows; 'A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the court of law being an interest, which the court will enforce.' We agree with these observations of the superior courts regarding this issue of who can be a proper party before a court. Therefore, while we recognise the objectives of the appellant as provided for in section 4 of the *Law Society of Kenya Act, 2014*, we find that it is not and cannot be a proper party in this appeal.

38. Lastly, the appellant invoked the provisions of articles 22 and 258 of the *Constitution* in preferring the appeal. Article 22 of the *Constitution* provides that 'every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.' The Court of Appeal in *Mumo Matemu* cited above described that 'a person' in this regard, includes one who acts in the public interest. Be that as it may, we find that while article 22 of the *Constitution* provides a pathway for parties to contest the denial, violation or infringement of a right or fundamental freedoms, the proper avenue is at the High Court which grants that court jurisdiction to determine questions of denial, violation or infringement of a right or fundamental freedom.

39. In view of the above, we determine that this court does not have jurisdiction to hear and determine the instant petition of appeal. Similarly, the cross appeal finds itself with no legs to stand on.

F. Orders

40. Consequently, the court makes the following orders:

    i. The appeal is hereby dismissed for want of the locus of the appellant;

    ii. The cross appeal is also hereby dismissed;

    iii. The appellant shall bear the costs of this appeal.

Judicial Service Commission v Oduor & 5 others (Petition 18 (E025) of 2021) [2023] KESC 32 (KLR) (21 April 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 32 (KLR)

Constitutional Law *- interpretation of constitutional provisions - interpretation of section 23(2) of the Sixth Schedule to the Constitution - where section 23(2) provided that a removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under section 23(1) shall not be subject to question in, or review by, any court - whether the ouster in section 23(2) of the Sixth Schedule to the Constitution applied to magistrates - whether a contest to the decision of the Judges and Magistrates Vetting Board affecting judges involved in the vetting process was inconsistent with the terms of the Constitution - Constitution, articles 160,167, 168, Sixth Schedule, section 23(2).*

Constitutional Law *- Judges and Magistrates Vetting Board (the Board) - functions of the Board - vetting of judges and magistrates - scope of the Board in considering the conduct of serving judges and magistrates - Constitution, article 262, Sixth Schedule, section 23(2).*

Jurisdiction *- jurisdiction of the High Court - review jurisdiction of the High Court - review jurisdiction against the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates - whether the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates was subject to the review jurisdiction of the High Court - Constitution, articles 160,167, 168 Sixth Schedule, section 23.*

Civil Practice and Procedure *- orders - orders as to costs - orders as to costs against public bodies and organizations - when could public bodies and organizations which ordinarily existed to serve a country's government and who were acting within their mandate be condemned to pay costs in a suit.*

Brief facts

The 1st to 4th respondents, who were serving magistrates, were vetted by the 5th respondent, the Judges and Magistrates Vetting Board (the Board) and found unsuitable to continue serving as such. Their attempt to have the Board review its decision was dismissed and as a result, the Judicial Service Commission, (appellant) removed them from office. Aggrieved, various petitions were filed by individual magistrates before the High Court challenging their removal as magistrates by the Board. The 1st to 4th respondents sought to quash the determination of the Board regarding their suitability to continue serving as magistrates, alleging violation of fundamental rights and freedoms and breach of process.

The High Court held that the intention of the drafters of the Constitution of Kenya, 2010 (Constitution) was that both the serving judges and magistrates were to be vetted under a process insulated from court proceedings. Accordingly, the provisions of section 23(2) of the Sixth Schedule to the Constitution as to the decisions by the Board on the removal of a magistrate were not subject to question in any court.

The High Court also found that the Supreme Court's decision in *Judges and Magistrates Vetting Board and 2 Others v Centre for Human Rights and Democracy and 11 others*, Petition No 13A of 2013 as consolidated with Petition No 14 of 2013 and 15 of 2013 [2014] eKLR (*JMVB 1*) held that courts lacked jurisdiction to review the process or outcome of the vetting process by the Board. Further, in *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another*, SC Petition No 29 of 2014; [2014] eKLR (*JMVB 2*) the Supreme Court determined that courts could intervene in decisions of the Board only where the Board exceeded its constitutional and statutory mandate and more specifically, where there was proof that the Board considered matters outside the period provided under the law.

The High Court concluded that the Board acted within its powers and dismissed the petitions. Aggrieved, the 1st to 4th respondents filed appeals to the Court of Appeal, which by a majority held that the Supreme Court in *JMVB (1)* never addressed the question as to whether the reference to a judge under section 23(2) of the Sixth Schedule extended to include a magistrate. Consequently, the Court of Appeal held that the Supreme Court had not determined with finality the issue of the High Court's jurisdiction over decisions by the Board in respect of magistrates as it was only judges who were exclusively mentioned. The Court of Appeal allowed the appeals and set aside the High Court's judgment. Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether the ouster clause in section 23(2) of the Sixth Schedule to the Constitution applied to magistrates.
ii. Whether the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates was subject to the review jurisdiction of the High Court.
iii. Whether a contest to the decision of the Judges and Magistrates Vetting Board affecting judges involved in the vetting process was inconsistent with the terms of the Constitution.
iv. What was the scope in which the Judges and Magistrates Vetting Board in considering the conduct of serving judges and magistrates?
v. When could public bodies and organizations which ordinarily existed to serve a country's government and who were acting within their mandate be condemned to pay costs in a suit?

Relevant provisions of the Law

Constitution of Kenya, 2010

Sixth Schedule

Section 23 - Judges

1. *Within one year after the effective date, Parliament shall enact legislation, which shall operate despite article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.*

2. *A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.*

Held

1. The instant appeal met the requisite jurisdictional threshold since it involved the interpretation of section 23(2) of the Sixth Schedule to the Constitution *vis-à-vis* its applicability to magistrates which issue had been subject of the litigation and transcended through the superior courts to the court. In any event, section 23(2) had previously been before the court through *JMVB 1* and *JMVB 2* the effect of which was partly in issue in the instant appeal.
2. Following the court's decision in *JMVB 1* and *JMVB 2*, section 23(2) of the Sixth Schedule to the Constitution ousted the jurisdiction of the courts. In the *JMVB* cases, the focus of the court's decision was the mechanism contemplated under section 23 of the Sixth Schedule. That mechanism revolved around the operations and functions of the Board as per the legislation enacted under section 23(1). It did not matter whether the judges, magistrates or any other litigant, considering the expanded scope of access to justice that the Constitution brought with it, were challenging the decisions or mechanisms of the Board in relation to vetting.
3. To avert the potential excesses by the Board in the vetting of magistrates and judges, it was necessary to clarify and delineate the time zone within which the Board was to consider its activities. The Board having been established as a transitional institution was expected to consider the conduct of the serving judges and magistrates as at the effective date of the promulgation of the Constitution. Any consideration beyond that date would turn it into what the court equated to the unruly dog.
4. It was not entirely accurate to proclaim that magistrates were not represented in the *JMVB* cases. Indeed, while the *JMVB* cases pit at least 7 judges, serving at the time, amongst the litigants were the appellant and the Kenya Judges and Magistrates Association (KJMA) – the umbrella body dealing with the welfare of judicial officers to which magistrates comprised a large constituency. The KMJA was at all times capable of articulating the position of magistrates alongside those of judges.
5. The court's findings in the *JMVB* cases on the interpretation of section 23(2) of the Sixth Schedule to the Constitution was adequate. The court's findings in the *JMVB* cases were neither *per incuriam* nor *obiter dictum*. The alleged absence of magistrates among the direct litigants did not overshadow the constitutional imperative which shielded the operations of the Board itself under which both the judges and magistrates fell. The mandate of the Board itself was not at the moment under challenge and the respondents willingly submitted to its jurisdiction both at the first instance and in appellate capacity when they sought a review of the Board's decision.

6. The constitutionality of section 22(4) of the Vetting of Judges and Magistrates Act No 2 of 2011 (the Act) was not framed by either of the superior courts as an issue for determination. At the heart of the instant dispute on appeal was the interpretation of section 23(2) of the Sixth Schedule to the Constitution and whether the ouster contemplated under section 23(1) of the Sixth Schedule extended to magistrates. It therefore served no further purpose to spend judicial time and resources in answering a peripheral question by way of unconstitutionality of section 22(4), the main constitutional provision of section 23(2) of the Sixth Schedule having already been addressed by the court.
7. In construing the Constitution, article 259 of the Constitution posited that interpretation ought to be in a manner that promoted its purpose, values and principles; advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance.
8. The main aim of the vetting process was to ensure that any serious complaints against sitting judicial officers were properly considered. Even though the committee of experts' (CoE) recommendation on vetting was limited to judges, it was alive to the fact that most of the public's experiences of the justice system were at the magistracy level. However, the challenge faced was that the magistracy was large and would pose implications in the operations of subordinate courts; and by reason of judges having stronger protection, their removal being a rare occurrence. Nevertheless, before the draft Constitution was submitted to the people of Kenya in the ensuing referendum, the vetting process was extended to cover both judges and magistrates who were in office on the effective date of August 27, 2010. Resultantly, it led to the transition clause contained in section 23 of the Sixth Schedule to the Constitution as promulgated.
9. The suitability of a judicial officer to continue in service under the 2010 constitutional dispensation was a matter reserved by law to the Board. Hardly any cogent argument had been advanced before the court, that the Act, which implemented the ouster clause, was not indeed the legislation contemplated under section 23(1) of the Sixth Schedule to the Constitution; and as there was no other legislation that would claim that status, there was nothing out of harmony in the common purpose of the Constitution, section 23 of its Sixth Schedule, and the relevant statute – the Act.
10. A contest to the decision of the Board, insofar as such a decision affected particular judges involved in the vetting process, was in effect, a collateral challenge to the Board's authority: and that would be inconsistent with the terms of the Constitution.
11. Shielding the vetting process by the Board from the review jurisdiction of the courts represented the unique situation that Kenya found itself in as a country that was transitioning from the old order. In any event, the transition only operated in a specific time frame and historical context of Kenya. Moreover, that transition between the repealed Constitution and the 2010 Constitution was more people centric having accrued from a

referendum. It was within that prism that the court went for the broader consideration of the vetting exercise in the transition context.

12. The only logical conclusion out of the vetting exercise by the Board was to either recommend suitability of judges and magistrates to continue serving or unsuitability with the latter resulting to removal. There was no expectation that the judges and magistrates would expect different treatment before the Board undertaking a similar vetting exercise. That by no means amounted to a reading in of the specific provisional Constitution in section 23(2) of the Sixth Schedule, or equating magistrates to judges. The vetting of judges and magistrates was a constitutional requirement that was time bound under article 262 of the Constitution. Any legislative enactments made to effect the Sixth Schedule, including section 23 thereof had to be sustained.

13. On the contention that the drafters of the Constitution knew the difference between magistrates and judges and used the words in the Constitution deliberately, nothing could be further from the truth. In the transition context, articles 160, 167 and 168 were inapplicable, and were thus unavailable for comparative purposes. The issue appeared to be more of grievances regarding the outcomes for the specific respondents who did not agree with the decisions of the Board. Section 23(2) of the Sixth Schedule to the Constitution, in so far as it implicated the function of the Board in the vetting of judges and magistrates, was not subject to the review jurisdiction of the High Court.

14. The appellant sought declarations with regard to a process that was time bound as it was to conclude not later than December 31, 2015 and the Board was to be subsequently dissolved within thirty (30) days as per the Act. The Board was non-existent. Moreover, the declarations the appellant sought were not matters that were before the superior courts for their determination.

15. The issues raised in the appeal did no more than seek clarity on a legal position that the court had previously provided. There was no purpose to be served by making declarations touching on the defunct Board. Nevertheless, it did not matter that the term of the Board may have lapsed. That was to say, lapse of time was not a factor that contributed towards the interpretation and/or application of the Constitution when the jurisdiction was properly invoked and more so, found to have merit.

16. Public bodies and organizations which ordinarily existed to serve a country's government and who were acting within their mandate needed not be condemned to pay costs where such an entity had brought or defended proceedings while acting purely in that regulatory capacity. Therefore, award of costs against such entities should only be made where such an entity had acted unreasonably or in bad faith. The appellant being an independent commission and having filed the petition in that capacity did so with no ill intent but rather to clarify the position in relation to the litigants. The court could not punish the respondents, particularly the 1st to 4th respondents for pursuing their legitimate right to access justice under the Constitution.

Appeal allowed.

Orders

i. *The judgment and order of the Court of Appeal dated and delivered on October 22, 2021 was set aside.*

ii. *The judgment and decree of the High Court dated and delivered on June 22, 2018 was upheld.*

iii. *Each party to bear its costs.*

Citations

Cases

Kenya

1. *In re Kenya National Commission on Human Rights & 2 others* Reference 1 of 2012; [2014] eKLR; [2014] 2 KLR 356 - (Explained)
2. *In re the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] eKLR; [2011] 2 KLR 223 - (Explained)
3. *In the Matter of the Speaker of the Senate & another* Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
5. *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* Petition 13 A, 14 &15; of 2014; [2014] KESC 9 (KLR) - (Explained)
6. *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another* Petition 29 of 2014; [2014] KESC 4 (KLR) - (Explained)
7. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Explained)
8. *Mong'are v Attorney General & 3 others* Petition 146 of 2011; [2011] KEHC 1139 (KLR); [2011] 2 KLR 168 - (Explained)
9. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804- (Explained)
10. *Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others* Petition 6 of 2017; [2017] KESC 25 (KLR) - (Explained)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)

Texts

1. Constitution of Kenya Review Commission (CKRC) (2010), *The Final Report of the Constitution of Kenya Review Commission* Nairobi: Constitution of Kenya Review Commission (CKRC)
2. Neo, JL., (Ed) (2017), *Constitutional Interpretation in Singapore; Theory and Practice* London; Routledge 1st Edn p 1

Statutes

Kenya

1. Constitution of Kenya articles 1, 2, 10, 159(2)(e); 160; 161; 163(4)(a)(7); 165; 167; 168; 172; 259; 260; 262; Chapter 10; Sixth Schedule section 23(1)(2) - (Interpreted)
2. Supreme Court Act (cap 9B) sections 15(2); 21(A) - (Interpreted)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 39(1) - (Interpreted)
4. Vetting of Judges and Magistrates Act, 2011 (Act No 2 of 2011) sections 14, 18, 22(4) - (Interpreted)

Advocates

1. *Mr Kanjama Senior Counsel, and Ms Owano* (Muma & Kanjama Advocates) for the appellant
2. *Mr Ongoya* (Ongoya & Wambola Advocates*)* for the 1st to 3rd respondents
3. *Mr Bernard James Ndeda* (C/O Billy Amendi & Co Advocates) for the 4th respondent
4. *Mr Marwa* for the 5th and 6th respondents

April 21, 2023, the Court delivered the following Judgment:

A. Introduction and Background

1. The promulgation of the *Constitution of Kenya, 2010* on August 27, 2010 signaled the beginning of a transformative path in Kenya. The new constitutional dispensation brought with it a new wave of reforms across governance structures and public institutions. To enhance confidence in the Judiciary, chapter 10 of the *Constitution* contained provisions on judicial authority, independence of the Judiciary, judicial offices and officers, system of courts, appointment of Chief Justice, Deputy Chief Justice and other judges including their tenure, establishment of the Judicial Service Commission as well as the establishment of the Judiciary Fund. To facilitate the transition of the institution from the previous constitutional design of the Judiciary, there had to be mechanism to ensure that judges and judicial officers inspired confidence and were fit to continue serving under the new regime.

2. This paved way for the enactment of the *Vetting of Judges and Magistrates Act* No 2 of 2011 (hereinafter the Act) pursuant to section 23 (1) of the sixth schedule to the *Constitution*. The object of the Act was to provide for the vetting of judges and magistrates pursuant to section 23 of the sixth schedule to the *Constitution*; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board, and for connected purposes. The Act established the 5th respondent, the Judges and Magistrates Vetting Board (hereinafter the Board) whose function was to vet judges and magistrates in accordance with the provisions of the *Constitution* and the Act. The Board was tasked with the responsibility of establishing the suitability of judges and magistrates serving at that the time to continue serving.

3. The 1st to 4th respondents, who were all serving magistrates at the time, were vetted by the Board and found unsuitable to continue serving as such. Their attempt to have the Board review its decision was dismissed. As a result, the Judicial Service Commission, the appellant herein, removed the 1st to 4th respondents from office, in line with the Board's decision.

4. This appeal, pursuant to section 15(2) of the *Supreme Court Act* and rule 39 (1) of the *Supreme Court Rules 2020* stems from the ensuing litigation initiated by several magistrates challenging their removal by the Board. The appeal invokes this court's jurisdiction under article 163(4)(a) of the *Constitution* and primarily seeks the interpretation of section 23(2) of the sixth schedule to the *Constitution* and its applicability to magistrates.

B. Litigation History

i. Proceedings at the High Court

5. Various petitions were filed by individual magistrates before the High Court challenging their removal as magistrates by the Board. The 1st and 2nd respondents filed Petition No 251 of 2016 and Petition No 154 of 2016 respectively, which were heard and determined separately. The 3rd and 4th respondents filed Petitions Nos 270 and 230 of 2016 which were consolidated with those filed by five other magistrates not party to the present appeal, heard and determined as High Court Constitutional Petition No 230 of 2016 as consolidated with Petitions Nos 236, 259, 262, 270, 272 and 323 of 2016.

6. From their respective petitions, the 1st to 4th respondents sought to quash the determination of the Board regarding their suitability to continue serving as magistrates, alleging violation of fundamental rights and freedoms and breach of process. The petition was based on, *inter alia*, grounds that: the vetting process was conducted in a manner that violated their constitutional rights to a fair trial; to be presumed innocent; to legal representation; and that the 5th respondent exceeded its mandate and acted *ultra vires* and, in some instances, considered matters outside the set constitutional frames. In response, the Board argued that the 1st to 4th respondents having voluntarily submitted to its jurisdiction, it dealt with the specific complaints raised, weighed them against the evidence and circumstances, and acted within the law to reach their determination and/ or finding.

7. A five judge bench of the High Court (Lesiit, Wakiaga, Ng'enye, Mativo & Onyiego, JJ) determined the petitions and delivered three distinct judgments on June 22, 2018. Across the petitions, the court identified three common issues for determination: (i) whether section 23(2) of the sixth schedule to the *Constitution* ousts the High Court's jurisdiction to review the Board's decisions declaring the magistrates unsuitable to continue serving; (ii) whether the court's jurisdiction to review decisions rendered by the Board has conclusively been

determined by the Supreme Court of Kenya; and (iii) whether the High Court can examine the merits of the filed petitions.

8. In addressing the first issue, the learned judges acknowledged that the word 'magistrate' does not appear in section 23(2) of the sixth schedule to the *Constitution*. The High Court interpreted that provision as raising two possibilities - removal and a process leading to the removal of a judge. To the learned judges, the unsuitability of a magistrate to continue serving fell under the first possibility of removal. The court found that section 23(2) cannot be read in isolation, to the exclusion of section 23(1) since it is a settled principle of constitutional construction that constitutional provisions touching on the same subject are to be construed together to sustain rather than destroy the other provisions. The High Court was of the opinion that the intention of the drafters of the *Constitution* was that both the serving judges and magistrates were to be vetted under a process insulated from court proceedings. Accordingly, the provisions of section 23(2) of the sixth schedule as to the decisions by the Board on the removal of a magistrate are not subject to question in any court.

9. On the second issue, the court found that this court's decision in *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy and 11 others*, Petition No 13A of 2013 as consolidated with Petition No 14 of 2013 and 15 of 2013 [2014] eKLR ('JMVB (1)') settled the first question conclusively when it held that courts lack jurisdiction to review the process or outcome of the vetting process by the Board. Further, the trial judges held that in *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another*, SC Petition No 29 of 2014; [2014] eKLR ('JMVB (2)') this court determined that courts may intervene in decisions of the Board only where the Board exceeds its constitutional and statutory mandate and more specifically, where there is proof that the Board considered matters outside the period provided under the law.

10. Upon analysis of each magistrate's case, the learned judges concluded that the Board acted within its powers under section 14 of the Act and took into account relevant considerations comprised in section 18 of the Act during the vetting exercise. Consequently, they dismissed all the petitions with no order as to costs.

ii. Proceedings at the Court of Appeal

11. Aggrieved by the decision of the High Court, the 1st to 4th respondents filed four appeals being, Civil Appeals Nos 457, 458, 466 & 475 (Consolidated) of 2018. From the grounds raised in the appeals, the Court of Appeal, by a majority judgment penned by Kiage JA (Kantai, JA concurring) framed two issues for determination as: (i) whether the Supreme Court has conclusively determined the question on report of magistrates; (sic) and (ii)

whether the ouster clause in section 23(2) of the sixth schedule to the *Constitution* applies to the Board's decisions in regard to magistrates.

12. It was the appellate court's position that the Supreme Court in JMVB (1) never addressed the question as to whether the reference to a 'judge' under section 23(2) of the sixth schedule extended to include a 'magistrate'. This is because the issue before the court at the time related to decisions of the Board concerning the removal of a judge from office. Consequently, the Court of Appeal held that the Supreme Court had not determined with finality the issue of the High Court's jurisdiction over decisions by the Board in respect of magistrates as it is only judges who are exclusively mentioned. This conclusion was based on the reasoning that the manner in which section 23 is framed reflects a deliberate and conscious decision on the part of the drafters of the *Constitution* to limit the exclusion of judicial question, enquiry or review to the removal or process leading to the removal of judges only. Thus, the exclusion of the word 'magistrate' from the provision was not accidental or unintended.

13. The appeals were allowed by the appellate court and the trial court's judgment set aside with orders that the constitutional petitions be listed for hearing and determination by a judge or a bench comprising an odd number of judges of the High Court, other than Lesiit, Wakiaga, Ng'enye, Mativo and Onyiego, JJ whose decision was subject of the appeal.

14. Okwengu JA in her dissenting opinion pointed out that there was only one main issue for determination: whether section 23 (2) of the sixth schedule to the *Constitution* is applicable to magistrates. Placing reliance on this court's decision in *JMVB (1)*, the learned judge of appeal concluded that section 23(2) is an ouster clause that gives exclusive jurisdiction to the Board in the vetting of judges and magistrates. Despite, faulting the trial court's interpretation of section 23(2), she affirmed that it arrived at a correct conclusion. She held that the fact that the said section does not explicitly state 'magistrate' does not exclude magistrates from the applicability of the section taking into account the historical context of the provision and broad interpretation of the *Constitution* in consonance with the spirit, values and principles espoused in the *Constitution*.

C. Proceedings Before the Supreme Court

i. Appellant's case

15. The appellant, dissatisfied with the decision of the Court of Appeal, has now filed the instant petition of appeal on the grounds that the learned judges of appeal, by a majority, erred:

    a. By holding that the Supreme Court did not determine with finality the question of whether the High Court lacks jurisdiction to adjudicate upon the suitability of a judge or magistrate to continue serving;

b. By holding that section 23(2) of the sixth schedule to the *Constitution* does not oust the jurisdiction of the High Court to review the decision of the Board regarding magistrates and as such the learned judges were at fault in declaring themselves devoid of jurisdiction and thereby failing to go into consideration of the petitions before them on merit;

c. Failing to note that the Judges and Magistrates Vetting Board is no longer in existence and as such cannot revisit any of its decisions; and

d. Failing to recognize the special circumstances of this case - namely the transition period under the *Constitution* and which involved the vetting process for judges and magistrates- was concluded and can no longer be reopened.

16. On that account, the appellant seeks the following reliefs:

a. The petition be allowed and the judgement and order of the Court of Appeal dated and delivered on October 22, 2021 be set aside and the judgment and decree of the High Court dated and delivered on June 22, 2018 be upheld.

b. A declaration be and is hereby made that section 23(2) of the sixth schedule of the *Constitution* is an ouster clause that insulates the determination of the Vetting Board in regard to the suitability of judges and magistrates, from the review jurisdiction of the courts.

c. A declaration be and is hereby made that no court is clothed with the jurisdiction to review the determination, and the process leading thereto, of the now defunct Judges and Magistrates Vetting Board unless it is shown that the Board exceeded its constitutional and statutory mandate.

d. A declaration that the Judges and Magistrates Vetting Board - the 2nd respondent herein, is no longer in existence and as such cannot revisit any of its decisions.

e. A declaration that the transition period under the *Constitution*, and which involved the vetting process for judges and magistrates was concluded and can no longer be reopened.

f. Costs of the appeal.

g. Any further relief that this honourable court may deem fit to grant in the interest of justice.

17. In support of its petition of appeal, the appellant relies on submissions dated May 25, 2022 and filed on May 27, 2022. The appellant affirms that this court has jurisdiction to determine the appeal under article 163(4)(a) since it involves the interpretation and application of

section 23(2) of the sixth schedule to the *Constitution*. The appellant relies on this court's decisions including in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & anor* [2012] eKLR, to support its submission.

18. On the High Court's lack of jurisdiction to review decisions on the suitability of a judge or magistrate to continue serving *vis-à-vis* the provisions of section 23(2) of the sixth schedule, the appellant submits that this issue was conclusively determined in *JMVB* (1) and *JMVB* wherein the Supreme Court found that section 23(2) is an ouster clause that insulates the determination of the Board regarding the suitability of judges and magistrates from the review jurisdiction of the courts.

19. The appellant further submits that section 23(2) of the sixth schedule cannot be read in isolation and must be read with section 23(1) of the sixth schedule, articles 159(2)(e) and 259 of the *Constitution* as well as the preamble to the Act. Therefore, it follows that a contextual interpretation of the aforesaid provisions leads to the conclusion that section 23 applies to both judges and magistrates.

20. Besides, the appellant contends that due to the non - existence of the Board, there cannot be a revisit of any of its decisions. In that regard, the vetting process cannot be reopened to subject the 1st to 4th respondents to a fresh vetting. Moreover, that it would be discriminatory to exclude judges from having the Board's decisions reviewed by the courts but allow magistrates to seek redress. The appellant urges this court to allow the appeal and grant the reliefs sought.

i. Respondents' case

a. 1st, 2nd and 3rd respondents

21. In opposing the appeal, the 1st, 2nd and 3rd respondents rely on the replying affidavit by the 3rd respondent sworn on March 15, 2022 on his own behalf and on behalf of the 1st and 2nd respondents, and their written submissions dated March 15, 2022 and filed on November 3, 2022 on their behalf. They identify the main issue for determination as being whether section 23(2) of the sixth schedule to the *Constitution* ousts the jurisdiction of the High Court from reviewing the decision by the Board to remove a magistrate from office.

22. They submit that section 23(2) does not apply to magistrates for the reason that the word 'magistrate' does not appear in the section; that the *Constitution* does not in other provisions, including articles 161 and 260, use the word 'judge' to refer to a magistrate but rather, uses the two words whenever it refers to judges and magistrates; and that since the subordinate courts, unlike the High Court, have no supervisory jurisdiction over bodies exercising judicial or quasi-judicial function, such as the Board, there is zero likelihood of conflict of

interest by magistrates as opposed to judges being allowed to supervise the process leading to their vetting and possible removal.

23. To support their submission, these respondents refer to the *Report by the Final Committee on Constitutional Review* wherein the distinction between judges and magistrates was clear in the minds of the drafters of the *Constitution*. On that account, they contend that to read the word 'magistrate' into section 23(2) of the sixth schedule would not be an act of interpreting the *Constitution* but rather an act of amending it.

24. In addition, they contend that this court never conclusively addressed the question as to whether a magistrate is a judge for the purposes of section 23(2) in both JMVB (1) and JMVB (2). They argue that should this court fault the Court of Appeal on the ground that it failed to follow the binding decisions in JMVB (1) and JMVB (2), then this court should expressly identify with precision its determination on the question of whether magistrates are regarded as judges in the two decisions. They urge this court to dismiss the appeal and affirm the Court of Appeal's decision.

b. 4th respondent

25. The 4th respondent, in opposing the appeal, relies on his grounds of objection contained in his response to the appeal dated December 18, 2021 and filed on December 20, 2021 together with his written submissions dated June 6, 2022 and filed on June 13, 2022. Therein, the 4th respondent agrees with the majority decision by the Court of Appeal and avers that any contrary finding would be against the provisions of articles 1, 2, 159, 165, 172 and 260 of the *Constitution*. In that event, he is of the view that the provisions of section 22(4) of the Act are inconsistent with the provisions of section 23(2) of the sixth schedule. The 4th respondent maintains that the Supreme Court in JMVB (1) did not determine with finality, the High Court's lack of jurisdiction to review decisions by the Board on removal of magistrates. Accordingly, he prays for the dismissal of the appeal.

c. 5th and 6th respondents

26. The 5th and 6th respondents in support of the petition rely on their written submissions dated June 27, 2022 and filed on July 7, 2022. They submit that a reading of section 23 of the sixth schedule shows that there are no ambiguities. The main aim of the Board was to determine the suitability of all judges and magistrates who were in office on the effective date to continue serving in accordance with the values and principles set out in articles 10 and 159 of the *Constitution*. For that reason, the intention of the drafters of the *Constitution* cannot therefore be alleged to exempt magistrates from the process just because section 23(2) did not capture the term 'magistrates'.

27. They further submit that it was conclusively determined by this court in JMVB (1) and JMVB (2) with the common finding being that section 23(2) of the sixth schedule is an ouster clause that insulates the determination of the Board regarding the suitability of judges and magistrates from the review jurisdiction of the courts. To that end, this court's decisions remain binding to all other courts.

28. Alternatively, they assert that section 23(2) of the sixth schedule cannot be read in isolation for it must be read together with section 23(1) of the sixth schedule; article 159 and 259 of the *Constitution*; as well as the preamble to the *Vetting of Judges and Magistrates Act*. They state that the section must be read holistically and with a purposive interpretation as held by this court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR.

D. Issues for Determination

29. Giving consideration to the foregoing and the arguments put forth by the parties, the following issues fall for our determination:

    i. Whether section 23(2) of the sixth schedule to the *Constitution* applies to magistrates; and

    ii. What the appropriate available reliefs are.

E. Analysis and Determination

30. At the onset, we need to satisfy ourselves of our jurisdiction over any matter before us, taking into account our limited jurisdictional contours. This arises from the well settled edict that a court can only exercise jurisdiction as circumscribed in the *Constitution* or statute or both.

31. We note that none of the parties objected to our jurisdiction in this matter. The appellant has nevertheless specified with precision that it invokes this court's jurisdiction, as of right, under article 163(4)(a) of the *Constitution*. The constitutional question identified by the appellant relates to the interpretation and/or application of section 23(2) of the sixth schedule to the *Constitution* in relation to magistrates. We have made numerous pronouncements including, *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No 3 of 2012 [2012] eKLR and *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] eKLR where we have enunciated that where issues of contestation revolve around the interpretation or application of the *Constitution* the same ought to have been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this court by way of an appeal as contemplated under article 163 (4)(a) of the *Constitution*.

32. The present appeal easily meets the requisite jurisdictional threshold since it involves the interpretation of section 23(2) of the sixth schedule to the *Constitution vis-à-vis* its applicability to magistrates which issue has been subject of the litigation and transcended through the superior courts to this court. In any event, the said constitutional provision has previously been before this court through JMVB 1 and JMVB 2 the effect of which is partly in issue in the present appeal. Having dispensed with the court's jurisdiction, we now move to the crux of the dispute.

i. Whether section 23(2) of the sixth schedule to the Constitution applies to magistrates

33. To get its proper perspective and context, section 23 of the Sixth Schedule to the *Constitution* provides:

> "(1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in articles 10 and 159.
>
> (2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court."

34. The appellant; the 5th and 6th respondents contend that section 23(2), which cannot be read in isolation of section 23(1), is an ouster clause that applies to the Board's decisions relating to both judges and magistrates. This is firmly opposed by the 1st to 4th respondents who aver that there is a clear difference between judges and magistrates and that the drafters of the *Constitution* were aware and could not have used the term 'judge' to refer to both judges and magistrates. For this reason, it is the 1st and 4th respondents' contention that the absence of the word magistrate in section 23(2) was not intentional as the said section was not intended to apply to magistrates.

35. It is appreciated by all the parties, following our decision in JMVB 1 and JMVB 2 that section 23(2) of the sixth schedule to the *Constitution* ousted the jurisdiction of the courts. Indeed,

the majority judgment, appreciating the binding nature of this court's findings on superior courts below, alluded to the same position in the following manner:

> " 31 Regarding the 1st issue, there is no dispute that the applicability and efficacy of article 23(2) of the 6th schedule has been conclusively determined by the Supreme Court... It is enough that the Supreme Court declared the ouster clause valid."

The bone of contention which is subject of litigious contestation and remains alive in the present appeal is whether the ouster applies to magistrates or was only limited to judges. The applicable provision which extended ouster of the Board's decision to magistrates is section 22(4) of the Act which provides:

> " 22 Review
>
> (4) A removal or a process leading to the removal of a magistrate from office under this Act shall not be subject to question in, or review by, any court."

This provision is buttressed by the provision of section 22(5) which states that "the decision by the Board under the review provision shall be final."

36. The proponents of the ouster clause applying to magistrates argue that this was the import of the decision in JMVB cases and that section 23(2) of the sixth schedule cannot be read in isolation of section 23(1) thereof but rather in a manner that sustains both. On the other end of the argument comes the 1st to 4th respondent who maintain that the magistrates are excluded from the ouster set out in section 23(2). This is because the drafters of the *Constitution* were very deliberate in differentiating the judges from the magistrates in the different provisions such as article 160, 167 and 168; that in the JMVB cases decisions, the Supreme Court did not address itself to the ouster of magistrates as none of them was party to the case and that extending section 23(2) to include magistrates amounts to amending the *Constitution*, a jurisdiction that the court is not clothed with. Peripheral to these arguments is the constitutionality of section 22(4) of the Act which the 4th respondent urged us to find as unconstitutional.

37. In unravelling this contestation, we have to address ourselves to these three questions: a) What is the import of JMVB 1 and 2 in so far as they apply to magistrates? b) is section 22(4) of the Act unconstitutional? and c) Does the ouster in section 23(2) apply to magistrates?

a. The JMVB 1 and JMVB 2

38. The superior courts below took divergent views with the High Court and appellate court arriving at different conclusions on the finality of the Board's decisions under section 23(2) in relation to magistrates. Considering the binding nature of the said decisions on the courts below as dictated by article 163(7) of the *Constitution*, we thought the dragon was slayed and would not have foreseen that there would arise fundamental differences as to the import of the said decisions. The present case presents the proverbial phoenix that resurrected the discussion surrounding section 23(2) of the sixth schedule. This makes it imperative for us to restate our position on the said decisions, notwithstanding the fact that magistrates were never part of the litigants.

39. In JMVB 1, the main issue before us was "whether section 23 (2) of the sixth schedule to the *Constitution of 2010* ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a judge (or magistrate) as being unsuitable to continue serving as such". In our determination we stated as follows:

> " [200] ... We would clarify that by the terms of the Constitution itself, the High Court's general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board the exclusive mandate of determining the suitability of a judge or magistrate in service as at the date of promulgation of the Constitution, to continue in service. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself."

40. Having set out the applicable parameters under the *Constitution*, our historical perspective including the views of the citizens as collected and collated leading to the referendum and eventual promulgation of the *Constitution*, we appreciated the disruptive potential of litigation against the decisions of the Board in the wake of the transitional provisions that bestowed upon the High Court, supervisory jurisdiction over bodies or authority exercising judicial or quasi-judicial functions. The Board by its function fell under such body that would, but for the ouster provided in the transition clause, be subject to the jurisdiction of

the High Court, presided over by Judges. Underscoring the centrality of the vetting process we concluded as follows:

> " [202] For the avoidance of doubt, and in the terms of section 23(2) of the sixth schedule to the Constitution, it is our finding that none of the superior courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act."

41. Appreciating the exclusive mandate of the Board in determining the suitability of a judge or magistrate in service at the date of promulgation of the *Constitution*, we directed the superior courts below to dispose of the pending matters against the board in line with our decision.

42. The 1st to 4th respondents argue that our decision in *JMVB* cases was *obiter dictum*. The 4th respondent goes a step further to argue that our decision was made per incuriam rendering it non-binding on the courts below. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* SC Petition No 4 of 2012 [2013] eKLR we expressed ourselves as follows:

> "It is a general rule that the court is not bound to follow its previous decision where such decision was an *obiter dictum* (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement that is *obiter dictum* is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law."

43. In the *JMVB* case, the focus of our decision was the mechanism contemplated under section 23 of the sixth schedule. This mechanism revolved around the operations and functions of the Board as per the legislation enacted under section 23(1). To us, it did not matter whether the judges, magistrates or any other litigant, considering the expanded scope of access to justice that the *Constitution* brought with it, were challenging the decisions or mechanisms of the board in relation to vetting. That explains why in framing the issue in JMVB 1, the focal point was the ouster of the jurisdiction of the court to review the decision of the Board arising out of the vetting exercise. Our position was further manifested in our finding affirming that the process or outcome attendant upon the operations of the Board were not subject to review by the superior courts.

44. However, noting that the board would sometimes stretch the vetting exercise to consider matters beyond the promulgation of the *Constitution*, it was necessary to clarify the effect of our decision in JMVB 1. In *JMVB* 2 we not only affirmed our position in *JMVB* 1 regarding

the frontiers of section 23(2) of the sixth schedule, but also reiterated the obtaining legal position as follows:

> "39. Having extensively considered the frontiers of section 23(2) of the sixth schedule to the Constitution, this court (at paragraph 202) stated categorically as follows:
>
> ...
>
> 40. In other words, this court consciously articulated the state of the law, in accordance with the Constitution: the removal of a judge or magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law. That remains the valid position, under the law." [Emphasis added]

45. However, to avert the potential excesses by the board in the vetting of magistrates and judges, it was necessary to clarify and delineate the time zone within which the board was to consider its activities. The board having been established as a transitional institution was expected to consider the conduct of the serving judges and magistrates as at the effective date of the promulgation of the *Constitution*. Any consideration beyond that date would turn it into what we equated to the "unruly dog" as espoused by Lord Mersey. To rehash our position, we stated as follows:

> "(63) We find and hold that the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in section 23 of the sixth schedule to the Constitution of 2010, can only investigate the conduct of judges and magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date. To hold otherwise would not only defeat the transitional nature of the vetting process, but would transform the Board into something akin to what Lord Mersey once called "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be" (Lord *Mersey in G & C Kreglinger v New Patagonia Meat & Cold Storage Co Ltd* (1913). Lord Mersey used the analogy of "a dog" to refer to the "Equity of Redemption" in the law of mortgages. Here, we use it to refer to "a jurisdictional mandate" within our constitutional set-up; and not, the Board per se."

46. Before concluding this aspect, it is incumbent upon us to address the assertion that magistrates were not represented in the JMVB cases before us. It is also not entirely accurate to proclaim that magistrates were not represented in the JMVB cases. Indeed, while the JMVB cases pitted at least 7 judges, serving at the time, amongst the litigants were the appellant and the Kenya Judges and Magistrates Association (KJMA) – the umbrella body dealing with the welfare of judicial officers to which magistrates comprise a large constituency. The KMJA was at all times capable of articulating the position of magistrates alongside those of judges.

47. Flowing from above, our findings in JMVB cases on the interpretation of section 23(2) of the sixth schedule was adequate. In arriving at the said decision, we considered the tenets of the interpretation of the *Constitution*, the history, purpose, objective and unique circumstances of our country. As the apex court, we want no more than undertake our constitutional and statutory duty in settling the legal position surrounding the dictates of the people of Kenya, on whose behalf we exercise judicial authority.

48. To our minds therefore our findings in JMVB cases were neither per incuriam nor *obiter dictum*. As explained, the alleged absence of magistrates among the direct litigants did not overshadow the constitutional imperative which shielded the operations of the Board itself under which both the judges and magistrates fell. We note that the mandate of the Board itself is not at the moment under challenge and the respondents willingly submitted to its jurisdiction both at the first instance and in appellate capacity when they sought a review of the Board's decision.

b. Is section 22(4) of the Act unconstitutional?

49. We note that this is an issue that was brought up by the 4th respondent in his submissions. Considering the nature of our jurisdiction, we appreciate that this is not an issue that was at the centre of the arguments and court determination by the superior courts below. As set out in *Lawrence Nduttu* case (*supra*) this issue does not qualify to attract our resolution under article 163(4)(a) of the *Constitution*. As stated above, the constitutionality of section 22(4) of the Act was not framed by either of the superior courts as an issue for determination. At the heart of the dispute now on appeal was the interpretation of section 23(2) of the sixth schedule of the *Constitution* and whether the ouster contemplated under section 23(1) of the sixth schedule extended to magistrates.

50. We point out that, as already stated, we considered the import of section 22(4) of the Act in JMVB 1. Undeniably, the first issue for determination as framed in JMVB 1 was:

> "78 ...

> i) whether section 23(2) of the sixth schedule to the Constitution and section 22(4) of the Vetting of the Judges and Magistrates Act oust the jurisdiction of the High Court to review the decision of the Judges and Magistrates Board; and" (Emphasis ours)

It is our painstaking view that the court, in interrogating the provisions of section 23(2) of the sixth schedule was mindful of not only its application to magistrates but of the enabling statutory provision contained in section 22(4) of the Act. Undoubtedly, the constitutionality of this statutory provision would only be weighed against the provisions of section 23(2) of the sixth schedule, something that has already received sufficient judicial consideration.

51. Moreover, in Nairobi High Court Petition No 146 of 2011, *Dennis Mogambi Mong'are v Attorney General & 3 others*, the petitioner unsuccessfully sought a declaration that Section 23 of the Sixth Schedule to the *Constitution* together with the *Vetting of Judges and Magistrates Act* are unconstitutional. This position was affirmed by the Court of Appeal and we took cognisance of this fact in *JMVB 1*.

52. It therefore serves no further purpose to spend judicial time and resources in answering a peripheral question by way of unconstitutionality of section 22(4) of the Act, the main constitutional provision of section 23(2) of the sixth schedule to the *Constitution* having already been addressed by this court. In any event, the 4th respondent never put a spirited attempt to make his argument around the constitutionality of this statutory provision as to try to persuade us otherwise.

c. Does the ouster in section 23(2) of the sixth schedule to the Constitution apply to magistrates?

53. The crux of the appeal is whether section 23(2) of the sixth schedule to the *Constitution* apply to magistrates. The appeal calls for our interpretation of the said constitutional provision in light of the arguments before us. We remain alive to the previous decisions and positions taken by this court in the JMVB cases. We also remain alive to the fact that this court is not bound by its previous decisions. To this end, article 163(7) of the *Constitution* provides that:

> "(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

The 1st to 4th respondents hinge their argument in favour of an interpretation against the ouster of the jurisdiction of the High Court, on the main fact that we are dealing with magistrates and not judges, unlike the JMVB cases. To them, any other interpretation of the

provision amounts to equating magistrates to judges contrary to the other provisions of the *Constitution*.

54. Jaclyn L Neo (ed) *Constitutional Interpretation in Singapore; Theory and Practice* (Routledge, 2017) at page 1, states that constitutional interpretation introduces additional factors for consideration as compared to the interpretation of statutes. With that in mind, a holistic reading of the *Constitution* is imperative to give it a purposive and contextual interpretation taking cognizance of other provisions as well as Kenya's historical context with the view of protecting and promoting the purpose, effect, intent and principles of the *Constitution*. In *In the Matter of Kenya National Commission on Human Rights* SC Advisory Opinion Reference No 1 of 2012 [2014] eKLR we expressed ourselves as follows:

> "But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

55. In construing the *Constitution*, article 259 posits that interpretation ought to be in a manner that promotes its purpose, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the bill of rights; permits the development of the law; and contributes to good governance. Being the court of final judicial authority, this court is tasked with asserting the supremacy of the *Constitution* and sovereignty of the people of Kenya by providing an authoritative, impartial and ultimate interpretation of the *Constitution* having due regard to circumstances, history and cultures of the people of Kenya. This results in development of rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth. This court appreciates its solemn duty and clear obligation to provide firm and recognizable reference-points, devoid of contradictions, that lower courts can rely on when called upon to interpret the *Constitution*, see *In the Matter of the Speaker of the Senate & another* SC Advisory Opinion Reference No 2 of 2013 [2013] eKLR.

56. The context of our decision in *JMVB* cases remains and there is no argument about it. And in order to put the dispute in context, various proposals were made to the Committee of Experts (hereinafter "CoE") on how to shepherd the intended transformation from the old to the new constitutional dispensation. The Final Report on the Committee of Experts on Constitutional Review categorized the proposals by Kenyans into two. One, that the entire judiciary be reappointed (with the judicial officers or at least all judges being treated as having

lost their jobs but permitted to reapply); and two, the judicial officers remain in office but be required to take a new oath and undergo a vetting process. On careful consideration, the CoE decided that a wholesale reappointment was not appropriate. Instead, some form of vetting was proper, similarly, as it was done in Bosnia-Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe.

57. The main aim of the vetting process was to ensure that any serious complaints against sitting judicial officers were properly considered. Even though CoE's recommendation on vetting was limited to judges, it was alive to the fact that most of the public's experiences of the justice system were at the magistracy level. However, the challenge faced was that the magistracy was large and would pose implications in the operations of subordinate courts; and by reason of judges having stronger protection, their removal being a rare occurrence. Nevertheless, before the draft *Constitution* was submitted to the people of Kenya in the ensuing referendum, the vetting process was extended to cover both judges and magistrates who were in office on the effective date of August 27, 2010. Resultantly, it led to the transition clause contained in section 23 of the sixth schedule of the *Constitution* as promulgated.

58. As previously observed, the suitability of a judicial officer to continue in service under the new constitutional dispensation, is a matter reserved by law to the Board. Hardly any cogent argument has been advanced before this Court, that the *Judges and Magistrates Vetting Act*, which implemented the ouster clause, is not indeed the legislation contemplated under section 23(1) of the sixth schedule to the *Constitution*; and as there is no other legislation such as would claim that status, we have come to the conclusion that there is nothing out of harmony in the common purpose of the *Constitution*, section 23 of its sixth schedule, and the relevant statute – the *Judges and Magistrates Vetting Act*.

59. It follows that a contest to the decision of the Judges and Magistrates Vetting Board, insofar as such a decision affects particular judges involved in the vetting process, is in effect, a collateral challenge to the Board's authority: and this would be inconsistent with the terms of the *Constitution*. This is what we held in the *JMVB* cases. We have not been persuaded to alter our position in the *JMVB* Cases. Nothing has been tabled before us to warrant a review of our own decision as settled in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition (App) No 4 of 2012; [2013] eKLR, *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* SC Petition No 6 of 2014 [2017] eKLR and contemplated by section 21(A) of the *Supreme Court Act*.

60. Shielding the vetting process by the Board from the review jurisdiction of the courts in our view represents the unique situation that we found ourselves in as a country that was transitioning from the old order. In any event, the transition only operated in a specific time frame and historical context of our country. Moreover, this transition between the old

Constitution and the new one was more people centric having accrued from a referendum. It is within this prism that we went for the broader consideration of the vetting exercise in the transition context. The only logical conclusion out of the vetting exercise by the Board was to either recommend suitability of judges and magistrates to continue serving or unsuitability with the latter resulting to removal. There was no expectation that the judges and magistrates would expect different treatment before the Board undertaking a similar vetting exercise.

61. This by no means amounted to a reading in of the specific provisional *Constitution* in section 23(2) of the sixth schedule, or equating magistrates to judges. The vetting or judges and magistrates was a constitutional requirement that was time bound under article 262 of the *Constitution*. Any legislative enactments made to effect the sixth schedule to the *Constitution*, including section 23 thereof had to be sustained.

62. On the contention by the 1st to 4th respondents that the drafters of the *Constitution* knew the difference between magistrates and judges and used the words in the *Constitution* deliberately, nothing could be further from the truth. In the transition context, articles 160, 167 and 168 are inapplicable, and are thus unavailable for comparative purposes. The issue, as we see it, appears to be more of grievances regarding the outcomes for the specific respondents who did not agree with the decisions of the Board.

63. In the end, and having clarified JMVB 1 and JMVB 2 in so far as it applies to magistrates, we find merit in the appeal and reiterate that section 23(2) of the sixth schedule, in so far as it implicates the function of the Board in the vetting of judges and magistrates, is not subject to the review jurisdiction of the High Court. This leads us to the consideration of the appropriate reliefs in the circumstances.

ii. What are the appropriate available reliefs

64. Apart from urging us to allow the appeal by setting aside the judgment of the Court of Appeal and upholding that of the High Court, the appellant seeks declaratory reliefs on the interpretation of section 23(2) of the sixth schedule to the *Constitution* as an ouster clause and that no court is clothed with jurisdiction to review the determination and the process leading thereto of the now defunct Board. The appellant further seeks a declaration that the Board is no longer in existence and as such the vetting process can neither be reopened nor can its decisions be revisited.

65. The 1st to 3rd respondents oppose these proposed declarations on the basis that the unavailability of the remedies cannot be a ground that would lead a court to fail to consider a matter on merit. They contend that the Board's jurisdiction to give magistrates a hearing and entertain review applications was done and completed. Hence, once the matter is before the High Court, the existence of the Board becomes irrelevant and nothing can go back there.

That the court is to determine the matters before it conclusively, therefore, existence of the Board becomes irrelevant.

66. It is apparent that the appellant seeks declarations with regard to a process that was time bound as it was to conclude not later than December 31, 2015 and the Board be subsequently dissolved within thirty (30) days as per the Act. As it stands, the Board is non-existent. Moreover, the declarations the appellant seeks were not matters that were before the superior courts for their determination. Can a party contend that the unavailability of the remedies is ground that would result in a court's failure to consider a matter on merit?

67. Clearly the issues raised in the appeal do no more than seek clarity on a legal position that we have previously provided. We do not see any purpose to be served by making declarations touching on the defunct Board in light of our findings. We nevertheless add that it matters not that the term of the Board may have lapsed. That is to say, lapse of time is not a factor that contributes towards the interpretation and/or application of the *Constitution* when the jurisdiction is properly invoked and more so, found to have merit.

68. On the issue of costs, in *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) we opined that public bodies and organizations which ordinarily exist to serve a country's government and who are acting within their mandate need not be condemned to pay costs where such an entity has brought or defended proceedings while acting purely in that regulatory capacity. Therefore, award of costs against such entities should only be made where such an entity has acted unreasonably or in bad faith. That said, to us the appellant being an independent commission and having filed the petition in that capacity undoubtedly did so with no ill intent but rather to clarify the position in relation to the litigants. Similarly, we cannot punish the respondents, particularly the 1st to 4th respondents for pursuing their legitimate right to access justice under the *Constitution*. Thus, we are not persuaded to make any order for costs for or against any of the parties.

69. We thank all the counsel for their input, research and presentation in the course of this matter.

F. Orders

70. In the end, we make the following orders:

1. The petition of appeal dated December 1, 2021 and filed on December 3, 2021 is allowed to the extent that:

    a. The judgment and order of the Court of Appeal dated and delivered on October 22, 2021 be and is hereby set aside.

b. The judgment and decree of the High Court dated and delivered on June 22, 2018 is upheld.

2. Each party shall bear their own costs.

It is so ordered.

Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 30 (KLR)

Constitutional Law *– rights and fundamental freedoms – enforcement of rights and fundamental freedoms – right to property - whether the right to property under article 40 of the Constitution extended to property that had been found to have been unlawfully acquired - Constitution, article 40.*

Land Law *– ownership of land – proof of ownership of land - whether having the instrument of title was sufficient proof of ownership of land where the registered proprietor's root title was under challenge.*

Land Law *– allocation of land - allocation of unalienated Government land - what was the procedure for the allocation of unalienated land.*

Devolution *– intergovernmental disputes – nature of intergovernmental disputes - what were the factors to consider in determining what amounted to an intergovernmental dispute.*

Civil Practice and Procedure *– appeals – appeals to the Supreme Court - appeals as of right in a matter involving the interpretation or application of the Constitution - what were the limits of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution on appeals as of right in a matter involving the interpretation or application of the Constitution - Constitution, article 163(4)(a).*

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine issues which were not articulated in trial courts - whether the Supreme Court had the jurisdiction to determine an issue which was not articulated at the trial court but only at the appellate court - Constitution, article 163(4)(a).*

Civil Practice and Procedure *– doctrine of res judicata - nature of the doctrine of res judicata - what were the elements to be proven before a court could determine that a matter was res judicata - Civil Procedure Act, cap 21, section 7.*

Precedent *– precedents from courts of concurring jurisdiction - binding nature of precedents on courts of concurring jurisdiction – whether decisions made by courts of concurrent jurisdiction made in rem were binding on courts of equal jurisdiction.*

Words and Phrases *- bona fide purchaser – definition of bona fide purchaser – one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims - Black's Law Dictionary 9th Edition.*

Brief facts

The appellant's grievance was that on various dates in September, 2017, the 1st respondent, County Government of Mombasa, without prior notice forcefully entered the suit property registered to the appellant and demolished the entire perimeter wall facing the beachfront. The 1st respondent

claimed that the entry and demolition was an enforcement action to create a thoroughfare to the beach as the suit property was public land and not private. Prior to the filing of the petition, a suit had been filed and determined in favour of the appellant in HCCC. No. 131 of 2011, *Elizabeth Karangari Githunguri v Dina Management Limited* which the appellant averred, settled the issues concerning the ownership and validity of title over the suit property and had conclusively addressed the issue whether there was a public road through the suit property.

Aggrieved by the 1st respondent's actions, the appellant filed a petition at the Environment and Land Court (ELC Petition No. 8 of 2017) against the 1st respondent and sought among other orders; declarations that the 1st respondent's actions were in violation of its rights under article 40, 27(1) and (2), 29, 47(1) and (2) of the Constitution; and a permanent injunction against the 1st respondent to restrain it from interfering with the suit property. The 1st respondent filed a separate petition (ELC Petition No 12 of 2017) against the appellant and the 2nd – 6th respondents wherein it sought among other declarations; that the suit property was public land; and that the subsequent acquisition by the appellant was from inception null and void *ab initio* The two petitions, ELC Petition No 8 and 12 of 2017, were consolidated.

The trial court determined that: the alienation of the suit property was unprocedural and unlawful for lack of an approved part development plan (PDP) from the Director of Physical Planning and Central/Regional Authority in compliance with the provisions of the repealed Land Planning Act, cap 303; there existed an access road through the open space to the sea, which was later blocked by the allotment of the suit property; the 1st respondent acted within the law in removing the wall which blocked the access road; the 1st respondent's suit was not *res judicata*; the 1st respondent's suit was not time barred as it related to constitutional violations of a continuing nature; and the appellant could not be protected as an innocent purchaser without notice as it failed to demonstrate that it was diligent before purchasing the suit property.

Aggrieved by the judgment of the trial court, the appellant filed an appeal at the Court of Appeal and the 2nd to 6th respondents filed a cross appeal challenging the court's jurisdiction on the grounds that the dispute between the 1st respondent and the National Government, to wit, Ministry of Lands and Physical Planning, the Chief Land Registrar, the Land Registrar, the Director of Survey, and the Director Physical Planning was inter-governmental in nature and hence contrary to articles 6, 159(c) and 189(3) and (4) of the Constitution as read with sections 30 to 35 of the Intergovernmental Relations Act No 2 of 2012 (IGR Act). The appellate court dismissed the appeal and the cross appeal and affirmed the trial court's decision. Aggrieved, the appellant filed the instant appeal.

Issues

i. What were the limits of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution on appeals as of right in a matter involving the interpretation or application of the Constitution?

ii. Whether the Supreme Court had the jurisdiction to determine an issue which was not articulated at the trial court but only at the appellate court.
iii. What was the nature of the doctrine of *res judicata*?
iv. What were the elements to be proven before a court could determine that a matter was *res judicata*?
v. Whether decisions made by courts of concurrent jurisdiction made in *rem* were binding on courts of equal jurisdiction.
vi. Whether the right to property under article 40 of the Constitution extended to property that had been found to have been unlawfully acquired.
vii. Whether having the instrument of title was sufficient proof of ownership of the land where the registered proprietor's root title was under challenge.
viii. What was the procedure for the allocation of unalienated land?
ix. What were the factors to consider in determining what amounted to an intergovernmental dispute?

Held

1. A party had the liberty to appeal against the whole decision of the Court of Appeal to the court, however, it must be within the confines of the law, in the instant case, article 163(4)(a) of the Constitution.
2. The appellant electronically filed its record of appeal within the stipulated time under rule 12(1) of the Supreme Court Rules and submitted the hard copy thereof on July 19, 2021. The record of appeal, however, did not contain the signed and stamped notice of appeal by the Registrar of the Court of Appeal, Mombasa. Nevertheless, the appellant subsequently filed an application dated October 21, 2021 seeking leave to file a supplementary record of appeal which solely contained the signed and stamped notice of appeal. That application was allowed, the notice of appeal was therefore properly on record.
3. A court's jurisdiction emanated from either the Constitution or legislation or both. The limits of the court's jurisdiction under article 163(4)(a) of the Constitutionwere as follows:
    a. The jurisdiction revered judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the trial court in the first instance with a further determination on the same issues on appeal at the Court of Appeal.
    b. The jurisdiction was discretionary in nature at the instance of the court. It did not guarantee a blanket route to appeal. A party had to categorically state to the satisfaction of the court and with precision those aspects/ issues of his matter which in his opinion fell for determination on appeal in the Supreme Court as of right. It was not enough for one to generally plead that his case involved issues of constitutional interpretation and application.
    c. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involved little or nothing to do with the

application or interpretation of the Constitutiondid not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

d. Only cardinal issues of constitutional law or jurisprudential moment, and legal issues founded on cogent constitutional controversies deserved the further input of the Supreme Court under article 163(4)(a).

e. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluating evidence did not bring up an appeal within the ambit of article 163(4)(a).

4. The court had no jurisdiction to revisit the factual findings of the superior courts, and the court was limited to its jurisdiction under article 163(4)(a) of the Constitution.

5. The interpretation or application of articles 27(1) and 47 of the Constitutionhaving not been a question for determination before the superior courts, the instant court would have no jurisdiction to entertain an appeal brought under article 163(4)(a) of the Constitution. Accordingly, the instant court had no jurisdiction to establish whether the 1st respondent's enforcement actions violated the appellant's right to property (article 40), right to equal protection before the law (article 27(1)) and the right to fair administrative action under article 47 of the Constitutionas that would amount to converting the court into a court of first instance. The appellant was no more than seeking compensation and/or damages both liquidated and special, matters that were not in the purview of consideration by the instant court.

6. Whether the dispute was intergovernmental was a jurisdictional issue. Indeed, jurisdiction was a pertinent question for determination. A court was bound to always satisfy itself whether or not it had jurisdiction to hear and determine a matter before it. Whereas the issue of intergovernmental dispute was not articulated at the trial court but only at the appellate court, the inherent jurisdiction of the instant court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates necessitated that the instant court should assume jurisdiction and interrogate those alleged wrongs. The court had jurisdiction to entertain the consideration and determination of that issue under article 163(4)(a) of the Constitution.

7. Not all the four grounds set out by the appellant satisfied the court's jurisdictional threshold under article 163(4)(a) of the Constitution. The appeal correctly invoked the court's jurisdiction to the extent of determining only three questions:
   a. Whether the appellant's rights under article 27(1) and 50(1) of the Constitutionwere violated by the court's application of the doctrine of *res judicata* or in the alternative issue estoppel;
   b. whether the appellate court's interpretation of *bona fide* purchaser amounted to a violation of the appellant's right to property under article 40 of the Constitution; and
   c. whether the suit amounted to an inter-governmental dispute under article 189(3) of the Constitutionand the Inter-Governmental Relations Act.
8. The doctrine of *res judicata* was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where *res judicata* was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. *Res judicata*, was embodied in section 7 of the Civil Procedure Act.
9. The elements to be proven before a court could arrive at the conclusion that a matter was *res judicata* were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed *res judicata* on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject and cause of action.
10. The issues for determination in ELC Petition 12 of 2017 were not substantially in issue in HCCC No 131 of 2011. Further, the 2nd to 6th respondents were not parties in HCCC No 131 of 2011 and the court's findings were inconclusive due to the absence of the State organs, specifically, the Registrar of Titles to enable the court to make a determination. The parties in ELC Petition 12 of 2017 were different from those in HCCC No 131 of 2011 save for the appellant. Therefore, ELC Petition 12 of 2017 was not *res judicata* as the elements to make such a finding had not been met. The appellant's rights to equal protection under article 27(1) and the right to fair hearing under article 50(1) of the Constitutionwere therefore not violated by the appellate court's interpretation of the doctrine of *res judicata* in the matter.
11. The decisions in HCCC No 131 of 2011 and ELC Petition 12 of 2017 were made by courts of concurrent jurisdiction. Decisions made by courts of concurrent jurisdiction made in *rem* were not binding on courts of equal jurisdiction. The ideal scenario on *stare decisis* was for trial court judges to follow the decisions of other judges of the same court unless there

were compelling reasons to depart from the same. That was to ensure consistency, certainty, predictability, and sound judicial administration.

12. The Inter-Governmental Relations Act was the legislation passed pursuant to article 189 of the Constitutionto establish a framework for consultation and cooperation between the National and County Governments, and amongst county governments, and to establish mechanisms for the resolution of intergovernmental disputes. The intention of article 189 was to have consultation and cooperation between the National and County Governments and have disputes resolved in a less acrimonious way. The two levels of Government were required to make every reasonable effort to settle any arising disputes.

13. There was no express definition of what amounted to an intergovernmental dispute under the Inter-Governmental Relations Act. Section 30 of the Inter-Governmental Relations Act merely defined a dispute as an intergovernmental dispute and that the dispute resolution mechanisms applied to disputes arising between the National Government and a county government or amongst county governments. From article 189 of the Constitutionand section 30, the dispute must first be between the two levels of Government or between county governments. An intergovernmental dispute:

    a. Must involve a specific disagreement concerning a matter of fact, law or denial of another.
    b. Must be of a legal nature. That was a dispute capable of being the subject of a judicial proceeding.
    c. Must be an intergovernmental one in that it involves various organs of State and arose from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitutionor a statute.
    d. The dispute may not be subject to any of the previously enumerated exceptions.

14. The main issue for determination before the trial court was not a disagreement between the County Government and the National Government agencies, but whether the ownership of the suit property was public or private. The suit property was central to the dispute, necessitating the basis for the consolidation of Petition 8 of 2017 and Petition 12 of 2017. Therefore, the question of the dispute being intergovernmental fell on the periphery and was incidental to the main issue in dispute. The mere fact that the 1st respondent opted to file separate proceedings in response to that filed by the appellant did not change the nature of the proceedings. The issues and challenges to the ownership of the suit property would still have been introduced in response to the petition, even if by way of cross-petition.

15. Where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

16. Under the repealed Government Lands Act (GLA), a PDP had to be drawn and approved by the Commissioner of Lands or the Minister for Lands before any unalienated Government land could be allocated. After a PDP had been drawn, a letter of allotment based on the approved PDP was then issued to the allotees. It was only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey could be conducted for the purpose of issuance of a certificate of lease.
17. There was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. The allocation of the suit property to the former President was irregular.
18. Before the allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, the court could not, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It was not enough for a party to state that they had a lease or title to the property.
19. The suit property was subsequently converted and the former President registered as owner and obtained a freehold title. Further, the suit property therein was within the then Mombasa municipality. Section 10 of the GLA was applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.
20. The title or lease was an end product of a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such a title could not be held as indefeasible. The first allocation having been irregularly obtained, the former President had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.
21. Article 40 of the Constitution entitled every person to the right to property, subject to the limitations set out therein. Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired. As the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter could not therefore be protected under article 40. The root of the title having been challenged, the appellant could not benefit from the doctrine of *bona fide* purchaser.
22. The appellant's title was not protected under article 40 the Constitutionand the land automatically vested to the 1st respondent pursuant to article 62(2) the Constitution. The suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.
23. Generally, costs followed the event and they should not be used to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit. As each party was pursuing an apparent genuine constitutional legitimate claim, and the appeal not having succeeded, there was no reason to burden any of them on the limited question of costs.

Appeal dismissed.

Orders

Each party to bear own costs.

Citations

Cases

Kenya

1. *Adega, Benson Ambuti & 2 others v Kibos Distillers Limited & others* Petition 3 of 2020; [2020] eKLR - (Explained)
2. *African Line Transport Co Ltd v Attorney General* Civil Suit 276 of 2003; [2007] KEHC 2621 (KLR) - (Explained)
3. *Aramat, Lemanken v Harun Meitamei Lempaka & 2 others* Petition 5 of 2014; [2014] eKLR - (Explained)
4. *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (amicus curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
5. *Chai, Nelson Kazungu & 9 others v Pwani University* Civil Appeal 78 of 2016; [2014] eKLR - (Explained)
6. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14 A, 14 B & 14 C of 2014; [2014] eKLR - (Explained)
7. *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another* Environment & Land Case 598 of 2016; [2017] KEELC 432 (KLR) - (Explained)
8. *Council of County Governors v Lake Basin Development Authority & 6 others* Petition 280 of 2017; [2017] eKLR - (Explained)
9. *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* Petition No 3 of 2014; [2014] eKLR - (Explained)
10. *ET v Attorney General & another* Petition 212 of 2011; [2012] eKLR - (Explained)
11. *Funzi Development Ltd & 2 others v County Council of Kwale & 2 others* Civil Appeal 252 of 2005; [2014] eKLR - (Explained)
12. *Ibren, Ibrahim v Independent Electoral & Boundaries Commission & 2 others* Election Petition Appeal 9 of 2018; [2018] eKLR - (Explained)
13. *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* Petition 370 of 2015; [2016] eKLR - (Explained)
14. *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
15. *Kamere, Samuel v Lands Registrar, Kajiado* Civil Appeal 28 of 2005; [2015] KECA 644 (KLR) - (Explained)
16. *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motion No 42 of 2014; [2016] eKLR - (Explained)

17. *Kimani, Paul Mungai & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR) - (Explained)
18. *Macharia v Kenya Commercial Bank & 3 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
19. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
20. *Modern Holdings (EA) Limited v Kenya Ports Authority* Petition 20 of 2017; [2020] KESC 53 (KLR) - (Explained)
21. *Muangi, Japhet Nzila v Kenya Safari Lodges & Hotels Ltd* Civil Suit 291 of 2000; [2008] eKLR - (Explained)
22. *Munyu, Maina v Hiram Gathiha Maina* Civil Appeal 239 of 2009; [2013] KECA 94 (KLR) - (Explained)
23. *Nduttu & 6000 others v Kenya Breweries Ltd* Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Explained)
24. *Njiroine, Daniel Shumaria v Naliaka Maroro* Motion 5 of 2013; [2014] eKLR - (Explained)
25. *Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties)* Petition 33 of 2021; [2022] KEELC 33 (KLR) - (Explained)
26. *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* Civil Appeal 80 of 1988; [1990] eKLR - (Explained)
27. *Rai & 3 others v Rai & 4 others* [2014] 2 KLR 253 - (Explained)
28. *Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others* Miscellaneous Civil Application 617 of 2003; [2006] 1 KLR (E&L) 563 - (Explained)

Uganda

1. *George William Katerregga v Commissioner for Land Registration & others* Miscellaneous Application No 347 of 2013; [2013] UGHCLD 83 - (Explained)
2. *Katende v Haridar & Company Ltd* [2008] 2 EA 173 - (Explained)

South Africa

Nicholas Francois Marteens & others v South African National Parks Case No 0117 - (Explained)

Nigeria

Alhaji Bello Nasir v Kano State Civil Service Commission & 2 others SC 144/2003; (2010) LLJR SC - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary St Paul* Minnesota: West Group 9th Edn
2. Hogg, QM (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws of England* London: Buttersworth para 1174

3. Mulla, DF., (Ed) (2013), *The Code of Civil Procedure* London: LexisNexis 18th Edn p 293

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7 - (Interpreted)
2. Constitution of Kenya (Repealed) section 117 - (Interpreted)
3. Constitution of Kenya articles 6, 19(3)(c); 20(1)(3); 23; 27(1)(2); 29; 40; 47(1)(2); 50(1); 62(2)(3); 67(2); 159(c); 163(4)(a); 189(3)(4); Chapter 11 part 4- (Interpreted)
4. Government Lands Act (cap 280) In general - (Cited)
5. Government Lands Act (Repealed) (cap 280) section 82 - (Interpreted)
6. Inter-Governmental Relations Act (cap 265F) sections 30 - 35 - (Interpreted)
7. Land Planning Act,(repealed) (cap 303) - (Cited)
8. Land Registration Act (cap 300) sections 26, 106(1)(3); 107(1) - (Interpreted)
9. Limitation of Actions Act (cap 22) sections 41, 42 - (Interpreted)
10. Physical and Land Use Planning Act (cap 303) - (Cited)
11. Registration of Titles Act (cap 281) In general - (Cited)
12. Supreme Court Act (cap 9B) sections 15(2); 21(1)(3) - (Interpreted)
13. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 12, 38, 39 - (Interpreted)
14. Survey Regulations, 1994 (cap 299 Sub Leg) regulation 110 - (Interpreted)
15. Trust Land Act (cap 288) section 13 - (Interpreted)

Advocates

Prof. Githu Muigai Senior Counsel & Mr. Dennis Nkarichia for the appellant
Mr. Paul Buti for the 1st respondent
Mr. Nguyo for the 2nd - 6th respondents

April 21, 2023, the Court delivered the following Judgment:

A. Introduction and Background

1. The appellant, Dina Management Limited, vide the petition of appeal dated 1July 5, 2021 challenges the decision of the Court of Appeal in Civil Appeal No 150 of 2021 which affirmed the judgment of the Environment and Land Court (A Omollo J) in ELC Petition No 8 of 2017 consolidated with Petition No 12 of 2017. The appeal invokes article 163(4)(a) of the *Constitution*, sections 15(2), 21(1) and (3) of the *Supreme Court Act, No 7 of 2011* and rules 12, 38 and 39 of the *Supreme Court Rules, 2020*.

2. The genesis of the appellant's grievance is that on various dates in September, 2017, the 1st respondent, County Government of Mombasa, without prior notice forcefully entered the property known as MN/1/6053 situated in Nyali Beach, Mombasa County, registered to

the appellant (hereinafter 'the suit property') demolished the entire perimeter wall facing the beachfront and flattened the whole property to be at the same level as the beach. It was urged by the 1st respondent that the entry and demolition was an enforcement action to create a thoroughfare to the beach as the suit property was public land and not private.

3. Prior to the filing of the above petition, a suit had been filed and determined in favour of the appellant in HCCC No 131 of 2011, *Elizabeth Karangari Githunguri v Dina Management Limited* (HCCC No 131 of 2011) which the appellant avers, settled the issues concerning the ownership and validity of title over the suit property and had conclusively addressed the issue whether there was a public road through the said property.

B. Litigation History

(i) Proceedings at the Environment and Land Court

4. Aggrieved by the 1st respondent's actions, the appellant filed Environment and Land Court Petition No 8 of 2017 (ELC Petition No 8 of 2017) dated September 27, 2017 against the 1st respondent. The appellant sought a total of fifteen orders, asserting its ownership to the suit property. Among the orders sought were declarations that the 1st respondent's actions were in violation of its rights under article 40, 27(1) & (2), 29, 47(1) & (2) of the *Constitution*; a permanent injunction against the 1st respondent to restrain it from interfering with the suit property; the 1st respondent be compelled to meet the costs of its actions assessed at Kshs 10,102,774.08; compensation for malicious damage to property; damages for trespass, interest and costs of the petition.

5. The 1st respondent filed a separate petition, ELC Petition No 12 of 2017 dated November 15, 2017 against the appellant and the 2nd – 6th respondents wherein it sought declarations that the suit property is public land forming part of the beach property within the high and low water marks of the Indian Ocean; that the subsequent acquisition by the appellant was from inception null and void ab initio; an order that the Chief Land Registrar be compelled to revoke the title over the suit property and the Director Surveys to cancel and expunge all survey plans, computations, field notes, deed plans and survey records over the suit property including an order for the eviction of the appellant from the suit property, general damages for trespass and costs.

6. The appellant opposed the 1st respondent's petition on the grounds that the suit property was previously unalienated government land which was lawfully alienated as private property in 1989; that the suit property was 30 meters above the high water mark as per the law at the time of alienation and regulation 110 of the *Survey Regulations* 1994 which established that all land within the 60 meters from the high watermark was public land was not in force at the time; that no evidence was presented to support the assertion that the

suit property was a road reserve; that the suit was time barred as allocation was done close to 30 years from the date the suit was filed; that the appellant was not guilty of any illegalities or irregularities; and that the suit was res judicata as the subject matter was determined by Mukunya J in HCCC, No 131 of 2011.

7. The 2nd-6th respondents on the other hand urged that the suit property was initially an open space and the alienation of the suit property to HE Daniel Arap Moi was lawful and all procedures followed, however the letter of application to the Commissioner of Lands seeking to be allocated the suit land and the Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land were missing.

8. The two petitions, ELC Petition No 8 and 12 of 2017, were consolidated by consent of the parties and proceeded to hearing by way of affidavit evidence. The court framed the issues for determination as; whether the suit property was a public utility and there was a public access road through it to the beach; whether the suit property was within 60 metres of the high water mark; were illegalities or faults committed by those responsible for alienating the suit property and whether the appellant should suffer the faults of those third parties (if any); whether the 1st respondent's suit is res judicata and/or an abuse of court process; whether the suit was time barred and/or the 1st respondent guilty of latches and indolence; and whether the appellant was the lawful owner of the suit property and entitled to the orders sought. In a judgment dated 10th September, 2019 the trial court dismissed the appellant's petition and partially allowed the 1st respondent's petition.

9. The trial court determined that: the alienation of the suit property was unprocedural and unlawful for lack of an approved PDP from the Director of Physical Planning and Central/ Regional Authority in compliance with the provisions of the *Land Planning Act,* cap 303 (repealed by the *Physical Planning Act* cap 286); there existed an access road through the open space to the sea, which was later blocked by the allotment of the suit property in disregard of the provisions of section 85 of the *Government Lands Act* (repealed) (hereinafter referred to as "GLA"); the 1st respondent acted within the law in removing the wall which blocked the said access road; the 1994 regulations relied on by the 1st respondent to urge that the suit land was within 60 meters from the high-water mark were not in operation in September 1989 when the property was alienated; the 1st respondent's suit was not res judicata; the 1st respondent's suit was not time barred as it related to constitutional violations of a continuing nature; the appellant could not be protected as an innocent purchaser without notice as it failed to demonstrate that it was diligent before purchasing the suit property; and the appellant's rights were not violated and it was not entitled to the reliefs sought.

(ii) Proceedings at the Court of Appeal

10. Aggrieved by the judgment, the appellant moved the Court of Appeal vide Civil Appeal No 150 of 2019 premised on a total of 22 grounds of appeal. The 2nd to 6th respondents filed a cross appeal challenging the court's jurisdiction on the grounds that the dispute between the County Government of Mombasa and the National Government, to wit, Ministry of Lands and Physical Planning, the Chief Land Registrar, the Land Registrar, the Director of Survey, and the Director Physical Planning was inter-governmental in nature and hence contrary to articles 6, 159(c) and 189(3) and (4) of the *Constitution* as read with Sections 30 to 35 of the *Inter-Governmental Relations Act* No 2 of 2012 (hereinafter IGR Act).

11. The 1st respondent filed a notice of grounds for affirming the decision and urged that the suit property was trust land, and such land was not government land available for alienation and any alienation thereof contravened section 117 of the repealed Constitution, section 13 of the *Trust Land* and section 82 of the *Government Lands Act (repealed)*.

12. The appellate court framed seven issues for determination. On the first issue, the appellate court held that the appeal did not relate to an inter-governmental dispute. This is because the mere introduction of the 2nd to 6th respondents by the 1st respondent to the suit could not convert the dispute into an intergovernmental dispute as the ultimate objective of the dispute was to determine the status of the suit property as against the appellant who had moved the court to assert its ownership, the appellant not being a party to any of the levels of government.

13. On the second issue, the appellate court found that the claim of res judicata was devoid of merit as the matter before it went to the root of the ownership of the title. On whether the dispute was statute barred under the *Limitation of Actions Act* it was held that since the suit was framed as a constitutional petition seeking to enforce fundamental rights and freedoms which violations were of a continuing nature, the doctrine of limitations did not apply. Further, that sections 41 and 42 of the *Limitation of Actions Act* excludes application of the Act on matters concerning government land, including proceedings towards recovery of government land.

14. On the nature of the suit property including the road, the court held that it was not trust land, but an open space and the applicable law when the purported alienation took place is the GLA, thus under the realm of the 2nd to 6th respondents. The suit property being within the municipality of Mombasa, the land was to be allotted in accordance with section 10 of the GLA, which is to the effect that "Leases of town plots may be granted for any term not exceeding one hundred years."

15. On whether the title to the suit property was lawfully acquired and whether the appellant was an innocent purchaser for value without notice, the appellate court agreed with the trial court, holding that the appellant cannot enjoy protection under the doctrine of innocent purchaser and that where property is acquired through a procedure against the law, the title cannot qualify for indefeasibility. It held that the title subsequently issued was invalid having been acquired illegally and irregularly. The appellate court found that the suit property was public land reserved for a public utility and that there was a road leading to the beach through the open space that was the suit property. The suit property thus remained a public utility incapable of giving rise to a private proprietary interest capable of being protected by a court of law. The appellate court thus dismissed the appeal and the cross appeal and affirmed the trial court's decision including awarding costs to the 1st respondent.

C. Proceedings before the Supreme Court

(a) Appellant's case

16. The appeal is premised on the grounds that the learned Justices of Appeal(Warsame, Musinga and Murgor JJA) erred in:

    i. determining that the appeal did not relate to an inter-governmental dispute despite Petition No 12 of 2017 being a *prima facie* declaration of an intergovernmental dispute by a county government *vis-à-vis* the national government;

    ii. in determining that the issue of res judicata or alternatively issue of estoppel did not apply to the instant suit despite the Judgment by Mukunya J in HCCC No 131 of 2011 *Elizabeth Karangari Githunguri v Dina Management Limited* having determined the issue of whether there existed a public access road through the suit property and issued a judgment in rem on the issue;

    iii. in their interpretation of the principle of bona fide purchaser for value without notice of defect resulting in a violation of the petitioner's right to property under article 40 of the *Constitution*; and

    iv. by affirming the violent, summary, unprocedural and illegal acts of the 1st respondent, resulting in violation of the petitioner's right to fair administrative action protected under article 47.

17. The appellant seeks the following reliefs:

    a. The Judgment and order of the Court of Appeal (Warsame, Musinga, & Murgor JJA) delivered on June 4, 2021 be set aside in its entirety and substituted with the reliefs sought by the petitioner in Mombasa Environment and Land Court Petition No 8 of 2017, *Dina Management Limited v County Government of Mombasa*;

    b. The judgment and Decree of the Environment and Land Court in Petition No 8 of 2017 be set aside;

    c. The petitioner's costs of this petition, the appeal in Mombasa Civil Appeal No 150 of 2019 and the Consolidated Petition in Mombasa Environment and Land Court Petition No 8 of 2017 be borne by the 1st respondent;

    d. Such consequential and appropriate relief, further or other order(s) as this honourable court may deem just and expedient in the interest of justice.

18. The appellant filed submissions dated August 12, 2021 in response to the 1st respondent's Grounds of objection raising a challenge to the court's jurisdiction, submissions dated September 9, 2021 in support of its petition of appeal and submissions dated October 18, 2021 in reply to the 1st -6th respondents' submissions.

19. On the competency of the appeal, the appellant submits that the notice of appeal is fit and proper for it is challenging the entire interpretation and application of the *Constitution* by the appellate court, the basis of an appeal under article 163(4)(a) of the *Constitution*. Secondly, it is urged that the appeal was electronically filed on time on July 16, 2021 and that it was only the physical copies that were submitted to the court's Registry on 1July 9, 2021.

20. On the issue whether the suit was an intergovernmental dispute ousting the court's jurisdiction, the appellant submits that while ELC Petition No 8 of 2017 did not relate to an intergovernmental dispute, upon consolidation with ELC Petition No 12 of 2020, it mutated into an intergovernmental dispute between the two levels of government. It is emphasized that in the second petition, the 1st respondent sought to compel the officers of the National Government to pursue a particular cause of action and that its substratum involved issues of extent, scope and engagement between a devolved unit and the national government. It submits that the appellate court failed to consider the requirements of article 189(4) of the *Constitution* and sections 30-35 IGR Act, which provide for an alternative mechanism for intergovernmental dispute resolution. The appellant urges that

the exhaustion principle was binding on the parties and they ought to have resorted to the alternative mechanism under section 34 of the IGR Act first before approaching the court.

21. On whether the appellant's rights protected under articles 40, 27(1) and 47 of the *Constitution* were violated, the appellant contends that at all material times, it was the registered owner of the suit property, and that the 1st respondent does not enjoy any constitutional, statutory or common law mandate to administer public land. It further submits that pursuant to articles 62(3) and 67(2) of the *Constitution*, such powers vest with the National Land Commission, and accordingly the 1st respondent's actions were unlawful, illegal and a violation of its fundamental rights under articles 40, 27(1) and 47 of the *Constitution*. The appellant avers that although the National Land Commission filed an application for joinder as an interested party based on the contention that the substratum of the decision by the superior court fell within its mandate to manage and administer public land, it did not prosecute its application. It urges that the enforcement action was undertaken without prior notice and in breach of its right to natural justice. To this end, it contends that it was immaterial whether the same decision would have been arrived at in the absence of the departure from principles of natural justice.

22. On the issue of whether the Court of Appeal's interpretation of the principle of bona fide purchaser limited the appellant's right to property under article 40 and was a violation of articles 19(3)(c), 20(1) (3) and 23 of the *Constitution*, it is the appellant's case that the Court of Appeal misapplied and misconstrued the doctrine of bona fide purchaser; misapplied the provisions of the *Physical Planning Act* (repealed), specifically the requirements of the Part Development Plan; and failed to apply the provisions of the Government *Land Act* (repealed).

23. On the issue of estoppel and res judicata the appellant contends that the judgment by Mukunya J in HCCC No 131 of 2011 determined the ownership and validity of the appellant's title over the suit property and had conclusively addressed whether there was a public road through the said property. It urges that any judgment that declares, defines, denotes or otherwise determines the status or condition of a property operates directly on the property and the whole world irrespective of the parties in a dispute. It also asserts that decisions in rem by courts of concurrent jurisdiction are binding on each other and that a mere change, addition or deletion of parties to the suit could not alter the status of a decision *in rem*. Consequently, it is urged that the superior courts were estopped from reopening the subject matter. As a consequence of the misapplication of the two doctrines, the appellant's rights to equality and freedom from discrimination protected under article 27(1) of the *Constitution* were infringed.

(b) 1st respondent's Case (County Government of Mombasa)

24. The 1st respondent filed grounds of objection dated July 28, 2021 and an affidavit sworn by Jimmy Waliaula in response to the petition of appeal. It also filed submissions to the petition dated September 17, 2021. the 1st respondent sets out two preliminary jurisdictional arguments. Firstly, that the notice of appeal is defective as it upsets rules 36 and 38(1) of the *Supreme Court Rules* as it was neither lodged in the Court of Appeal, nor dated, signed or sealed by the Deputy Registrar of the said court, and that it was filed on June 16, 2021 while the appeal was lodged on July 19, 2021, three days late and without leave of court. Secondly, the 1st respondent submits that this court does not have jurisdiction as the grounds set out by the appellant do not clothe this court with jurisdiction under article 163(4)(a) of the *Constitution* as they do not concern the interpretation and application of the *Constitution*.

25. On whether the suit was an intergovernmental dispute, it is urged that the proceedings before the superior courts did not raise any dispute touching on either articles 189 or sections 30-35 of the *IGR Act*. In any event, it submits that the dispute does not satisfy the mandatory requirements set out under section 32 of the Act as there was no agreement between the two governments to trigger an alternative dispute resolution mechanism under the Act. In the alternative, it is argued that the transactions leading to the dispute were finalized before the advent of the *Constitution*, 2010 and the enactment of the *IGR Act*. Moreover, that as provided under section 106(1) and 107(1) of the *Land Registration Act*, the two laws would not apply to any ensuing rights, liabilities or remedies. For that proposition it relies on this court's decisions in *Samuel Kamau Macharia v Kenya commercial Bank & others* [2012] eKLR and *Daniel Shumaria Njiroine v Naliaka Maroro* [2014] eKLR.

26. On estoppel and its applicability, the 1st respondent argues that the doctrine is an equitable remedy which must follow the law and only applies to issues of fact, and neither of law nor on interpretation and application of the *Constitution*. Furthermore, it is contended that the doctrine of estoppel cannot be invoked against a statute citing this court's pronouncement in the *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR to support its submission.

27. As to whether the appellant was an innocent purchaser without notice, the 1st respondent submits that the crux of the superior courts' judgments was that the suit property was public land reserved for a public utility and any subsequent acquisition would be contrary to the original purpose. For this reason, it urges that the issue at hand was not the basis of the Court of Appeal's determination and therefore could not form the basis of an automatic right of appeal pursuant to article 163(4)(a) of the *Constitution*.

28. On whether the 1st respondent's acts were procedural, it is submitted that the conversion of the suit property from public to private land was illegal and void ab initio as was upheld by the superior courts, which decision was not based upon a consideration of article 47 of the *Constitution*. It is therefore submitted that in the circumstances, the application of article 47 of the *Constitution* was not in issue before the superior courts and cannot similarly be the subject of commencing an appeal as of right before this court. It relies on this court's decisions in *Lawrence Nduttu & 6000 others vs Kenya Breweries* [2012] eKLR; *Ibrahim Ibren vs IEBC & others* [2018] eKLR; and *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & others* [2020] eKLR to buttress this argument. Moreover, the 1st respondent submits that the appellant has challenged the appellate court's statutory interpretation and application, that is, of the *Physical Planning Act* (repealed) and the *Government Lands Act* (repealed), which challenge cannot fall for appellate determination as of right.

The 2nd to 6th Respondents' Case

29. The 2nd to 6th respondents filed grounds of objection dated September 15, 2021 and submissions dated September 29, 2021 . They submit on only two issues, whether the suit property was lawfully allocated, and whether the dispute was intergovernmental in nature.

30. It is their submission that the suit land was unalienated government land legally allotted in accordance with section 9 of the Governments Act (repealed) and in compliance with the set procedural requirements and upon payment of the requisite fees. Consequently, the title to the suit property was indefeasible under section 26 of the *Land Registration Act* No 3 of 2021, had not been cancelled on grounds of fraud or misrepresentation, and had legally passed to the appellant.

31. On whether the dispute is intergovernmental in nature, the 2nd to 6th respondents reiterate that the 1st respondent's petition before the ELC raised a prima facie intergovernmental dispute between the two levels of government as the 1st respondent challenged the actions of the national government. For these reasons, it is contended that the provisions of article 189 of the *Constitution* and the derivative Act were applicable to the dispute. It is therefore urged that the finding by the Court of Appeal was made in error and upset the principle of exhaustion, which requires that where a specific alternative dispute resolution mechanism is prescribed in the *Constitution* or statute, parties must resort to that mechanism before invoking the court's jurisdiction.

D. Issues for Determination

32. The 1st respondent raised preliminary issues in response to the petition. This emanates from the notice of appeal which is argued to be defective for non- compliance with rules 36 and

38 of the Supreme Court Rules. Accordingly, that rule 36 requires the notice of appeal to be in accordance with Form F of the first schedule of the Supreme Court Rules which indicates that it be an appeal "against the whole of the said decision or such part of the said decision." The 1st respondent's case is that for this court to consider an appeal under article 163(4)(a), it must be limited to matters of interpretation and application of the *Constitution* only and does not entitle a party to appeal against the whole of the Judgment of the Court of Appeal.

33. The second facet of the 1st respondent's objection to the non-compliance with Form F of the first schedule is manifest in that the notice of appeal filed in the record of appeal lacks the date when it was lodged, it is unsigned by the Deputy Registrar and lacks the seal of the court. Further, the 1st respondent argues that with all the defects in the notice of appeal, the appeal was lodged out of time. That the notice of appeal having been filed on June 16, 2021, the appeal ought to have been filed on July 16, 2021. It urges that since the appeal was filed on July 19, 2021, it was filed a period of three (3) days outside the date stipulated for filing the appeal and no leave of this court was sought and obtained by the appellant before filing the appeal out of time.

34. In response, the appellant submits that its appeal lies against the Court of Appeal decision in its entirety and its appeal is within the provisions of article 163(4)(a) of the *Constitution*. The appellant also submits that following the delivery of the Court of Appeal Judgment on June 4, 2021, it electronically lodged and paid for its notice of appeal on June 16, 2021, through its Advocates, within the statutory timeline as per the Practice Directions on Electronic Case Management, Gazette Notice No 2357 of 2020. The appellant further states that the appeal was filed electronically and fees paid on July 16, 2021. It is the physical copies of what was filed that were delivered to the court registry on July 19, 2021. The appellant avers that it pursued the appeal while awaiting and following up with the registrar of the appellate court for the signed and stamped copy.

35. We note from the record that the appellant's notice of appeal dated June 16, 2021 indicates that "it is dissatisfied with the decision of the Court of Appeal and intends to appeal to the Supreme Court against the whole of the said decision." It is for this reason, that the appellant in its prayers, seeks to have this court set aside in its entirety the Judgment of the Court of Appeal. A party has the liberty to appeal against the whole decision of the Court of Appeal to this court, however, it must be within the confines of the law, in this case, article 163(4)(a) of the *Constitution* which we shall address later, as we address the jurisdiction of this court.

36. We also note that the appellant electronically filed its record of appeal within the stipulated time under rule 12(1) of the *Supreme Court Rules* and submitted the hard copy thereof on July 19, 2021. The record of appeal, however, did not contain the signed and stamped notice of appeal by the Registrar of the Court of Appeal, Mombasa.

37. Nevertheless, the appellant subsequently filed an application dated October 21, 2021 seeking leave to file a supplementary record of appeal which solely contained the signed and stamped notice of appeal. This application was canvassed by the parties culminating in the ruling dated May 19, 2022 wherein the application was allowed, the 1st respondent's objection was rejected and found that the notice of appeal was properly on record. The 1st respondent contends that the appellant was expected to file the supplementary record of appeal, the same having been annexed to its application for leave. This would form the basis of the 1st respondent filing further submissions since it had already filed submissions on the appeal. The appellant maintains that it had filed and duly served to all the parties the supplementary record. From the record, when the matter was last mentioned before the Hon Deputy Registrar of this court, counsel for the 1st respondent indicated that he would not be filing any supplementary submissions and he gave no reasons for it. It is only at this hearing that it turns out he had reservations. Having accepted the notice of appeal and the attendant record of appeal in the ruling, the 1st respondent's objection on this limb therefore fails and we do not wish to belabour the same any further.

38. From our careful consideration of the respective pleadings, written and oral submissions in the instant appeal, the following issues emerge for determination:

    i. Whether the appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*;

    ii. Whether the suit amounts to an inter-governmental dispute under article 189(3) of the *Constitution* and the *Intergovernmental Relations Act* No 2 of 2012;

    iii. Whether the appellant's rights under articles 27(1) and 50(1) of the *Constitution* were violated by the appellate court's application of the doctrine of res judicata and/or the doctrine of estoppel;

    iv. Whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under article 40 in violation of articles 19(3)(c), 20(1), 21(3) and 23 of the *Constitution*; and

    v. Whether the 1st respondent's enforcement actions violated the appellant's rights to property, right to equal protection before the law and the right to fair administrative action under articles 40, 27(1), and 47 of the *Constitution*.

E. Analysis and Determination

(i) Whether the appeal meets the constitutional threshold under article 163(4)(a) of the constitution Constitution?

39. The 1st respondent challenges this court's jurisdiction to hear and determine the appeal. It urges that none of the grounds in the appeal relate to interpretation or application of the *Constitution*. Indeed, jurisdiction is a preliminary issue that ought to be dealt with at the onset given that, without jurisdiction a court is obligated to down its tools. It therefore follows that we must first address the issue whether we are clothed with requisite jurisdiction under article 163(4)(a) of the *Constitution* pursuant to which the appeal has been brought.

40. A court's jurisdiction emanates from either the *Constitution* or legislation or both, as we stated in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*, Civil Application No 2 of 2011 as follows:

> " A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

41. Article 163(4)(a) of the *Constitution* states that:

> " (4) Appeals shall lie from the Court of Appeal to the Supreme Court -
>
> a) As of right in any case involving the interpretation or application of this Constitution."

This court has stipulated the limits of its jurisdiction under article 163(4)(a) of the *Constitution* in several of its decisions. In *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* [2020] eKLR we stated as follows:

> " (i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

ii. The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/ issues of his matter which in his opinion fall for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of constitutional interpretation and application.

iii. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the *Constitution* does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).

v. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)."

42. Each case must however be evaluated on its own facts. To enable us resolve the question whether the matter concerns the interpretation and application of the *Constitution*, we must establish whether each of the issues raised falls under the court's jurisdiction.

43. The appellant seeks a determination on whether its rights under article 27(1) and 50(1) of the *Constitution* were violated by the appellate court's application of the doctrine of *res judicata*, in the alternative, issue estoppel. The 1st respondent submits that the doctrine of issue estoppel is concerned with issues of facts and not law, and this does not call for the interpretation or application of the *Constitution*.

44. We note that this is an issue that arose before the ELC, whereby the appellant argued, albeit unsuccessfully, that the 1st respondent's petition, ELC Petition No 12 of 2017 was *res judicata* as the issues raised had been determined in HCCC No 131 of 2011. This issue was also taken up by the appellate court and now finds its way in this appeal. Is *res judicata* a factual matter devoid of the application of the *Constitution*?

45. This court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*, Motion No 42 of 2014 [2016] eKLR stated as follows concerning the doctrine of *res judicata*:

> "[52] *Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....[55]..*Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept..."

46. The question the appellant seeks this court to determine is not on the principle of *res judicata* per se, but whether the petitioner's rights under article 27(1) and 50(1) of the *Constitution* were violated by the court's application of the doctrine of *res judicata* thus bringing it within this court's jurisdiction. This is in tandem with its argument that decisions in rem by courts of concurrent jurisdiction are binding on each other to facilitate access to justice, rule of law and afford equal protection before the law. As seen above, *res judicata* is not just a factual contest but rather an issue of substantive law. In the context before us, we are persuaded that the issue is worth our input as a matter involving the interpretation and application of the *Constitution* as regards violations of the cited articles above.

47. The second issue the appellant seeks determination of is whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under article 40 and in violation of articles 19(3)(c), 20(1), 21(3) and article 23 of the *Constitution*. The 1st respondent urges that the crux of the decision by the superior courts was on the status of the suit property as a public utility and being so, article 40 of the *Constitution* does not apply; that there is no such provision under article 40, protecting an innocent purchaser for value without notice. Having not been particularized under the article, it urges that it cannot be for determination as a matter of either interpretation or application of the *Constitution*.

48. The 1st respondent urges that the appellant's complaint, instead, relates to the manner in which the courts below applied the provisions of statute, being the *Physical Planning Act* (repealed) and the Government Lands Act and that a question of statutory interpretation and common law are not matters that fall for determination by this court under article 163(4)(a) of the *Constitution*.

49. The appellant urges us to find that the initial allotment was legally and regularly undertaken under the then prevailing legal regime, the Government *Land Act* and further that the Physical Planning Act's date of commencement was in 1998 while that of the Survey Regulations was in 1994, which was after the initial allotment of the suit property to the first registered owner. It is clear that the appellant seeks to have the court make a determination

on the application of these statutory provisions, and more so, on the findings of fact upon which the applicable constitutional argument if any, can be applied.

50. To interrogate this issue, the court inevitably has to descend into the factual contestations pitting both sides of the ownership divide. Allotment and allocation of land is a matter that is governed by Statute, be it Government Lands Act, Surveys Act, Physical Planning Act or any such legislation for that matter. Both the High Court and the Court of Appeal, as superior courts enjoined to look at the evidence and make factual findings, undertook their mandate appropriately arriving at the same conclusion relating to the proprietorship of the suit property.

51. We are careful to note that this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court's jurisdiction under article 163(4)(a) of the *Constitution*. In *Paul Mungai Kimani & 20 others* (*supra*) we stated as follows:

> "Not every issue that was before the superior courts is open for this court's determination in exercise of its appellate jurisdiction under article 163(4)(a). Matters of fact that touch on evidence without any constitutional underpinning are not open for this court's review on appeal in exercise of its article 163(4)(a) jurisdiction. The same is also true of matters that purely dealt with interpretation and application of statutory provisions."

52. Similarly, in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* [2021] KESC 34 (KLR) we stated:

> "This court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under article 163(4)(b) of the *Constitution*... We may however not delve into the factual findings of the trial court and Court of Appeal...Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)"

53. From the record and pleadings, the appellant asserted its rights to property under article 40 of the *Constitution*. It averred that it was a bona fide purchaser and the registered owner of the suit property and thus the actions of the 1st respondent amounted to unjustifiable and unreasonable limitation of the right to property under article 40 in violation of articles 19(3)(c), 20(1), 21(3) and 23 of the *Constitution*. On the other hand, the 1st respondent asserted its rights both as public property on the beach and on the basis of article 40(6) of the *Constitution* not to protect illegally acquired property. The question for interpretation

and application of the *Constitution* is therefore the extent of the protection, if any, to the suit property. In doing so, we shall interrogate whether the appellate court's interpretation of *bona fide* purchaser amounted to a violation of the appellant's right to property under article 40 of the *Constitution*. We therefore find that we have jurisdiction to hear and determine the matter.

54. Thirdly, the appellant urges this court to determine whether the enforcement actions by the 1st respondent violated the appellant's right to property under article 40, right to equal protection before the law under article 27(1) and the right to fair administrative action under article 47 of the *Constitution*. The 1st respondent counters that by arguing that there was no specific complaint pleaded under article 47 and this was not for discussion and never for determination by the courts below. Further, it urges that the modalities of raising complaints under article 47 are set out in the Fair Administrative Actions Act, 2015 which actualized the article 47 of the *Constitution*.

55. From the record, we note that one of the prayers sought before the trial court was, 'a declaration that the respondent's actions are unconstitutional and a violation of the petitioner's rights under article 27(1) and (1), article 29 and articles 47(1) and (2) of the *Constitution*.' The appellant framed six issues for determination which the trial court adopted. None of these issues included a determination as to whether the rights cited were violated. Similarly, a perusal of the appellant's memorandum of appeal lodged at the Court of Appeal, wherein it raised twenty-two grounds of appeal, does not reveal any fault being attributed to the trial judge for not addressing this issue. As it appears, they were not issues considered by the superior courts. Can they therefore come up at this juncture, on appeal? Hardly.

56. This court has held in several of its decisions including in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*; SC Pet No 3 of 2021 [2012] eKLR and *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* SC Petition No 3 of 2020 [2020] eKLR that to bring an appeal pursuant to article 163(4)(a) of the *Constitution*, it must be demonstrated that the issues of contestation involve the interpretation or application of the *Constitution*, which constitutional issues had been considered and determined by the superior courts. It is that interpretation or application of the *Constitution* by the appellate court that forms the basis of a challenge before this court.

57. The interpretation or application of articles 27(1) and 47 of the *Constitution* having not been a question for determination before the superior courts, this court would have no jurisdiction to entertain an appeal brought under article 163(4)(a). Accordingly, this court has no jurisdiction to establish whether the 1st respondent's "enforcement actions" violated the appellant's right to property (article 40), right to equal protection before the law (article 27(1)) and the right to fair administrative action under article 47 of the *Constitution* as this

would amount to converting the court into a court of first instance. In our view, the appellant is no more than seeking compensation and/or damages both liquidated and special, matters that are not in the purview of consideration by this court.

58. Lastly, the appellant seeks a determination on whether the appellate court erred by failing to consider the provisions of Part V of Chapter 11 of the *Constitution* on the relationship between devolved government and the national government, specifically Article 189 of the *Constitution* in relation to resolution of disputes between the national government, its agencies and devolved government.

59. The 1st respondent submits that the issue for determination before the superior courts was the ownership of the suit property which was registered in the name of the appellant in July, 2006. Its case is that the law applicable at the time for a person to assert rights, liabilities and remedies was the *Registration of Titles Act*, which was repealed by the *Land Registration Act*. Further, neither the *Constitution* 2010 nor the derivative Act under Article 189 of the *Constitution* were in existence including the two levels of government for the intergovernmental relations dispute mechanism to apply.

60. We note that this question neither arose nor was it determined by the trial court. It is only at the Court of Appeal vide the Attorney General's cross appeal that the court's jurisdiction to hear and determine the matter was first questioned on this ground. Whether the dispute is intergovernmental in nature is a jurisdictional issue. Indeed, jurisdiction is a pertinent question for determination. A court is bound to always satisfy itself whether or not it has jurisdiction to hear and determine a matter before it. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR we held that jurisdiction is a legal question and it can be raised at any time and by any party. The Nigerian Supreme Court in the case of *Alhaji Bello Nasir v Kano State Civil Service Commission & 2 others*, SC 144/2003 per Ogbuagu, JSC in his concurring judgement held as follows:

> "It is now firmly settled that issues of jurisdiction or competence of a court to entertain or deal with a matter before it, is very fundamental. It is a point of law and therefore, a rule of court, cannot dictate when and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this court"

61. Whereas the issue of intergovernmental dispute was not articulated at the trial court but only at the appellate court, the inherent jurisdiction of this court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates necessitates that this court should assume jurisdiction and interrogate those alleged wrongs. In *Modern Holdings (EA) Limited v Kenya Ports Authority* SC Petition No 20 of 2017 [2020] eKLR we

acknowledged that the question of jurisdiction can be raised at any stage of the proceedings and observed that:

> "57. In concluding on this issue, it is trite that the question of jurisdiction, can be raised at any stage of the proceedings..."

In our earlier ruling in *Modern Holdings (EA) Ltd v Kenya Ports Authority* (*supra*) we noted that the challenge on jurisdiction of the court had not transcended the court hierarchy but had originated at the Court of Appeal and we accepted to exercise our jurisdiction under article 163(4)(a) of the *Constitution*. To that end, we consequently find that this Court has jurisdiction to entertain the consideration and determination of this issue under article 163(4)(a) of the *Constitution*.

62. We reiterate that not all the four grounds set out by the appellant satisfy our jurisdictional threshold under article 163(4)(a) of the *Constitution*. The upshot is that the appeal correctly invokes this court's jurisdiction to the extent of determining only three questions: a) whether the appellant's rights under article 27(1) and 50(1) of the *Constitution* were violated by the court's application of the doctrine of res judicata in the alternative issue estoppel; b) whether the appellate court's interpretation of bona fide purchaser amounted to a violation of the appellant's right to property under article 40 of the *Constitution* and c) whether the suit amounts to an inter-governmental dispute under article 189(3) of the *Constitution*, and the *Intergovernmental Relations Act* No 2 of 2012.

63. Having delineated our jurisdiction, we now proceed to address the identified issues

(ii) Whether the appellant's rights under article 27(1) and 50(1) of the Constitution were violated by the court's application of the doctrine of *res judicata* in the alternative issue estoppel.

64. The appellant's case is that the superior courts neglected the existence of the determination in HCCC No 131 of 2011, a decision in rem, regarding the status of the suit property made by a court with equal jurisdiction. For this reason, it urges that the trial court was estopped from reopening the subject matter regardless of the parties. It urges that Petition 12 of 2017 was camouflaged as a constitutional petition to escape the statutory limitation of action. The appellant relies on the decisions in *Nicholas Francois Marteens & others v South African National Parks*, Case No 0117, *George William Katerregga v Commissioner for Land Registration & others* Kampala High Court Misc Appl No 347 of 2013, *Japhet Nzila Muangi v Kenya Safari Lodges & Hotels Ltd* [2008] eKLR, *ET v Attorney General & another* [2012] eKLR and *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] eKLR.

65. The 1st respondent on the other hand submits that issue estoppel cannot be invoked against statute so as to render statutory provisions inoperative, citing sections 9, 10 and 85 of the *GLA* and that the principle cannot be used to deprive the public of public land and also reiterating that HCCC 131 of 2011 was a judgment per incuriam.

66. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. (See Mulla, the *Code of Civil Procedure*, 16th Ed Vol 1 – pg 161). The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been delivered, subsequent proceedings are estopped. Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, this is a form of action estoppel. (See *Halsbury's Laws of England*, paragraph 1174).

67. *Res judicata*, is embodied in section 7 of the *Civil Procedure Act* which provides that:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
>
> Explanation — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation -(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

> Explanation —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

68. In *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) we stated as follows:

> "We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former judgment or order which was final;
>
> b. The judgment or order was on merit;
>
> c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

69. The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed *res judicata* on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action.

70. From the record, we establish that ELC Petition 12 of 2017 was filed by the 1st respondent against the appellant and the 2nd to 6th respondents. In the said petition, the 1st respondent's claims were that the alienation and subsequent conversion of the suit property from public to private land was illegally and unlawfully done, and that the appellant cannot enjoy constitutional protection as the suit property was unlawfully acquired.

71. We establish from the judgment in HCCC No 131 of 2011 that the plaintiff, Elizabeth Karunguri Githunguri sought, *inter alia*, a permanent injunction to restrain the appellant herein from dealing with plot No 6053/MN, (the suit property) and for the Registrar of Titles to revoke/cancel title No 6053/1/MN and rectify the register. The court framed the questions for determination as whether the plaintiff's plot no 1908/1/MN is a beach plot; whether the construction of the perimeter wall on plot no 6053/1/MN has encroached the beach plot and is on riparian reserve; whether the blockage of the view of the sea breeze is actionable; and whether a mandatory injunction can be issued to the Registrar of Titles to

rectify the register by deleting the entries relating to MN/1/6053 when the Registrar is not a party to the suit.

72. The court dismissed HCCC No 131 of 2011 for reason that the plaintiff had failed to make her case and further that the court could not make orders against the registrar of Titles who was not a party to the suit. It stated:

> "Not without any feeling to the plaintiff, I am afraid, the plaintiff was not able to make her case before me. Even if she had done so, I would have had great difficulty in ordering a party who has not been made a party to the same suit to comply with court orders before I have an input from them. This suit fails..."

73. In the consolidated petitions at the Environment and Land Court, the issues for determination were: whether the suit property was a public utility and there was a public access road through it to the beach; whether the suit property was within 60 metres of the high water mark; were illegalities or faults committed by those responsible for alienating the suit property and whether the appellant should suffer the faults of those third parties (if any); whether the 1st respondent's suit is res judicata and/or an abuse of court process; whether the suit was time barred and/or the 1st respondent guilty of latches and indolence; and whether the appellant was the lawful owner of the suit property and entitled to the orders sought.

74. Whereas the two suits concern the suit property, the main issue for determination in ELC Petition 12 of 2017 was whether the suit property is a public utility and it challenged the manner in which the suit property was alienated and subsequently allocated to the 1st registered owner and the conversion to freehold property. On the other hand, the main issue in HCCC No 131 of 2011 was whether the suit property was a beach plot and on a riparian reserve and whether blocking the plaintiff's view to the ocean and sea breeze by the appellant was actionable. The issues for determination in ELC Petition 12 of 2017 were therefore not substantially in issue in HCCC No 131 of 2011. Further, the 2nd to 6th respondents were not parties in HCCC No 131 of 2011 and the court's findings were inconclusive due to the absence of the state organs, specifically, the Registrar of Titles to enable the court make a determination. The parties in ELC Petition 12 of 2017 are different from those in HCCC No 131 of 2011 save for the appellant.

75. To this end therefore, we find that ELC Petition 12 of 2017 is not *res judicata* as the elements to make such a finding have not been met. The appellant's rights to equal protection under article 27(1) and the right to fair hearing under article 50(1) of the *Constitution* were therefore not violated by the appellate court's interpretation of the doctrine of *res judicata* in the matter.

76. It is vital to note that the decisions in HCCC No 131 of 2011 and ELC Petition 12 of 2017 were made by courts of concurrent jurisdiction. By majority, this court stated in *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (amicus curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) that decisions made by courts of concurrent jurisdiction made in rem are not binding on courts of equal jurisdiction. The ideal scenario on stare decisis is for trial court judges to follow decisions of other judges of the same court unless there are compelling reasons to depart from the same. This is to ensure consistency, certainty, predictability, and sound judicial administration.

(iii) Whether the suit amounted to an inter-governmental dispute under article 189(3) of the Constitution and the Intergovernmental Relations Act No 2 of 2012

77. The appellant urges that ELC Petition No 8 of 2017 did not relate to an intergovernmental dispute, however, the framing and disposition of the suit evolved into an intergovernmental dispute once it was consolidated with ELC Petition No 12 of 2017. The appellant submits that the 1st respondent in its petition, sought to compel the national government officers to pursue and enforce a particular course of action and that the subject matter was the issue of the extent, scope, and engagement between a devolved unit and the national government. It relies on the case of *Council of County Governors v Lake Basin Development Authority & 6 others* [2017] eKLR and *Isiolo County Assembly Service Board & Another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* [2016] eKLR to buttress its argument.

78. Conversely, the 1st respondent submits that by virtue of section 106(3) of the *Land Registration Act*, the intergovernmental relations dispute mechanism is not applicable and it is not in compliance with section 32 of the IGR Act, which requires that there be an agreement.

79. The 2nd to 6th respondents on the other hand support the appellant's averments and state that the suit was *prima facie* an intergovernmental dispute by a county government *vis-a-vis* the national government since Petition 12 of 2017 challenged the actions of the national government agencies, that is the Chief Land Registrar and the Director of Survey and sought to have their decision nullified. It is their case that the first point of dispute resolution ought to be the alternative modes of dispute settlement and not litigation in order to allow the two levels of government to continuously engage. They urge that this was the purpose of the setting up of the Council of Governors and the IGR Committee and therefore argue that Petition 12 of 2017 ought to have been struck out and be referred to the alternative dispute resolution forums in accordance with article 189(3) and (4) of the *Constitution* and section 31 of the *Intergovernmental Relations Act*.

80. Article 189 of the *Constitution* provides that:

> Cooperation between national and county governments
>
> 1. Government at either level shall—
>
> a. perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
>
> b. assist, support and consult and, as appropriate, implement the legislation of the other level of government; and
>
> c. liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.
>
> 2. Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.
>
> 3. In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.
>
> 4. National legislation shall provide procedures for settling inter- governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

81. The *Intergovernmental Relations Act* No.2 of 2012 (IGR Act) is the legislation passed pursuant to article 189 of the *Constitution* to establish a framework for consultation and cooperation between the national and county governments, and amongst county governments, and to establish mechanisms for the resolution of intergovernmental disputes. The intention of article 189 of the *Constitution* was to have consultation and cooperation

between the national and county governments and have disputes resolved in a less acrimonious way. The two levels of government are required to make every reasonable effort to settle any arising disputes.

82. There is no express definition of what amounts to an intergovernmental dispute under the *IGR act*. Section 30 merely defines a "dispute" as an intergovernmental dispute and that the dispute resolution mechanisms applies to disputes arising between the national government and a county government or amongst county governments.

83. From the provisions of the *Constitution* and the *IGR Act* set out above, the dispute must first be between the two levels of government or between county governments. The High Court in *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* Petition No 3 of 2014 [2014] eKLR in further defining what an intergovernmental dispute is, stated as follows:

> "a. The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.
>
> b. Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceeding.
>
> c. Must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the *Constitution*, a statute or an agreement or instrument entered into pursuant to the *Constitution* or a statute.
>
> d. The dispute may not be subject to any of the previously enumerated exceptions."

84. This definition found footing in *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another* ELC No 598 of 2016 [2017] eKLR and *Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (interested parties)* (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (ruling) by the High Court.

85. In the instant case, ELC Petition 8 of 2017 concerned the appellant's assertions of its rights to the suit property. ELC Petition 12 of 2017 on the other hand was between the 1st respondent against the appellant, which is a private entity and the 2nd -6th respondents which are national government agencies. The main issue in dispute in the petition was the manner in which the suit property was first allocated to the 1st registered owner. The 1st respondent also sought declarations that that the suit property is public land forming part of the beach property within the high and low water marks of the Indian Ocean, and sought to have the court

order that the Chief Land Registrar be compelled to revoke the title over the suit property including an order for the eviction of the appellant from the suit property, general damages for trespass and costs.

86. The main issue for determination before the Environment and Land Court was therefore not a disagreement between the county government and the national government agencies, but whether the ownership of the suit property was public or private. The suit property was central to the dispute, necessitating the basis for the consolidation of the Petition 8 of 2017 and Petition 12 of 2017. In our view, therefore, and we agree with the appellate court, the question of the dispute being intergovernmental fell on the periphery and was incidental to the main issue in dispute. The mere fact that the 1st respondent opted to file separate proceedings in response to that filed by the appellant does not change the nature of the proceedings. The issues and challenges to the ownership of the suit property would have still been introduced in response to the petition, even if by way of cross petition.

(iv) Whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under article 40 in violation of article 19(3)(c), 20(1), 21(3) and article 23 of the Constitution

87. The appellant contends that it is a bona fide purchaser of the suit property, having purchased it from Messrs Bawazir & Co for Kshs 18,000,000.00. That it was a second purchaser and acquired a valid and legal title, having carried out all the necessary due diligence and paid valuable consideration for the purchase of the suit property. That for these reasons, its title was indefeasible and protected under article 40 of the *Constitution*, contrary to the superior courts' findings.

88. The appellant avers that in carrying out due diligence, it sought confirmation from the relevant government registry that a valid title capable of transmission to it existed. It is its case that the consent to transfer was sought and obtained from the Ministry of Lands who also confirmed the validity of the title to the appellant vide the letter dated October 9, 2006 stating that "the above plot is the genuine plot". Further, it states that it obtained a beacon certificate and survey plans to determine the boundaries and extent of the property vide the letter dated August 25, 2010. It asserts that neither the national government nor the local government (the 1st respondent's predecessor) questioned the appellant's title but confirmed the validity or legality of the appellant's title, making the appellant a bona fide purchaser and its title remains indefeasible.

89. The appellant states that it periodically made payments of rates to the then local government and its successor, the 1st respondent. It made an application for Development Permission for the construction of a boundary wall, which was subsequently conditionally approved by the then Town Clerk Mombasa City Council on August 31, 2006 and the National

Environmental Management Authority permit was issued for the proposed development on March 15, 2011 after the preparation and submission of an Environmental Impact Assessment Report.

90. The *Black's Law Dictionary* 9th Edition defines a bona fide purchaser as:

> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a *bona fide* purchaser for value as follows:

> "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:
>
> 1. he holds a certificate of title;
> 2. he purchased the property in good faith;
> 3. he had no knowledge of the fraud;
> 4. he purchased for valuable consideration;
> 5. the vendors had apparent valid title;
> 6. he purchased without notice of any fraud; and
> 7. he was not party to the fraud."

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar*, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

> "...in order to be considered a *bona fide* purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor's root title is under challenge,

it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

95. The appellant contends that prior to the first allotment and registration in 1989, the suit property was unalienated government land and the applicable law was the *Government Land Act* (repealed) (GLA). It asserts that the allotment was legal, regular and procedural as per the then prevailing legal regime, under the GLA. It is its case that the grant was issued under section 3 of the said Act, wherein the President had the power, subject to the set limitations, to make grants or disposition of any estate, interest or rights over unalienated government land. It also urges that Section 10 of the Act limiting issuance of leases to a term of one hundred years was inapplicable to the suit property which is a freehold. In the same manner, the Physical Planning Act was inapplicable, retrospectively, as it was enacted and assented to on October 24, 1996 and its commencement on October 29, 1996 after the initial grant had been issued. It is the appellant's further contention that the 1994 Survey Regulations providing for the coast foreshore reservation at 60 meters of the high watermarks were inapplicable as they were enacted and a corrigenda issued in 1996 after the initial grant had been issued.

96. The 2nd to 6th respondents aver that the prevailing legal and regulatory regime was adhered to in the allocation of the property to its first registered owner. They state that vide an allotment letter dated November 23, 1989, the Commissioner of Lands, in compliance with section 9 of the *GLA* allocated HE Daniel T Arap Moi an un-surveyed parcel of land measuring approximately 0.45 Hectares. The Director of Surveys then caused the property to be surveyed to reflect LR MN/1/6053 as per survey plan F/R 198/30. The Director of Surveys submitted a Deed Plan to the Commissioner of Lands and a grant of title was processed in favour of Daniel T Arap Moi. On 19th December, 1989 the letter of allotment issued was revised to reflect the surveyed acreage of 0.49 Ha. A grant (title) was thus processed and a lease forwarded to the Registrar of Titles Mombasa. They further stated that prior to the allocation of the suit property, records at the lands' office indicate that the property was an open space. It is their contention that HE Daniel T Arap Moi, as the first registered owner, obtained good title protected under Section 26 of the *Land Registration Act* and section 23 of the *Registration of Titles Act* cap 281 (repealed), and it is not public land.

97. According to the 1st respondent, there were pertinent requirements which ought to have been followed before the allocation of public land, including an application to the Chief

Land Registrar for such allocation, thereafter a Letter of Allotment is issued spelling out the conditions to be fulfilled, a Part Development Plan (PDP) of the area is subsequently drawn and approved by the local authority of the area, which PDP is then forwarded to the Director Physical Planning. Once the approvals are made, the approved PDP together with the original Letter of Allotment are handed over to the Director of Surveys who prepares a Survey Plan. It contended that it is from this Survey Plan that a Deed Plan of the plot is prepared by the Survey Plan showing the dimensions of the plot and it is only after these procedural stages are completed that a grant or title is issued by the Chief Land Registrar. In this instance, they urge that the procedure was not followed.

98. Under section 2 of the *GLA*, unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment. Under section 3 of the GLA, the President had power to, make grants or dispositions of any estates, interests or rights in or over unalienated government land, subject to any other written law. section 9 of the *GLA*, empowered the Commissioner of Lands "to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner." Further, under section 10 of the *GLA*, the Leases of town plots could only be granted for any term not exceeding one hundred years.

99. The 1st respondent averred that a survey plan of the area drawn in the year 1971 showed that the suit property was in that year designated as an open space and not private land, and which open space was reserved for a public road. The 2nd to 6th respondents in their submissions similarly indicated that prior to the allocation of the suit property to HE Daniel T Arap Moi, the suit property was an open space.

100. From the record and submissions, we note that the land was first allocated to HE Daniel T Arap Moi in 1989. The applicable law at the time was the Land Planning Act, cap 303, which was repealed by the *Physical Planning Act* cap 286 which has since been repealed by the *Physical and Land Use Planning Act* No 13 of 2019. The Land Planning Act made provision for open spaces. regulation 11(3) of the Development and Use of Land (Planning) regulations, 1961 made under the Land Planning Act defined "public purpose" as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the *Physical Planning Act*, section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

101. The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land

as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation.

102. The Court of Appeal in its judgment, while finding that the title was irregularly and illegally allocated to HE Daniel T Arap Moi was persuaded by the High Court decision in *Republic v Minister for Transport & Communication & 5 others Ex Parte Waa Ship Garbage Collector & 15 others* Mombasa HCMCA No 617 of 2003 [2006] 1 KLR (E&L) 563 where Maraga J (as he then was) stated as follows:

> "Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the *Constitution* or under section 1 and 1A of the *Constitution* or under the doctrine of public trust a title would have to be nullified because the *Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept."

103. The appellate court affirmed the trial court's conclusion that the alienation of the open space was unprocedural to the extent of blocking existing access to the sea and unlawful for lack of an approved PDP by the Director of Physical Planning and Central/Regional Authority in compliance with the provisions of the *Land Planning Act* cap 303 (repealed by the Physical Planning Act cap 286. It found that the PDP would have settled the issue of whether there was a public access road to the beach through the suit property and/or at the positioning of the high-water mark in relation to the suit property.

104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows:

> "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
>
> 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were

> unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

105. This process is restated in *African Line Transport Co Ltd v Attorney General*, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, "the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land."

107. We are careful to note that this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court's jurisdiction under article 163(4)(a) in this case. It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to HE Daniel T Arap Moi was irregular.

108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of

Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

109. We note that the suit property was subsequently converted and HE Daniel T Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant's averment, section 10 of the *GLA* is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

111. Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the *Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

112. We therefore agree with the appellate court that the appellant's title is not protected under article 40 of the *Constitution* and the land automatically vests to the 1st respondent pursuant to article 62(2) of the *Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.

(v) Whether the appellant is entitled to the reliefs sought

113. The appellant prays that we set aside the appellate court's judgment and have it substituted with the reliefs sought in ELC Petition No 8 of 2017, in the alternative, that the matter be remitted to the dispute resolution mechanism envisaged under the *IGR* Act with parties granted leave to approach the High Court if dissatisfied with the determination rendered

pursuant to their engagement under the IGR Act. From our findings, we have found no reason to disturb the findings of the superior courts below.

114. In light of the above analysis and our findings set out therein, we find that the suit herein does not amount to an intergovernmental dispute; and that ELC Petition 12 of 2017 is not *res judicata* HCCC No 131 of 2011. The appeal did not surmount the jurisdictional parameters invoked on the other claims of a constitutional nature. What therefore remains is the issue of costs. This court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012; [2014] eKLR set out the legal principles that guide the grant of costs and enunciated that generally, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. As each party was pursuing an apparent genuine constitutional legitimate claim, and the appeal not having succeeded, we see no reason to burden any of them on the limited question of costs.

F. Orders

115. Consequently, we order that the petition of appeal dated July 15, 2021 be and is hereby dismissed. Each party shall bear their own costs.

It is so ordered.

Law Society of Kenya v Attorney General & 4 others (Petition 45 of 2019)
[2023] KESC 19 (KLR) (31 March 2023) (Judgment) (with dissent - N Ndungu, SCJ)

Supreme Court of Kenya

MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 19 (KLR)

Constitutional Law *- constitutional commissions - Judicial Service Commission (JSC) - appointment to the JSC - procedure to be followed in the appointment to JSC - whether the three stages of appointment of commissioners to the JSC were mandatory - whether elected members of the JSC ought to be vetted and approved by the National Assembly before being appointed - who ought to issue the gazette notice signifying the appointment of elected or nominated representatives in the JSC - Constitution, articles 1(2) and (3), 2(2), 10, 73, 74, 81, 124, 132, 160, 171 and 250; Judicial Service Act, cap 8A, sections 15(2) and 40(1).*

Constitutional Law *- constitutionality of statutory provisions - constitutionality of section 15(2) of the Judicial Service Act on the procedure of appointment to the Judicial Service Commission (JSC) - whether section 15(2) was inconsistent with article 171 of Constitution on the establishment of the JSC to the extent that it donated to the President the power to appoint elected and nominated members of the JSC - whether section 15(2) was unconstitutional in as far as it purported to direct a specific timeline in which the President was to appoint individuals to the JSC - Constitution, article 171; Judicial Service Act, cap 8A, section 15(2).*

Constitutional Law *- President - powers of the President - appointment of members of the Judicial Service Commission (JSC) - nature of the President's power to appoint members of the JSC - whether the President's power to appoint a Court of Appeal Judge elected by judges of the Court of Appeal as member of the JSC was only ceremonial - Constitution, articles 132, 171, 248 and 250; Judicial Service Act, cap 8A, section 15(2).*

Constitutional Law *- Judiciary - independence of the Judiciary - claim that the President's appointing role of Judicial Service Commission (JSC) commissioners and the National Assembly's approval role would interfere with the independence of the Judiciary and the JSC - whether the President's appointing role for JSC commissioners and the National Assembly's approval role would interfere with the independence of the Judiciary and the JSC - Constitution, articles 159 and 160.*

Constitutional Law *- interpretation of constitutional provisions - interpretation of article 171 of the Constitution on the establishment of the Judicial Service Commission - whether article 171 was a self-executing provision - Constitution, article 171.*

Words and Phrases *- appoint - definition of appoint - the designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office - Black's Law Dictionary, 9th Ed at page 116.*

Words and Phrases *- approve - definition of approve - to give formal sanction to; to confirm authoritatively - Black's Law Dictionary 11th edition.*

Words and Phrases *- approval - definition of approval - when a plan, decision, or person is officially accepted - Longman Dictionary.*

Brief facts

On March 9, 2018, the 3rd respondent, a justice of the Court of Appeal was re-elected by the justices of that court to serve a second term as their representative to the 5th respondent, the Judicial Service Commission (JSC). Thereafter, his name was forwarded to the President for appointment as a member of the JSC. Instead, the President, in turn, dispatched the name to the National Assembly (the 2nd respondent) for approval before appointment. That action was the gravamen in the original grievance; whether Parliament could vet for approval a member of the JSC who had been democratically elected by his or her peers.

The JSC and the Law Society of Kenya (the appellant) by separate letters objected to the intended exercise, pointing out that it was not only unconstitutional but also an interference with the independence of the nominating institution, the Judiciary (the Court of Appeal). The National Assembly responded and insisted that the scheduled hearing would proceed, precipitating the action before the High Court. The High Court found that the requirement relating to approval of nominees by the National Assembly in article 250 of the Constitution did not apply to JSC commissioners, except those appointed by the President under article 171(2)(h) of the Constitution - one woman and one man to represent the public.

Aggrieved, the 1st respondent filed an appeal at the Court of Appeal while the appellant filed a cross-appeal. The Court of Appeal dismissed the 1st respondent's appeal as well as the appellant's cross-appeal and held that Parliament, in enacting section 15(2) of the Judicial Service Act, cap 8A (Judicial Service Act) was guided by article 171(2) of the Constitution which created four categories of members and catered for the appointment procedure for each. More specifically, Parliament was clear that the only persons to be subjected to approval hearing in the National Assembly were the two candidates representing the public and no other. As such, the 3rd respondent, having been elected by his peers as a member of the JSC, was not subject to approval by the National Assembly. In rejecting the ground of unconstitutionality of section 15(2) of the Judicial Service Act, the court held that the President's duty was simply to appoint an elected commissioner within three days of submission of the nominee's name. Aggrieved by the Court of Appeal's decision, the appellant lodged the instant appeal.

Issues

i. Whether elected members of the Judicial Service Commission ought to be vetted and approved by the National Assembly before being appointed.

ii. Whether section 15(2) of the Judicial Service Act was inconsistent with article 171 of the Constitution on the establishment of the Judicial Service Commission to the extent that it donated to the President the power to appoint elected and nominated members of the Judicial Service Commission.

iii. Whether section 15(2) of the Judicial Service Act was unconstitutional in as far as it purported to direct a specific timeline in which the President was to appoint individuals to the Judicial Service Commission.

iv. Whether article 171 of the Constitution on the establishment of the Judicial Service Commission was a self-executing provision.

v. Whether the President's power to appoint a Court of Appeal Judge elected by judges of the Court of Appeal as a member of the Judicial Service Commission was only ceremonial.

vi. Whether the President's appointing role for Judicial Service Commission commissioners and the National Assembly's approval role would interfere with the independence of the Judiciary and the Judicial Service Commission.

vii. Who ought to issue the gazette notice signifying the appointment of elected or nominated representatives in the Judicial Service Commission?

viii. Whether the three stages of appointment of commissioners to the Judicial Service Commission were mandatory.

Relevant provisions of the Law

Judicial Service Act (cap 8A)

Section 15 - Procedure of appointment

(2) Where the nominations are to be made by bodies specified under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution—

1. *the respective nominating body shall submit the name of its nominee to the President; and*
2. *the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.*

Held

1. The appeal was brought as of right pursuant to article 163(4)(a) of the Constitution. From the petition filed in the High Court, the memorandum of appeal in the Court of Appeal, the arguments before and the judgments of the two courts below, as well as the pleadings and arguments in the instant court, the subject matter in controversy involved the interpretation and application of articles 171, 248 and 250 of the Constitution.
2. By article 259 of the Constitution, courts were enjoined in construing the Constitution to promote its purpose, values and principles; advance the rule of law, human rights and fundamental freedoms in the Bill of Rights; permit the development of the law; and contribute to good governance. To construe the import and tenor of any provision of the Constitution, the entire Constitution had to be read as an integrated whole, because the Constitution embodied certain fundamental values and principles which required that its provisions be construed broadly, liberally and purposively to give effect to those values and principles. Where words used in any provision of the Constitution were precise and unambiguous then they must be given their natural and ordinary meaning. The words themselves in many situations declared the intention of the framers.

3. From article 171(2)(c) of the Constitution membership to the JSC was four-pronged; by virtue of office, for example, the Chief Justice and the Attorney-General, who remained chairperson and member, respectively, despite the term of five years and a further one term of five years applicable to other members. There were those members who were elected by peers, namely representatives of the Justices of the Supreme Court, Court of Appeal, High Court, the magistracy and the advocates. The third category comprised a member nominated to represent the Public Service Commission (PSC) and the final category were two members, one woman and one man, not being lawyers, appointed by the President to represent the public.

4. The name of the 3rd respondent was forwarded to the 2nd respondent for approval hearing ostensibly on the force of articles 132(4) and 250(2) of the Constitution, as well as section 15(2) of the Judicial Service Act. Article 132(4) embodied the specific function of the President to perform any other Executive function provided for in the Constitution or in national legislation and, except as otherwise provided for in the Constitution, may establish an office in the public service in accordance with the recommendation of the PSC. That could not be the basis upon which the President acted when he forwarded the 3rd respondent's name to the 2nd respondent. Similarly, the plain language of section 15(2) did not vindicate the action.

5. Article 250 of the Constitution was contained in Chapter Fifteen. The ten commissions in the article were collectively and generally referred to as Chapter Fifteen commissions. Article 250 prescribed the composition of commissions, appointments and terms of office of the commissioners. Chapter Fifteen which contained articles 248 and 250 applied to all the ten commissions, including the JSC, save only to the extent that the Constitution provided otherwise.

6. Article 171 the Constitution was fully self-executing. From a plain reading of the three articles, 171, 248 and 250, the former was intended to apply exclusively and specifically to the establishment of the JSC, its composition, mode of appointment and term of office of its members, while article 250 was to regulate and guide on the composition, appointment and terms of office of commissions and independent offices generally. The proviso in article 248(1) acknowledged the existence of other constitutional provisions, specific to other commissions which could differ from the provisions of Chapter Fifteen. Chapter Fifteen, for that reason, made provisions of general application to fill in the gaps in respect of composition, appointment and terms of office of any commission.

7. Article 250(2)(a) of the Constitution directed that, in the constitutional commissions where the procedure and manner of identification and recommendation for appointment of the chairpersons and commissioners were not provided for in the Constitution, recourse would be to national legislations. In contrast, by article 171, the Constitution itself provided for the means of identifying and methods of appointment of each of the four categories of

membership of the JSC, occasioning no need to resort to either article 250 or national legislation for that purpose.

8. It was the *lacuna* in some of the commissions that article 250 of the Constitution sought to fill. Where no particular provision of the Constitution specified the number of members to a commission, the answer would lie in article 250 which, as a general guide limited such membership to at least three, but not more than nine.

9. If the manner of identification and recommendation for appointment of the chairperson and each member of a commission was not specified elsewhere in the Constitution, reference must be made to article 250 of the Constitution. In all such instances of *lacuna*, article 250 was intended to fill the same by directing that the appointment of the chairperson and each member be subject of approval by the National Assembly; and thereafter appointment by the President. The article directed further that save for *ex officio* members, the rest of the members be appointed for only a single term of six years. Because article 171 of the Constitution was self-executing, those conditions did not apply to its members.

10. Article 250(1) of the Constitution was a general provision article, it provided that membership to each commission "shall" not consist of more than nine members, yet pursuant to article 171(2) of the Constitution, the JSC consisted of eleven (11) members. Article 250(6)(a) of the Constitution stipulated that a member of the commission shall be appointed for a single term of six years and was not eligible for re-election. In respect of the JSC, article 171(4) provides that members of the JSC, apart from the Chief Justice and the Attorney-General shall hold office for a term of five years and shall be eligible to be nominated for one further term of five years.

11. The direct involvement of the President in the appointment of two members to represent the public in the JSC could only be explained on the basis of the nature of the expanded functions of the JSC, including its role to advise the National Government on ways of improving the efficiency of the administration of justice (article 172(1)(e) of the Constitution). Moreover, it was in line with the provisions of article 10 of the Constitution and the centrality of public participation and transparency at all levels of administration of justice. The inclusion of the PSC nominee in the JSC, on the other hand, could be explained away by the long history of the two commissions.

12. The commissions were far from being homogeneous, contrary to the submissions that they all drew from article 250 of the Constitution. There were no typical common features between the commissions. The principle of checks and balances, the doctrines of separation of powers and independence of the three branches of Government from each other were highlighted in the deliberate distinct provisions.

13. Article 171 of the Constitution was a self-executing provision; and it was drafted in precise and unambiguous language, it could only be given its natural and ordinary meaning. The words used in the article speak the intention of the Legislature. The intention was to have the constituents in the Court of Appeal to determine for themselves, through the ballot, the

person to represent them in the JSC, without the involvement of third parties who had no interest in affairs of that court.

14. Had the people of Kenya or the Legislature intended that all elected members of the JSC be first approved by the National Assembly before being appointed, nothing would have been easier than to expressly state so, the same way they had done for the two members representing the public. In the case of the two, article 171(2)(h) of the Constitution unequivocally declared that, before their appointment, the National Assembly must approve.

15. Since the promulgation of the Constitution, all past elected members of the JSC, except in one instance, had never been subjected to an approval hearing by the National Assembly. In his first term, the 3rd respondent did not go through it, because there had never been any constitutional or legal imperative to do so. The resolve to subject him to parliamentary approval was not only in bad faith but amounted to a breach of his legitimate expectation and a fundamental contravention of the Constitution.

16. To suggest that the 3rd respondent was bound to be vetted and could only qualify for appointment after approval by the National Assembly, was to attack the spirit and letter of articles 1(3) and 2(2) of the Constitution; that sovereign power delegated to State organs, must be exercised strictly in accordance with the Constitution and that no person could claim or exercise State authority except as authorized under the Constitution. The Constitution did not permit the 2nd respondent to vet and approve an elected member of the JSC.

17. There could be no better vetting of a representative's suitability to a position than by peers or those whose interest he was expected to represent than in a transparent and democratic election. The electorates based their choices on considerations relevant to their needs; the needs they alone appreciated in a manner no other body could replace or replicate. Purely, by the fact of his election by the justices of the Court of Appeal, the 3rd respondent, without more, became a member of the JSC, only awaiting the administration of the oath under article 74 of the Constitution as read with section 40(1) of the Judicial Service Act before assuming the functions of the office of commissioner of the JSC. There was no basis, constitutional or legal for a member of the JSC elected or nominated under article 171(2)(b), (c), (d), (f) and (g) to be vetted and approved by the National Assembly before appointment.

18. The Judicial Service Act was enacted in 2011 to make further provisions to the membership and structure of the JSC and for connected purposes. The procedure of appointment was divided into section 15(1) and (2) of the Judicial Service Act. The former was specific to the appointment by the President with the approval of the National Assembly of two members under article 171(2)(h) of the Constitution, one woman and one man to represent the public. Section 15(2) on the other hand related to members appointed under article 171(2)(b), (c), (d), (f) and (g), who were elected or nominated.

19. The nominating bodies envisaged did not include the JSC, but were the judges of the superior courts, the magistrates, the Law Society of Kenya and the PSC. By section 15(2) of the Judicial Service Act those bodies were required to submit the names of their nominees to the President; and the President, in turn was expected, within three days of receipt of the names, to appoint the nominees as members of the JSC. Because the categories of the nominees were those elected or nominated, section 15(2) did not require parliamentary approval, unlike those in section 15(1).
20. There was a general rebuttable presumption that every Act of Parliament was constitutional and the burden of proof lay on the person who alleged otherwise. In determining whether a statute was constitutional or not, the court must ascertain the object, purpose and effect of that statute; to discern the intention expressed in the Act itself. A statute could not make provision whose effect contradicted the Constitution or placed additional requirements above those set out by the Constitution.
21. On the statutory interpretation of a statute, the function of the courts was to interpret the law, not to make it. A statute was an edict of the Legislature and the conventional way of interpreting or construing a statute was, in the first place, to seek to understand the intention of its maker. Where the meaning of a provision was plain and unambiguous, no question of interpretation or construction arose. It was the duty of the judges to apply such a law as it was. But if it was open to more than one interpretation, then the court had to choose the interpretation which represented the true intention of the legislature, the legal meaning of the statutory provision.
22. The language of article 171 of the Constitution was unambiguous in so far as vetting and approval by the National Assembly was concerned. The only members who, according to article 171(2)(h), must be approved by the National Assembly after appointment by the President, were one woman and one man to represent the public. All the other members were either elected under article 171(2)(b), (c), (d), (e), (f) and (g), or nominated under article 171(2)(h). An endorsement of a candidate through an election was another form of vetting by those he or she would be serving. In the instant case, it was only the judges, magistrates and lawyers who could choose for themselves their representatives. Parliament had no part to play, except to the limited extent explained earlier, in respect of the two members.
23. The powers of Parliament to vet and approve any constitutional and statutory appointments were circumscribed by section 3 of the Public Appointments (Parliamentary Approval) Act, 2011 as an appointment under the Constitution or any other law for which the approval of Parliament was required was not to be made unless the appointment was approved or deemed to have been approved by Parliament in accordance with the Act.
24. Parliament would only exercise its powers to vet and approve candidates for appointment to a public office if, and only if the Constitution or any other law required the approval of Parliament. Section 15(2) of the Judicial Service Act did not contain any requirement for approval by Parliament. Because there was no such requirement in article 171 of

the Constitution, except for (h), the arguments that all commissioners of the JSC ought to be approved by Parliament must fail for lacking constitutional or legal foundation.

25. From the history leading to the promulgation of the Constitution in 2010, the drafters intended to have an independent JSC and Judiciary. Article 251 of the Constitution guaranteed true independence of the JSC, not only by re-stating its independence from direction or control by any person or authority, but by securing the tenor of the commissioners, who could be removed only in accordance with that article. Its financial autonomy, with a separate vote was equally assured.

26. A purposive interpretation of all articles 249(2) and 251 of the Constitution would lead to the inevitable conclusion that there was no intention of the framers to subject the 3rd respondent or, for that matter, any of the elected members of the JSC to an appointment by the President. It was a contradiction in terms and an inherent absurdity to suggest that members elected by their peers or nominated by a State organ could, at the same time be appointed by a different person or authority.

27. There could be no justification for the invocation of article 250(2) of the Constitution as the basis for the requirement of appointment by the President of the 3rd respondent as a member of the JSC. Where the framers intended to vest in the President the power to appoint members of the Chapter Fifteen commissions, they expressly provided for it. A reading of article 132(2) of the Constitution did not yield the conclusion that the power of the President to appoint him under that section was only ceremonial.

28. Article 132(2) of the Constitution applied to State or public officers, who were named in (b), (c), (d), (e) as well as those to whom the Constitution empowered the President to appoint or dismiss (f). The JSC commissioners were not such officers. The President could only exercise the functions, whether formal or ceremonial, donated to him by the Constitution. The President had no ceremonial role in the appointment of elected and nominated commissioners of the JSC.

29. As an act of assigning a position to an elected public official, then appointment in section 15 of the Judicial Service Act by the President of elected or nominated members of the JSC would offend article 171 of the Constitution. The two past elections of the representative of the Court of Appeal in 2013 and 2018 were conducted by the Independent Electoral and Boundaries Commission (IEBC), pursuant to article 88(4) of the Constitution, section 4 of the Independent Electoral and Boundaries Commission Act and later rule 3.1 of the Court of Appeal of Kenya Election Rule, 2013.

30. Upon declaration of the 3rd respondent as duly elected representative of the court, the IEBC issued him with a certificate to confirm his election. That had been the practice with respect to elections of all members of the JSC under article 171(2)(b), (c), (d) and (f) of the Constitution. To complete the process, like in all cases where it conducted elections, the IEBC issued the elected member with a certificate of election and further published a gazette notice confirming the outcome of the elections of those members. That was followed

by the taking of oath of office before the Chief Justice, in accordance with article 74 of the Constitution as read with section 40(1) of the Judicial Service Act before the members assumed the functions of the office of commissioner of the JSC.

31. Traditionally as a practice carried over from the previous constitutional order, the President had always issued a gazette notice to signify the appointment of elected or nominated representatives in the JSC. With the new order, that role ought to be played by the IEBC but certainly not the President. Article 260 of the Constitution defined gazette as the Kenya gazette published by the authority of the National Government, or a supplement to the Kenya Gazette.

32. Under article 171(2) of the Constitution, the scope of the President's power to appoint members of the JSC was limited to two persons, a man and a woman, who were not lawyers, to represent the public. The Constitution did not require that the names of nominees, other than the representatives of the public, be submitted to the President for appointment. Contrary to that, section 15(2)(a) and (b) of the Judicial Service Act required nominating bodies to submit nominees' names to the President for appointment as members of the JSC. To that extent, section 15(2)(a) and (b) was contrary to article 171(2)(b), (c), (d), (f) and (g) which insulated the process of appointment of nominated and elected members of the JSC and undergirded the independence of the Judiciary and JSC from manipulation by the Executive. There was nothing in article 131(a) or 132 of the Constitution to suggest that the President as the Head of State and Government could appoint elected members of the JSC.

33. To give the President power to appoint or even to appoint by mere gazettement of names was to forget Kenya's history and the mischief article 171 of the Constitution was intended to cure. In the result, and to the extent that section 15(2)(b) of the Judicial Service Act donated to the President the power to appoint elected and nominated members of the JSC, it was void for being inconsistent with article 171 of the Constitution which did not recognize such power. Section 15(2) went against the letter and spirit of articles 1(3) and 2(2) of the Constitution which stipulated that sovereign power delegated to State organs, must be exercised strictly in accordance with the Constitution and that no person could claim or exercise State authority except as authorised under the Constitution.

Dissenting opinion

Per N Ndungu, SCJ (dissenting)

1. The court had jurisdiction and was properly seized of the appeal. To determine whether section 15(2) of the Judicial Service Act was inconsistent with the Constitution, three questions that came to the fore must be answered;
   a. whether the President had a constitutional obligation to appoint JSC commissioners;
   b. if the answer was in the affirmative, could the President do so without approval of the National Assembly; and,
   c. in appointing elected JSC commissioners, would the President interfere with the independence of the JSC.
2. The President as the Head of State and Government derived his powers from article 131 of the Constitution. In that regard, article 1(1) of the Constitution provided that all sovereign power belonged to the people of Kenya and shall be exercised only in accordance with the Constitution. The people could exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power under the Constitution was therefore, delegated to among other State organs, the National Executive (headed by the President) and Parliament.
3. Article 250 of the Constitution made general provisions on the composition, appointment, and terms of office of Chapter Fifteen commissions. The appointment process of members of Chapter Fifteen commissions was in three stages, unless provided for otherwise elsewhere in the Constitution. Those stages pursuant to article 250(2) were: identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President.
4. A clear reading of the majority decision was that the three stages of appointment were not mandatory and that an appointment could be concluded at the first stage of identification and recommendation, without going through the second step of parliamentary approval and the third step of appointment by the President. To have done so would be to disregard the carefully woven constitutional architectural design of separation of powers, and constitutional checks and balances between the arms of Government and the different State organs.
5. Article 171 of the Constitution was not self-executing because Chapter Fifteen of the Constitution also pertained to JSC and the provisions therein were applicable to it. The Constitution must always be read purposively, holistically and construed in a manner that promoted complementary processes within it. Having interrogated articles 171 and 172 of the Constitution, the court was unable to find any provision disallowing the President from appointing elected JSC commissioners, being State officers as commissioners.
6. The President had a constitutional duty to appoint as commissioner, individuals identified by the various bodies under article 171 of the Constitution. The President had a duty to appoint JSC commissioners both under the powers conferred to him under article 132(4) of the Constitution and by virtue of section 15(2) of the Judicial Service Act. There was no

express exception to article 132 that would exclude members of the JSC. The reading in by the majority of such an exception, where there was none specifically provided for in line with article 132, 248, and 250 of the Constitution, was legally unsound. In fact, it amounted to amending specific provisions of the Constitution (relating to appointment of State officers by the President), a function which could not be undertaken by any court of law.

7. The appointment of nominees as JSC commissioners by the President was an executive function conferred on the President by article 132(4) of the Constitution and section 15(2) of the Judicial Service Act. There was no constitutional invalidity in section 15(2) by virtue of the President's appointing role. However, section 15(2) was inconsistent with the Constitution in as far as it purported to direct a specific timeline in which the President appointed individuals selected under article 171 of the Constitution; that was, to appoint within three (3) days. That timeline, other than being extremely short and limiting, did not take into account any other necessary constitutional processes that must be carried out by the Executive and Parliament before such appointment.

8. From the history of constitution-making in Kenya, it was the intention of the drafters of the Constitution and of the people of Kenya that Kenya was going to be a presidential system, where political and administrative powers were divided between the Executive, legislative and judicial arms of Government. Under the pre-2010 Constitution, the President appointed State officers without approval by Parliament.

9. Other than specifying who would be the chairperson and members of the JSC, their term of office, and the mode of identifying representatives from the bodies listed thereunder, article 171 of the Constitution was silent on the approval and appointment of such elected representatives. Articles 171 and 172 of the Constitution were silent on the appointment of the elected members of the JSC, the majority ought to have searched for the intention of the drafters elsewhere in the Constitution.

10. The independence of JSC, like any other Chapter Fifteen commission, did not exempt the appointment of its elected individuals from going through the approval process under article 250(2) of the Constitution to ensure compliance with articles 10 and 73 of the Constitution, considering that the JSC was not self-executing.

11. It was necessary to determine whether an election anticipated under article 171 of the Constitution, was the same as that anticipated under article 73(2)(a) of the Constitution. A free and fair election in the context of article 73(2) was the one referred to under article 81(e) of the Constitution. A free and fair election referred to under article 73(1) concerned representation of the people – that was an election by universal suffrage; and not representation of bodies under article 171, that was, an election by an exclusive set of individuals of one of their own. Those two types of elections were manifestly and fundamentally different, as was their constitutional meaning and import.

12. The election of JSC commissioners did not fall under the detailed electoral system set up under the Constitution; that was because they entered into their offices through an

appointive process provided by article 248, 250 as read with article 171 of the Constitution, rather than the elective process by universal suffrage as defined under article 81 of the Constitution.

13. Parliamentary vetting served an important check on the Presidency; ensured that all nominees were truly qualified for the job they had been nominated for; allowed the opportunity for public participation and allowed the President the ability to choose from qualified people to work for the Government.

14. Allowing the President to appoint JSC nominees without first being vetted by Parliament, would be contrary to the intention of the drafters of the Constitution and indeed against the will of the people. It could also have the effect of unwittingly opening a door, a pandora's box, relating to the manner in which the President appointed other commissioners and other public and State officers.

15. The President, under articles 132 and 250 of the Constitution, did not have an option of appointing JSC commissioners without the approval of the National Assembly. If he did so, he would be depriving Kenyans their right to participate in the appointment of such commissioners, a role played by Parliament pursuant to articles 1(2) and (3), 124(4), and 250 of the Constitution. All constitutional authority must derive and could only be held and exercised on behalf of the people. The constituent power of the people must be reflected in the design of all aspects of the Constitution and particularly, in appointments, control and dismissal of holders of State offices such as those of JSC commissioners.

16. The contention by the majority, that article 171 of the Constitution was self-executing and exempted selected individuals under article 171 from undergoing parliamentary approval was erroneous. Indeed, the majority's position that out of the eleven JSC commissioners, only six of them could become State officers by the mere act of an election of their peers, without the approval of Parliament and without the appointment of the President was a constitutional absurdity. Consequently, having been elected by his peers in the Court of Appeal as a member of the JSC, the 3rd respondent was subject to approval by the National Assembly.

17. The President's appointing role of JSC commissioners and the National Assembly's approval role would not interfere with the independence of the Judiciary and that of the JSC. In interrogating whether the President's appointing role of JSC Commissioners and the National Assembly's approval role would interfere with the independence of the Judiciary and that of the JSC, the court must ask and answer two questions;

    a. whether the provisions on judicial authority and independence of the Judiciary as provided under articles 159 and 160 of the Constitution extended to the JSC; and
    b. whether the JSC was part of the Judiciary.

    The answers to both questions were in the negative.

18. The independence of the Judiciary was provided for under article 160(1) of the Constitution and was in respect of the judicial authority exercised by the courts under article 159 of

the Constitution. The constitutional mandate of the Judiciary and the JSC should never be confused. The Judiciary was an arm of Government; the JSC was a Chapter Fifteen service providing commission whose functions were clearly set out.

19. The JSC was meant to promote and facilitate the independence and accountability of the Judiciary as well as the efficient, effective and transparent administration of justice. However, the JSC did not itself enjoy the independence of the Judiciary enshrined under article 160 of the Constitution. That was the preserve of an arm of Government known as the Judiciary. The JSC did not exercise judicial power, and as such could not benefit from the independence of the Judiciary. (In the same way that the Parliamentary Service Commission did not command legislative authority, which belonged exclusively to Parliament.)

20. The JSC enjoyed the protection and independence under article 249 of the Constitution. That independence however was not unlimited. The JSC like other Chapter Fifteen commissions must make an annual report to Parliament and the National Assembly; further the President or any of the Houses of Parliament could require the commission to report to them on a particular issue. Therefore, that independence of commissions was distinct from that provided to the Judiciary under article 160 of the Constitution. Additionally, the independence of commissioners was not affected in any way by the President's appointing role, the National Assembly's approval and removal, reporting processes of those commissioners to the President or Parliament, all of which were expected and anticipated of all Chapter Fifteen commissions provided for under articles 248, 250, 251 and 254 of the Constitution.

21. There was no constitutional provision exempting elected JSC members from undergoing the approval stage by the National Assembly, when all other nominees for Chapter Fifteen commissioners did so. There could be no justification for that. The respective nominating bodies could not effectively vet their own nominees and remain objective. The approval process was meant, to check the President's powers of appointment; to ensure that the members nominated to serve at the JSC met the integrity test under Chapter Six of the Constitution, and to ensure strict compliance of the national values and principles of governance as stipulated in article 10 of the Constitution, particularly, participation of the people, integrity, transparency and accountability. That compliance with national values was specifically provided for in the appointment and approval of Chapter 15 commissions under article 250(4) of the Constitution.

22. All members of Chapter Fifteen constitutional commissions, the JSC not excepted, must be subject to the approval process by the National Assembly. That, was with a singular qualification that, in view of the fact that the commissioners elected under article 171(b), (c) and (d), served concurrently as judges and judicial officers, roles which were separate and distinct from that of other commissioners, the vetting processes set out by the National Assembly must be read holistically with other constitutional provisions including article 160 of the Constitution. Such that, for judges such as the 3rd respondent, the vetting ought to

be appropriately tailored to ensure and safeguard the sanctity of decisional independence of such nominees in strict compliance with the provisions protecting the Judiciary in accordance with article 160 of the Constitution.

23. In addition to and in conformity with the edict, the necessary and relevant amendments to the Public Appointments (Parliamentary Approval) Act, would then be made before any judge or judicial officer who was nominated to the JSC was subjected to the approval process. Another notion, on the flip side, was for Parliament to rethink the composition of the JSC: it could be more prudent to have retired judges or judicial officers as its members, instead of sitting members of the Judiciary, as that would dispose of the difficulty of dealing with the provisions of article 160 of the Constitution in the approval process.

24. The court would have made the following orders:

    a. That judgment of the Court of Appeal be upheld only to the extent that it found that under section 15(2) of the Judicial Service Act and article 132 of the Constitution, the President had a constitutional duty, as a Head of State to make State and public appointments, including that of appointing JSC commissioners.

    b. A declaration declaring section 15(2) of the Judicial Service Act unconstitutional only in as far as it directed the President to appoint commissioners nominated through elections within three days, and without approval of the National Assembly.

Appeal allowed.

Orders

i. *There was no basis, constitutional or legal for a member of the JSC elected or nominated under article 171(2)(b), (c), (d), (f) and (g) of the Constitution to be vetted and approved by the National Assembly before appointment.*

ii. *Only those commissioners of the JSC upon whom there was a constitutional obligation for vetting before appointment had to be approved by the National Assembly.*

iii. *To the extent that section 15(2)(b) of the JS Act donated to the President the power to appoint elected and nominated members of the JSC under article 171(2)(b), (c), (d), (f) and (g) of the Constitution, it was void for being inconsistent with article 171 of the Constitution.*

iv. *Parties to bear their own costs.*

Citations

Cases

Kenya

1. *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (amicus curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
2. *Center for Rights Education and Awareness & Caucus for Women's Leadership v John Harun Mwau & 6 others* Civil Appeals 74 & 82 of 2012; [2012] KECA 101 (KLR) - (Explained)

3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14 A, 14 B & 14 C of 2014; [2014] eKLR (Consolidated) - (Explained)
4. *In the Matter of the National Land Commission* Advisory Opinions Application 2 of 2014; [2015] KESC 3 (KLR) - (Explained)
5. *In the Matter of Interim Independent Electoral Commission* Application No 2 of 2011; [2011] 1 KLR 509 - (Explained)
6. *In the Matter of Kenya National Commission on Human Rights* Reference No1 of 2012; [2014] 1 KLR 356 - (Explained)
7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion No 2 of 2012; [2012] eKLR; [2012] 3 KLR 718 - (Mentioned)
8. *Joho & another v Shahbal & 2 others* Petition No 10 of 2013; [2014] 1 KLR 111 - (Explained)
9. *Judicial Service Commission v Speaker of the National Assembly & 8 others* Petition 518 of 2013; [2014] eKLR - (Explained)
10. *Katiba Institute & another v Attorney General* Constitutional Petition No 331 of 2016; [2020] eKLR - (Explained)
11. *Khalid, Hussein & 16 others v Attorney General & 2 others* Application No 32 of 2019; [2019] eKLR - (Explained)
12. *Law Society of Kenya v Attorney General & another* Constitutional Petition 313 of 2014; [2016] eKLR - (Explained)
13. *Law Society of Kenya v Attorney General & another* Petition No 4 of 2019; [2019] eKLR - (Explained)
14. *Macharia & another v Kenya commercial Bank & 2 others* SC Application No 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
15. *Muge, Andrew Kiplimo Sang v Independence Electoral and Boundaries Commission* Petition 576 of 2015; [2017] eKLR - (Explained)
16. *Munya v Kithinji & 2 others* Petition No 2B of 2014; [2014] eKLR; [2014] KLR-SCK; [2014] 3 KLR 36 - (Explained)
17. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application No 5 of 2014; [2014] eKLR - (Explained)
18. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Explained)
19. *Njenga, Adrian Kamotho v Attorney General & 3 others* Petition 369 of 2019; [2020] eKLR - (Explained)

Uganda

1. *Karahunga v Attorney General* [2014] UGCC 13 - (Explained)
2. *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997; [1997] UGCC 3 - (Explained)

South Africa

S v Manamela and Another (Director-General of Justice Intervening) (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000) - (Explained)

United Kingdom

Warburton v Loveland (1832) 2 D & Cl 480 - (Applied)

India

Dawakhana (Wakf) Lal Kuan, Delhi & Another v Union Of India & Others (1960) AIR 554, 1960 SCR (2) 671 - (Explained)

United States

1. *Smith Dakota v North Carolina* 192 US [1904] LED 448 - (Explained)
2. *United States v Butler* 297 US 1 (1936) - (Explained)

Canada

1. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)
2. *Schachter v Canada* [1992] 2 SCR 679 - (Explained)

Belize

Association of Belize v Attorney General of Belize Claim No 666 of 2010; BZ 2015 CA 9 - (Mentioned)

Texts

1. Constitution of Kenya Review Commission (CKRC) (2005), *The Final Report of the Constitution of Kenya Review Commission* Constitution of Kenya Review Commission (CKRC)
2. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 116
3. Garner, BA., (Ed) (2019), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 11th Edn

Statutes

Kenya

1. Constitution of Kenya articles 1(2)(3); 10; 59; 67; 73(1)(2); 74; 79; 81(e); 88(4); 95(5)(a); 124(4); 127; 131(a); 132(2)(f)(4); 152; 154; 155; 159; 160; 171(2)(b)(c)(d)(f)(g)(h)(4); 237; 248(2)(e); 249(1)(2)(3); 250(2)(b)(4)(6)(a); 251(2); 254; 255(1)(g)(11); 260; Chapter 15 - (Interpreted)
2. Independent Electoral and Boundaries Commission Act (cap 7C) In general - (Cited)
3. Judicial Service Act, 2011 (cap 8A) sections 15(2); 40(1) - (Interpreted)
4. National Police Service Act (cap 84) In general - (Cited)
5. Parliamentary Service Act (cap 186) First Schedule; Rule 5 - (Cited)
6. Public Appointments (Parliamentary Approval) Act (cap 7F) sections 3, 5, 7 - (Interpreted)
7. Public Service Commission Act (cap 185) In general - (Cited)
8. Salaries and Remuneration Commission Act (cap 412D) In general - (Cited)

Advocates

1. *Mr. Ochiel Dudley for the appellant*
2. *Mr. Christopher Marwa h/b for Mr. Kuria Thande for the 1st respondent*

3. *Mr. Mbarak (S. M Mwendwa & Company Advocates) for the 2nd respondent*
4. *Mr. Issa Mansur and Mrs. Maina (Issa & Company Advocates) for the 3rd respondent*
5. *Ms. Gikonyo h/b for Mr. Okong'o Omogeni (Okong'o Omogeni & Company Advocates) for the 5th respondent*

March 31, 2023, the Court delivered the following Judgment:

A. Introduction

1. At the heart of this appeal is the interpretation and application of articles 171, 248 and 250 of the *Constitution*; specifically to answer these three narrow but related questions; whether a member of the Judicial Service Commission (the JSC/Commission) elected and or nominated under article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment; whether section 15(2) of the *Judicial Service Act* (the Act) is unconstitutional to the extent that it gives the President a role in the appointment of JSC Commissioners elected and/or nominated under article 171(2)(b), (c), (d), (f) and (g); and finally, whether the section is unconstitutional for failure to require that all persons elected and or nominated as JSC Commissioners to be subjected to approval by the National Assembly.

2. Article 171 establishes the JSC, an independent body consisting of eleven (11) members; the Chief Justice, who is the chairperson; the Attorney-General; representatives of the Supreme Court, Court of Appeal, High Court, the Magistracy; the legal profession (2); the public (2); and the Public Service Commission (PSC). The Chief Registrar is the secretary to the Commission. The *JS Act* declares, in part, that it is an Act of Parliament that makes "further provision with respect to the membership and structure of the Judicial Service Commission", with section 15 providing for the procedure of appointment of members of the Commission.

3. The constitutionality of section 15(2) of the the *JS Act* has also been raised as one of the issues for determination in a separate appeal before this court in Petition No 17 of 2020, Katiba Institute v Attorney General & 9 others, which was heard on June 15, 2022.

B. Background

4. On March 9, 2018, Justice Mohammed Warsame, a justice of Court of Appeal (the 3rd respondent) was re-elected by the Justices of that court to serve a second term as their representative to the JSC in accordance with article 171(2)(c) as read with article 171(4) of the *Constitution* and section 16 of the *JS Act*. Thereafter, his name was forwarded to the President pursuant to section 15(2) of the *JS Act* for appointment as a member of

the JSC. Instead, the President, in turn, dispatched the name to the National Assembly (the 2nd respondent) for approval before appointment pursuant to article 250(2)(b) of the *Constitution*. This action was the gravamen in the original grievance; whether Parliament can vet for approval a member of the JSC who has been democratically elected by his or her peers.

5. By notices published on 21st and March 22, 2018 in the People Daily and the Daily Nation newspapers, respectively, the 2nd respondent invited views from the general public on the 3rd respondent's suitability for the office of Commissioner of the JSC. The notices were unequivocal that the approval hearing was in accordance with the provisions of article 250(2)(b) of the *Constitution* as read with sections 3 and 5 of the *Public Appointments (Parliamentary Approval) Act* No 33 of 2011.

6. As a consequence, the JSC and the Law Society of Kenya (the appellant) by separate letters dated 21st and March 22, 2018, respectively, objected to the intended exercise, pointing out that it was not only unconstitutional but also an interference with the independence of the nominating institution, the Judiciary (the Court of Appeal). The 2nd respondent, by a letter dated March 29, 2018 responded comprehensively but insisted that the scheduled hearing would proceed, precipitating the action before the High Court, which has culminated in this appeal after the Court of Appeal dismissed the first appeal.

C. Litigation History

i. Before the High Court

7. Aggrieved by the President's reluctance to appoint the 3rd respondent, and the insistence of the 2nd respondent to vet him, the appellant challenged the decision in the High Court, in Petition No 106 of 2018. Subsequently, Samuel Njuguna, (the 4th respondent) also filed an opposing Petition, No 119 of 2018 challenging the constitutionality of section 15(2) of the *JS Act* on the ground that, contrary to article 250 of the *Constitution*, it does not make parliamentary approval of all JSC commissioners mandatory. The two petitions were consolidated and heard together.

8. As far as the appellant was concerned, by forwarding the name of the 3rd respondent to the 2nd respondent, the President was in effect acting as the nominating authority; that both the purported nomination and the intended approval of the 3rd respondent by the 2nd respondent were *ultra vires* article 171(2)(c) of the *Constitution*. The constitutionality of section 15(2) of the Act was contested in so far as it confers on the President the power to appoint members of JSC who are elected or nominated by bodies specified under article 171(2)(b)(c), (d)(f) and (g) of the *Constitution*; and that article 171(2) is a special provision specific to the JSC and its membership, distinct from other chapter 15 constitutional commissions to which the general provisions of article 250 of the *Constitution* apply.

9. The 4th respondent, on his part, sought the court's interpretation of the *Constitution* in relation to the establishment and composition of constitutional commissions, appointment of members of these commissions and the import of article 248 as read with article 250 of the *Constitution*. It was his case that, without exception, all chapter fifteen, commissioners, including those of the JSC must be approved by the National Assembly; that the omission altogether in section 15, to provide for approval of all the JSC Commissioners was itself inconsistent with the *Constitution*; and that it was an affront to article 27 of the *Constitution* for only some members of JSC to undergo approval by the National Assembly.

10. He further expressed the view that although article 171(2) provides for the composition of JSC and the manner of identifying the commissioners, section 15(2) of *JS Act* contradicts this by vesting this function on the President, and declaring that nominating bodies under article 171(2)(b), (c), (d), (f) and (g), must submit names of their nominees to the President who must, within three days of receipt of the names, appoint the nominees as members of the Commission. The 4th respondent read this to mean, that the nominees were not required to undergo approval by the 2nd respondent; and that upon receipt of the names of the nominees, the President simply appoints them as members of the JSC, contrary to article 250(2)(b), which requires all those identified for appointment to commissions to be approved by the National Assembly before appointment. To that extent, he contended further, that section 15(2) of the *JS Act* contravened article 250(2)(b) of the *Constitution* and was therefore invalid.

11. The appellant shared these views with the 4th respondent, and added that, once a member of the JSC is elected, the President cannot, at the same time, appoint such a member. The 3rd respondent, for his part, urged that the appointment envisaged by section 15(2) is a formal function performed by the President as Head of State under article 131(a) of the *Constitution* through the issuance of a gazette notice. This, in his view, does not make section 15(2) unconstitutional. According to the JSC, the President cannot appoint elected commissioners under the guise of his functions as the Head of State under article 132; that his powers in the appointment of the JSC commissioners are limited to only two under article 171(2)(h).

12. In sum, the consolidated petitions, we have noted at the beginning of this judgment, were pegged on two constitutional provisions; articles 171 and 250. While the appellant, the 3rd respondent and JSC relied on article 171 to argue that there is no requirement that elected representative of the Justices of the Court of Appeal be approved by the National Assembly, the Attorney General (1st respondent), the 2nd and 4th respondents on the other hand, relied on article 250 to argue that all commissioners to constitutional commissions, without exception must be approved by the National Assembly.

13. The High Court (Mwita, J) in a judgment dated July 6, 2018 found that articles 171 and 250 apply to different commissions; that the latter does not apply to JSC either in the composition or identification of its commissioners. For this reason, the learned Judge concluded that the requirement relating to approval of nominees by the National Assembly in article 250 does not apply to JSC commissioners, except those appointed by the President under article 171(2)(h) of the *Constitution*- one woman and one man to represent the public. To buttress this conclusion, the Judge drew a parallel between the terms of office for Commissioners under article 250(6) and those in article 171(4), pointing out that under the former, commissioners' term of office is limited to a single non- renewable term of six years, while under the latter, JSC commissioners, other than the Chief Justice and Attorney General, enjoy a renewable term of five years provided they remain qualified.

14. Flowing from the language of article 171(2)(b), (c), (d) and (f), the learned Judge concluded this aspect of the subject, that once the results of elections under article 171(2)(b), (c), (d) and (f) are declared, those results are final and conclusive of the members elected. Those results do not require approval by any body, or other state organ, including the National Assembly under the guise of article 250(2) of the *Constitution*. In the Judge's view, any attempt to subject those elected to any form of approval is against the letter and spirit of the *Constitution* and is unconstitutional because such an interpretation would defeat the meaning and essence of elections conducted by peers through secret ballot.

15. Pertaining to the ground that, by directing the names of nominees to be forwarded to the President for formal appointment, section 15(2) of the *JS Act* is *ultra vires* the *Constitution*, the learned Judge ruled that the provision does not confer any discretion on the President once he receives the names. He is under a legal obligation, in exercise of his executive function, to formally appoint the nominee(s) within three days of receipt of the name(s). This view, the Judge noted, is supported by the provisions of article 250 and as such section 15(2) of the *JS Act* is not in conflict with any provision of the *Constitution*.

16. The High Court, in the end, partially allowed the petition by the appellant and nullified the purported nomination of the 3rd respondent by the President and, by an order of permanent injunction prohibited the 2nd respondent from holding an approval hearing to vet the 3rd respondent. The court, however, found no merit in the 4th respondent's petition and dismissed it, holding that section 15(2) is constitutional.

ii. Before the Court of Appeal

17. With 9 grounds, the 1st respondent sought to overturn in the Court of Appeal the entire judgment of the High Court and to have it substituted with one declaring that section 15(2) of *JS Act* is unconstitutional; and to further declare that the Judge elected to be a

representative of the Court of Appeal under the provisions of article 171(2)(c) is subject to parliamentary approval in terms of article 250(2) of the *Constitution*.

18. The appellant, on its part, filed a cross appeal to challenge that part of the judgment of the High Court that found section 15(2) of the *JS Act* constitutional, and that, once the names of nominees are forwarded to the President, the latter must formally make the appointment within three days. The appellant, therefore, asked the Court of Appeal to reverse the decision and hold that the section is void to the extent that it vests in the President the power to appoint commissioners of the JSC elected under article 171(2)(b), (c), (d) and (f).

19. The 1st, 2nd, 3rd and 4th respondents maintained their respective arguments before the High Court, which we have already summarized in the previous paragraphs of the judgment and no purpose will be served by rephrasing them here.

20. The Court of Appeal framed 3 issues for determination as follows: whether the 3rd respondent, an elected representative of the Court of Appeal, was subject to vetting and approval by the National Assembly; whether section 15(2) of the *JS Act* is unconstitutional for omitting to provide for parliamentary approval of all persons elected and nominated as JSC Commissioners; and whether section 15(2) is unconstitutional for vesting in the President the power to appoint elected members of the JSC.

21. The Court of Appeal dismissed the 1st respondent's appeal as well as the appellant's cross-appeal. In doing so, it held that, Parliament, in enacting section 15(2) of the *JS Act* was guided by article 171(2) which creates four categories of members and catered for appointment procedure for each. More specifically, Parliament was clear that the only persons to be subjected to approval hearing in the National Assembly were the two candidates representing the public, and no other. As such, the 3rd respondent, having been elected by his peers as a member of the JSC, was not subject to approval by the National Assembly.

22. In rejecting the ground of unconstitutionality of section 15(2) of the *JS Act*, the court endorsed the construction placed on section 15(2) by the High Court that the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name.

iii. Before the Supreme Court

23. Once again, aggrieved by the Court of Appeal's decision, the appellant lodged this appeal on a single ground, that the appellate court erred in law by holding that section 15(2) of the *JS Act* is constitutional without determining the section's purpose which unduly gives the President more powers than those conferred by article 171(2) and whose effect permits unlawful interference with the independence of the JSC.

D. Parties' Submissions

i. The appellant (LSK)

24. The appellant sought to persuade us from the onset that the court's jurisdiction under article 163(4)(a) has been properly invoked, the issues raised in the petition involving the interpretation of article 171(2) of the *Constitution* as read with section 15(2) of the *JS Act*; that the Court of Appeal erred in failing to find: that article 171(2) of the *Constitution* does not give the President any role in the appointment of JSC members under articles 171(2)(b), (c), (d) (f) and (g); and for that reason, section 15(2) is inconsistent with this article.

25. According to the appellant, by segregating article 132(4) on the functions of the President from articles 171(2), 248, and 250 on the composition and membership of the JSC, the Court of Appeal erred; and that, by focusing exclusively on article 132, the Court of Appeal failed to be guided in the holistic and integral interpretation of articles 132(4), 171(2), 248(1) and 250(1) and (2).

26. The appell ant further submitted that even though article 171(2)(b), (c), (d), (f) and (g) does not permit the President to appoint any JSC member besides the two members under article 171(2)(h), the Court of Appeal upheld the validity of section 15(2) based on nobility; that as a noble duty, the President exercises certain executive functions; and that in this case, the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name and consequences would ensue if there was a delay in complying with the statute, without specifying what these consequences would be.

27. As far as the appellant is concerned, had the Court of Appeal considered the purpose and effect of section 15(2), it would have found the section to be unconstitutional. The purpose of section 15(2) is to give the President more powers than article 171(2)(b), (c), (d), (f) and (g) allows. Its effect is the interference with the independence of not only the JSC but also the Judiciary by subjecting them to control of executive power, governmental and political pressure in appointments to the JSC.

28. In support of these arguments, the appellant has cited the following decisions: *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others*, CA No 74 & 82 of 2012; [2012] eKLR; *Tinyefuza v Attorney General of Uganda*, Constitutional Petition No 1 of 1997; (1997 UGCC 3); *Smith Dakota v North Carolina*, 192 US; [1940] LED 448; *Andrew Kiplimo Sang Muge v Independence Electoral and Boundaries Commission*, HC Petition No 576 of 2015 as consolidated with Petition 118 & 148 of 2016; [2017] eKLR all, for the proposition that the *Constitution* should be interpreted as an integrated whole ; *US v Butler*, 297 US 1 [1936]; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; *Katiba Institute & another v Attorney General & another*, HC Petition No 331 of 2016; [2020] eKLR, to make

the point that both purpose and effect are relevant in determining the constitutionality of a statute; *Association of Belize v Attorney General of Belize*, Claim No 666 of 2010, on the effect of a statute on judicial independence; *Schachter v Canada*, [1992] 2 SCR 679; and *S v Manamela and another (Director-General of Justice Intervening)* (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000), on the appropriate reliefs available with respect to unconstitutionality of a statute or its provision.

ii. 5th Respondent's submissions (JSC)

29. Supporting the petition, the 5th respondent argued that it was in error for the Court of Appeal to hold that the President has the power to appoint members of the JSC; that such a finding disregards a holistic interpretation of all the relevant articles of the *Constitution*, namely, 132(4), 171, 248 and 250; that whereas under article 132 (4) the President may perform certain executive function provided for in the *Constitution* or in national legislation and, may in exercise of that authority, among other things, establish offices in the public service in accordance with the recommendation of the PSC, that function does not extend to all members of the JSC under article 171 of the *Constitution*, but only to those appointed under article 171(2)(h) to represent the public. It does not certainly include the appointment of the 3rd respondent, a judge to represent his colleagues in the JSC. The mandatory terms of section 15(2) of the *JS Act*, giving authority to the President to appoint the 3rd respondent as a member of the JSC is a clear violation of express constitutional provisions, JSC contended.

30. The JSC reiterated that the purpose and effect of section 15(2) is to give the President a function beyond those granted by the *Constitution*. The JSC relied on the decisions of this Court in *In the Matter of Interim Independent Electoral Commission*, SC Application No 2 of 2011; [2011] eKLR and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition No 14 of 2014 as consolidated with Petition Nos 14 A, 14B and 14C of 2014; [2014] eKLR, highlighting the import of separation of powers and independence of the Judiciary.

iii. 1st Respondent's Submissions (Attorney-General)

31. In opposition to the appeal, the 1st respondent contended that under the doctrine of separation of powers and the principle of checks and balances, the framers of the *Constitution* of Kenya required that under article 250(2) as read together with section 15(2) of the *JS Act*, the National Assembly, due to its oversight role under Article 95 of the *Constitution*, should approve the membership of the JSC and indeed, all other commissions and independent offices. This is also in accord with section 7 of the *Public Appointments (Parliamentary Approval) Act*. Therefore, to the extent that section 15(2) of the *JS Act* takes away the powers of the National Assembly to vet and approve the elected members of the JSC, it is contrary to the provisions of article 250(2) of the *Constitution*. The President

was within the law in exercising his constitutional mandate to forward the name of the 3rd respondent to Parliament for approval in conformity with article 250(2) and section 15(2) of the *JS Act*. Section 15(2) mirrors article 250(2) in so far as the role of the President to formally appoint commissioners is concerned, and is therefore constitutional.

32. In a bold submission, the 1st respondent urged that elections, nominations and parliamentary approval of commissioners are processes of selection, mere proposals, suggestions or recommendations, but the ultimate decision rests on the formal appointment by the President in his capacity as Head of State and not as Head of the Executive arm of the Government.

iv. 2nd Respondent's submissions (National Assembly)

33. The 2nd respondent did not file any written submissions, however, counsel in his oral submissions before the court explained that the 2nd respondent has challenged the constitutionality of section 15(2) of the *JS Act* only to the extent that it omits to provide that the President must first forward the names of the nominees to the National Assembly for vetting and approval before appointment. However, when the High Court held that the impugned section was not unconstitutional, they abandoned that line of argument before the Court of Appeal.

34. Be that as it may, the 2nd respondent suggested law reform in regard to that provision. With that view, the 2nd respondent did not find any need to pursue the issue of constitutionality of section 15(2) before this court.

v. 3rd Respondent's submissions (Warsame, JA)

35. Equally opposing the appeal, the 3rd respondent asserted that pursuant to article 171(1), (2) and (4) of the *Constitution*, he has been elected twice by the Justices of the Court of Appeal, to represent them in the JSC, the first time being in 2013. He was re-elected on March 9, 2018, the election that is the subject matter of this dispute. Upon his first election in 2013, his name was forwarded to the President who duly appointed him as a commissioner without seeking approval from the National Assembly in compliance with both the *Constitution* and the *JS Act*. However, after his re-election in 2018, contrary to the *Constitution* and the law, and a departure from the 2013 position, the President instead of signifying his appointment by issuing a gazette notice, forwarded his name to the National Assembly for approval.

36. Relying on section 15(2) of the *JS Act*, the 3rd respondent submitted that having received his name as an elected representative of the Justices of the Court of Appeal, the President's only role as contemplated by article 171(2)(c) and section 15(2) of the *JS Act* was to gazette him, without more; that the only members who must be appointed by the President and only

with the approval of the National Assembly are those contemplated under article 171(2)(h) to represent members of the public. Section 15(2) of the *JS Act* does not contemplate any other role by the President either by way of further vetting, deliberation, approval or disapproval of other members. The powers of appointment by the President, as Head of State in accordance with section 15(2)(b) of the *JS Act* are limited to appointment upon nomination. The appointment process does not lend itself to scrutiny and deliberation by the President. The 3rd respondent further submitted that the constitutional scheme and design that vests the President with the power to appoint, nominate and dismiss Cabinet Secretaries and other State and public officers does not extend to a member of the JSC nominated under article 171(2)(c) of the *Constitution*. In his view therefore, in so far as section 15(2) only provides for the formal appointment, the section is not unconstitutional.

37. The 3rd respondent cited the following treatise and judicial decisions to illustrate the transformation path, from the old constitutional order, where the Executive had a significant influence over the Judiciary to the promulgation of the 2010 Constitution; 'Kenya Democracy and Political Participation: a Review by AfriMap, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS); Public Law and Political Change in Kenya by Prof Yash Pal Ghai; *Law Society of Kenya v Attorney General & Another* [2016] eKLR; *Adrian Kamotho Njenga v Attorney General & 3 Others* [2020] eKLR; and the Ugandan case of *Karahunga v Attorney General* (2014) UGCC 13, on the roles of the President and the Judicial Service Commission (of Uganda) on the appointment of Chief Justice.

vi. 4th Respondent (Samuel Njuguna)

38. Though the question of constitutionality of section 15 was introduced in these proceedings from the High Court by the 4th respondent, he has not participated in these proceedings and those in the Court of Appeal.

E. Issues for Determination

39. In the context of these arguments, and specifically bearing in mind the narrow dispute around the process of appointment of the 3rd respondent to the JSC, the following two issues fall for determination:

    i. Whether a member of the JSC elected under article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;

    ii. Whether section 15(2) of the *Judicial Service Act* is inconsistent with the *Constitution* to the extent that it gives the President a role in appointment of JSC Commissioners elected and/or nominated under article 171(2)(b), (c), (d), (f) and (g) or for failure to

require that all persons elected and or nominated as JSC Commissioners be subject to approval by the National Assembly

40. The two issues are based on the original grievance of the appellant when it petitioned the High Court to challenge the President's action of submitting the 3rd respondent to the 2nd respondent for vetting and approval. The combined effect of the two issues is whether it is within the 2nd respondent's authority to approve the elected representatives of the nominating bodies specified under article 171(2)(b), (c), (d), (f) and (g) of the *Constitution*.

F. Analysis and Determination

Jurisdiction of this court

41. This court's jurisdiction flows from the *Constitution* and the applicable statutes. See *Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others*, SC Application No 2 of 2011; [2012] eKLR. Therefore, even if the question of jurisdiction is not brought up by the parties, it is our duty, as a matter of practice to independently satisfy ourselves that we are legitimately seized of each matter before us.

42. The appeal was brought as of right pursuant to article 163(4)(a) of the *Constitution*. From the petition filed in the High Court, the memorandum of appeal in the Court of Appeal, the arguments before and the judgments of the two courts below, as well as the pleadings and arguments in this court, we entertain no doubt that the subject matter in controversy involves the interpretation and application of articles 171, 248 and 250 of the *Constitution*. The appeal, we are satisfied, meets the principles enunciated in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another,* SC Pet No 3 of 2012; [2012] eKLR. Further, on the question of constitutionality of section 15(2) the *JS Act*, taking a cue from our decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, SC Application No 5 of 2014; [2014] eKLR, we note that the *JS Act* is a normative derivative of the principles embodied in the *Constitution* under articles 171 and 172 and in interpreting the *JS Act*, the court cannot disengage from the *Constitution*. Furthermore, this court has previously invoked its appellate jurisdiction as of right on matters involving the constitutionality of a statutory provision in *Hussein Khalid and 16 others v Attorney General & 2 others*, SC Application No 32 of 2019 [2019] eKLR.

We turn to the first issue,

i. Whether a member of the JSC elected and or nominated under article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;

43. Two questions arise from this ground, whether the nomination of the 3rd respondent by the President was *ultra vires* article 171(2)(c) of the *Constitution*; and whether the intended approval of the 3rd respondent by the National Assembly was a violation of article 171(2)(c).

44. The resolution of these questions will depend on the construction and application of all the relevant articles of the *Constitution*. By article 259, courts are enjoined in construing the *Constitution* to promote its purpose, values and principles; advance the rule of law, human rights and fundamental freedoms in the Bill of Rights; permit the development of the law; and contribute to good governance.

45. This court; *In the Matter of Interim Independent Electoral Commission*, SC Application No 2 of 2011; [2011] eKLR and; *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, SC Advisory Opinion No 2 of 2012 [2012] eKLR, among other decisions, has affirmed that, in interpreting the *Constitution* and developing jurisprudence, the court will always take a purposive and holistic interpretation of the *Constitution* as guided by the *Constitution*.

46. The concept of holistic interpretation of the *Constitution* was explained in *In the Matter of Kenya National Commission on Human Rights*, SC Reference No 1 of 2012; [2014] eKLR, by the court as follows:

> "But what is meant by a 'holistic interpretation of the *Constitution*'? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

47. To construe the import and tenor of any provision of the *Constitution*, the entire Constitution has to be read as an integrated whole, because the *Constitution* embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposively to give effect to those values and principles. Where words used in any provision of the *Constitution* are precise and unambiguous then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because, to borrow the words of Burton, J in *Warburton v Loveland,* (1832) 2 D & Cl 480, the language used "speak the intention of the legislature."

48. Those values and principles reflect our historical and political realities and the people's aspirations for a democratic State, built on the rule of law and respect for human rights.

49. To apply these principles to the arguments before us, we reproduce the entire composition of the JSC in article 171(2) (a) to (h), as it is important for the determination of the question whether, the nomination by the President of the 3rd respondent, a member of the JSC, elected by his colleagues in the court was ultra vires article 171(2)(c) of the *Constitution*. The article is equally critical in answering the second issue, whether elected or nominated commissioners of the JSC ought to be approved by the National Assembly before appointment.

50. The article 171(2)(c) reads as follows:

> " The Commission shall consist of –
>
> a. the Chief Justice, who shall be the chairperson of the Commission;
>
> b. one Supreme Court judge elected by the judges of the Supreme Court;
>
> c. one Court of Appeal judge elected by the judges of the Court of Appeal;
>
> d. one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;
>
> e. the Attorney-General;
>
> f. two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
>
> g. one person nominated by the Public Service Commission; and
>
> h. one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly." [our emphasis]

51. It is apparent from this provision that membership to the JSC is four- pronged; by virtue of office, for example, the Chief Justice and the Attorney-General, who remain Chairperson and member, respectively, despite the term of five years and a further one term of five years applicable to other members. There are those members who are elected by peers, namely representatives of the Justices of the Supreme Court, Court of Appeal, High Court, the Magistracy and the advocates. The third category comprises a member nominated to

represent the PSC and the final category are two members, one woman and one man, not being lawyers, appointed by the President to represent the public.

52. It is common factor that the name of the 3rd respondent was forwarded to the 2nd respondent for approval hearing ostensibly on the force of articles 132(4) and 250(2), as well as section 15(2) of the *JS Act*. Article 132(4) embodies the specific function of the President to-

> "(4) (a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;" (Our emphasis).

53. This, to our mind, cannot be the basis upon which the President acted when he forwarded the 3rd respondent's name to the 2nd respondent. Similarly, the plain language of section 15(2) does not vindicate the action, as we shall demonstrate when considering the second issue. That leaves article 250, which must be read together with article 248.

54. Article 250 is contained in chapter fifteen. The ten commissions in the article are collectively and generally referred to as chapter fifteen commissions. Article 250 prescribes the composition of commissions, appointment and terms of office of the commissioners as follows:

> "250.
>
> (1) Each commission shall consist of at least three, but not more than nine, members.
>
> 2. The chairperson and each member of a commission, and the holder of an independent office, shall be—
>
> a. identified and recommended for appointment in a manner prescribed by national legislation;
>
> b. approved by the National Assembly; and
>
> c. appointed by the President.
>
> 3. To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.
>
> 4. Appointments to commissions and independent offices shall take into account the national values

referred to in article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

5. A member of a commission may serve on a part-time basis.

6. A member of a commission, or the holder of an independent office—

a. unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment; and

b. unless ex officio or part-time, shall not hold any other office or employment for profit, whether public or private.

...". (Our emphasis).

55. Article 248, which is also in chapter fifteen, on the other hand stipulates that:

"(1) This chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.

(2) The commissions are —

a. the Kenya National Human Rights and Equality Commission;

b. the National Land Commission;

c. the Independent Electoral and Boundaries Commission;

d. the Parliamentary Service Commission;

e. the Judicial Service Commission;

f. the Commission on Revenue Allocation;

g. the Public Service Commission;

h. the Salaries and Remuneration Commission;

i. the Teachers Service Commission; and

j. the National Police Service Commission.

3. The independent offices are—

a. the Auditor-General; and

b. the Controller of Budget."

(Our emphasis).

56. We stress that chapter fifteen which contains articles 248 and 250 applies to all the ten commissions, including the JSC, save only "to the extent that this Constitution provides otherwise".

57. The *Constitution* provides otherwise in article 171. We have seen in paragraph 50 above, that article 171 is fully self-executing. From a plain reading of the three articles, 171, 248 and 250, it is apparent that the former was intended to apply exclusively and specifically to the establishment of the JSC, its composition, mode of appointment and term of office of its members, while article 250 was to regulate and guide on the composition, appointment and terms of office of commissions and independent offices generally. The proviso in article 248(1) acknowledges the existence of other constitutional provisions, specific to other commissions which may differ from the provisions of chapter fifteen. Chapter fifteen, for this reason, makes provisions of general application to fill in the gaps in respect of composition, appointment and terms of office of any commission.

58. We are fortified in our conclusion by sub-article (2)(a) of article 250 which directs that, in those constitutional commissions where the procedure and manner of identification and recommendation for appointment of the chairpersons and commissioners are not provided for in the *Constitution*, recourse will be to national legislations. Examples of such commissions, are the Kenya National Human Rights and Equality Commission established under article 59 of the *Constitution*; National Land Commission under article 67 of the *Constitution*; Ethics and Anti- Corruption Commission under article 79 of the *Constitution*; Independent Electoral and Boundaries Commission under article 88 of the *Constitution*; and Teachers Service Commission under article 237 of *the Constitution*. In contrast, by article 171, the *Constitution* itself provides for the means of identifying and methods of appointment of each of the four categories of membership of the JSC, occasioning no need to resort to either article 250 or national legislation for this purpose.

59. It is the lacuna in some of these commissions that article 250 seeks to fill. Where no particular provision of the *Constitution* specifies the number of members to a commission, the answer will lie in article 250 which, as a general guide limits such membership to "at least three, but

not more than nine". If the manner of identification and recommendation for appointment of the chairperson and each member of a commission is not specified elsewhere in the *Constitution*, reference must be made to article 250. In all such instances of lacuna, article 250 was intended to fill the same by directing that the appointment of the chairperson and each member shall be subject of approval by the National Assembly; and thereafter appointment by the President. The Article directs further that save for ex officio members, the rest of the member shall be appointed for only a single term of six years. Because article 171 is self-executing, these conditions do not apply to its members.

60. To further buttress our view that article 250(1) is a general provision article, it provides that membership to each commission "shall" not consist of more than nine members, yet pursuant to article 171(2), the JSC consists of eleven (11) members. Secondly, article 250(6)(a) stipulates that a member of the commission shall be appointed for a single term of six years and is not eligible for re-election. In respect of the JSC, article 171(4) provides that members of the JSC, apart from the Chief Justice and the Attorney-General shall hold office for a term of five years and shall be eligible to be nominated for one further term of five years.

61. Another demonstration of the divergent nature of the commissions, is in the composition of the Parliamentary Service Commission established under article 127. The membership is wholly drawn from Parliament, apart from two, one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament. The mode of appointment and terms of service of its members which are distinct from those of the other commissions, are laid out in details in the *Constitution* itself. Like the JSC, the membership is not tied to "at least three, but not more than nine" in article 250. It has ten (10) members. In the identification, nomination and appointment of members, there is no involvement at all of the Executive, the President, or the other commissions in the process. There is also a category of commissions which, apart from merely being listed in the *Constitution*, are entirely left to legislations on their composition, appointment and mandate as discussed in paragraph 89 of this judgment.

62. These are examples of how the framers expressed their intention to effectuate the doctrine of separation of powers, the hallmark of our Constitution. The direct involvement of the President in the appointment of two members to represent the public in the JSC can only be explained on the basis of the nature of the expanded functions of the JSC, including its role to advise the national government on ways of improving the efficiency of the administration of justice (See article 172(1)(e). Moreover, it is in line with the provisions of article 10 and the centrality of public participation and transparency at all levels of administration of justice. The inclusion of the PSC nominee in the JSC, on the other hand, can be explained away by the long history of the two commissions. This history is aptly captured in the Final Report of the Constitution of Kenya Review Commission (2005).

From the pre-independence era, the PSC and the JSC have been joined at the hip. The PSC has always traditionally had two nominees, and lately one in the JSC.

63. The point we are making is that the commissions are far from being homogeneous, contrary to the submissions that they all draw from article 250. There are no typical common features between the commissions. The principle of checks and balances, the doctrines of separation of powers and independence of the three branches of Government from each other are highlighted in the deliberate distinct provisions.

64. Having come to the conclusion that article 171 is a self-executing provision; and that it is drafted in precise and unambiguous language, then it can only be given its natural and ordinary meaning. The words used in the article speak the intention of the legislature. The intention was to have the constituents in the Court of Appeal to determine for themselves, through the ballot, the person to represent them in the JSC, without the involvement of third parties who have no interest in affairs of that court.

65. Had the people of Kenya or the Legislature intended that all elected members of the JSC be first approved by the National Assembly before being appointed, nothing would have been easier than to expressly state so, the same way they have done for the two members representing the public. In the case of the two, article 171(2)(h) unequivocally declares that, before their appointment, the National Assembly must give an approval. As far as we can recall, since the promulgation of the *Constitution*, all past elected members of the JSC, except in one instance, have never been subjected to approval hearing by the National Assembly. As a matter of fact, in his first term, the 3rd respondent did not go through it, because there has never been any constitutional or legal imperative to do so. The resolve to subject him, this time round to parliamentary approval was not only in bad faith, but amounted to a breach of his legitimate expectation and a fundamental contravention of the *Constitution*.

66. To suggest, as has been expressed in this appeal, that the 3rd respondent was bound to be vetted and could only qualify for appointment after approval by the National Assembly, is to attack the spirit and letter of articles 1(3) and 2(2); that sovereign power delegated to State organs, must be exercised strictly in accordance with the *Constitution* and that no person may claim or exercise State authority except as authorised under the *Constitution*. The *Constitution* does not permit the 2nd respondent to vet and approve an elected member of the JSC.

67. There can be no better vetting of a representative's suitability to a position than by peers or those whose interest he is expected to represent than in a transparent and democratic election. The electorates base their choices on considerations relevant to their needs; the needs they alone appreciate in a manner no other body can replace or replicate.

68. Purely, by the fact of his election by the Justices of the Court of Appeal, the 3rd respondent, without more, became a member of the JSC, only awaiting the administration of the oath under article 74 of the *Constitution* as read with section 40(1) of the *JS Act* before assuming the functions of the office of Commissioner of the JSC.

69. Our answer to the first issue, it must follow from these reasons, like the two superior courts below, is that there is no basis, constitutional or legal for a member of the JSC elected or nominated under article 171(2)(b), (c), (d), (f) and (g) to be vetted and approved by the National Assembly before appointment.

70. We turn to the second and final issue,

ii Whether section 15(2) of the *Judicial Service Act* is unconstitutional to the extent that it gives the President a role in appointment of JSC Commissioners elected and/or nominated under article 171(2)(b), (c), (d), (f) and (g), and for failure to require that all persons elected and or nominated as JSC Commissioners be subject to approval by the National Assembly.

71. The *JS Act* was enacted in 2011 "to .....make further provision with respect to the membership and structure of the Judicial Service Commission;.....and for connected purposes". See the long title to the Act.

72. Section 15(1) and (2) state that:

> " 15. (1) Where the members are to be appointed by the President under article 171(2)(h) of the *Constitution*, the following procedure shall apply—
>
> (a) until after the first elections under the *Constitution*, the President shall, subject to the *National Accord and Reconciliation Act*, 2008 (No 4 of 2008) and after consultation with the Prime Minister, within seven days of the commencement of this Act, submit the names of the nominees to the National Assembly;
>
> .....
>
> 2. Where the nominations are to be made by bodies specified under article 171(2)(b), (c), (d), (f) and (g) of the *Constitution*—
>
> a. the respective nominating body shall submit the name of its nominee to the President; and

b. the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission." (our emphasis)

73. The procedure of appointment set out above is divided into sub-section (1) and (2). The former is specific to appointment by the President with the approval of the National Assembly of two members under (h), one woman and one man to represent the public.

74. Sub-section (2) on the other hand relates to members appointed in accordance with article 171(2) (b), (c), (d), (f) and (g), who are elected or nominated. The nominating bodies envisaged do not include the JSC, but are the judges of the superior courts, the Magistrates, the Law Society of Kenya and the PSC. By this sub-section those bodies are required to submit the names of their nominees to the President; and the President, in turn is expected, within three days of receipt of the names, "to appoint the nominees as members of the Commission." Because the categories of the nominees are those elected or nominated, sub-section (2) does not require parliamentary approval, unlike those in sub-section (1). Is the omission to vet nominees in sub-section (2) unconstitutional? and what does it entail for the President "to appoint the nominees"?

75. Before we settle these questions and the arguments proffered on this ground, it is apposite to stress two settled principles on constitutionality of a statute and the rules of interpretation of statutes. The first principle is that there is a general rebuttable presumption that every Act of Parliament is constitutional and the burden of proof lies on the person who alleges otherwise. See the decision of the Supreme Court of India in *Dawakhana (Wakf) Lal Kuan, Delhi & another v Union Of India & others*, (1960) AIR 554, 1960 SCR (2) 671, which has received endorsement by courts in this country, including this court in the case of *Law Society of Kenya v Attorney General & another*, SC Petition No 4 of 2019; (2019) eKLR. The second principle requires that in determining whether a statute is constitutional or not, the court must ascertain the object, purpose and effect of that statute; to discern the intention expressed in the Act itself. A statute cannot make provision whose effect contradicts the *Constitution* or places additional requirements above those set out by the *Constitution*.

76. On statutory interpretation of a statute, it is emphasized that the function of the courts is to interpret the law, not to make it. A statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is, in the first place, to seek to understand the intention of its maker. Where the meaning of a provision is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judges to apply such a law as it is. But if it is open to more than one interpretation, then the court has to choose the interpretation which represented the true intention of the legislature, the legal meaning of

the statutory provision. This has been underscored by this court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Petition No 2B of 2014; [2014] eKLR.

77. Having set out these principles to guide us in the determination of this ground and because the answer to the second limb of the ground is simple, we shall start with it. The 1st and 2nd respondents contended that, to the extent that section 15 takes away the powers of the National Assembly to vet and approve the elected members of the JSC, it is contrary to the provisions of article 250(2) of the *Constitution* and therefore invalid. We dispose of this argument by restating that the language of article 171 is unambiguous in so far as vetting and approval by the National Assembly is concerned. The only members who, according to article 171(2)(h), must be approved by the National Assembly after appointment by the President, are one woman and one man to represent the public. All the other members are either elected under (b), (c), (d), (e), (f) and (g), or nominated under (h) of article 171(2). An endorsement of a candidate through an election is another form of vetting by those he or she will be serving. In the instant case, it is only the judges, magistrates and lawyers who can choose for themselves their representatives. Parliament has no part to play, except to the limited extent explained earlier, in respect of the two members.

78. The powers of Parliament to vet and approve any constitutional and statutory appointments are circumscribed as follows by section 3 of the *Public Appointments (Parliamentary Approval) Act*, 2011:

> "An appointment under the *Constitution* or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by Parliament in accordance with this Act".

79. Parliament will only exercise its powers to vet and approve candidates for appointment to a public office if, and only if the *Constitution* or any other law requires the approval of Parliament. Section 15(2) of the *JS Act* does not contain any requirement for approval by Parliament. Because there is no such requirement in article 171, except for (h), the arguments by the 1st and 2nd respondents that all commissioners of the JSC ought to be approved by Parliament must fail for lacking constitutional or legal foundation.

80. We have explained elsewhere in this judgment that, it is only where the composition, appointment and terms of office of members of a commission are not provided for, that article 250 will be turned to for the answer. It is in that context that the words "approved by the National Assembly" in article 250(2)(b), must be read. Where approval by Parliament is made a condition precedent for appointment under article 171, express provision has been made. If the framers' intention was to have all members of the JSC approved by Parliament they would not have made it as condition for some and not for other members. This ground fails.

81. Is section 15(2) inconsistent with the *Constitution* for requiring that the names of the nominees under article 171(2)(b), (c), (d), (f) and (g) to be submitted to the President to; appoint the nominees as members of the Commission"? The answer to this question depends on the meaning to be ascribed to the word "appoint", in the context in which it is used in that sub- section.

82. The appellant, together with JSC, have maintained that sub-section (2)(b) is unconstitutional to the extent that it gives the President a role in the appointment of JSC commissioners who are elected and/or nominated under article 171(2)(b), (c), (d), (f) and (g). On the other hand, the 3rd respondent has maintained that the section cannot be construed to be unconstitutional simply because of that reason. According to him, the appointment envisaged in that sub-section is only ceremonial and anchored on article 132(2)(f) of the *Constitution*.

83. But, what did the drafters mean when they wrote in the *Constitution* that the names of the nominees under article 171(2)(b), (c), (d), (f) and (g) shall be submitted to the President for appointment as members of the Commission?

84. The history leading to the promulgation of the *Constitution* in 2010 leaves no doubt that the intention of the drafters was to have an independent JSC and Judiciary. We made reference in paragraph 62 above, to the Final Report of the *Constitution* of Kenya Review Commission and how it traced the evolution of the JSC from the pre-independence era to the period preceding the promulgation of the 2010 Constitution. The theme running through the Report, in so far as the JSC is concerned, is the protection of the independence of the Judiciary and by extension, the JSC which, was charged with the task of appointing judges. Once appointed, the judges could not be dismissed except as determined by a committee of Commonwealth judges, and only on the grounds for misconduct or inability to discharge their functions. It is debatable if full independence of the two institutions (the Judiciary and the JSC) was indeed realized through those provisions. The Report is, however, concerned with the *Constitution* and laws at the time and the intention of the drafters to insulate the two institutions.

85. With the making of the independence Constitution in 1963, the intention seemed to have shifted to one where the Executive appeared, from the composition of the JSC to have had a measure of control over the Commission, and going into the future, the JSC and the Judiciary were no longer regarded as truly independent of the Executive. Nothing demonstrates this capture more clearly than the composition of the JSC in section 68(1) of the former Constitution, as follows:

> " 68.(1) .....

a. The Chief Justice as chairman

b. The Attorney-General

c. Two persons who are for the time being designated by the President from among the puisne Judges of the High Court and the Judges of the Court of Appeal

d. The chairman of the Public Service Commission".

86. From its composition, the pre-2010 JSC was more Executive than Judicial. This changed following the clamour for constitutional review, to address among other concerns, a truly independent Judiciary and its institutions. Today, the judges and not the President, decide who among them represents those courts. Any interpretation of the *Constitution*, whose effect is to negate these gains, would in itself be invalid. Kenyans expressed themselves clearly that they did not want to repeat history. They wanted the role of the President in the affairs of the JSC to remain minimal. Today, article 249(2) proclaims this independence of chapter fifteen commissions by declaring that they—

"a. are subject only to this Constitution and the law; and

b. are independent and not subject to direction or control by any person or authority".

87. Article 251 guarantees true independence of the JSC, not only by re-stating its independence from direction or control by any person or authority, but by securing the tenor of the Commissioners, who can be removed only in accordance with that article. Its financial autonomy, with a separate vote is equally assured.

88. Based on the foregoing historical background, it is our considered view that a purposive interpretation of all the above-mentioned articles will lead to the inevitable conclusion that there was no intention of the framers to subject the 3rd respondent or, for that matter, any of the elected members of the JSC to an "appointment" by the President. It is a contradiction in terms and an inherent absurdity to suggest that members elected by their peers or nominated by a state organ can, at the same time be "appointed" by a different person or authority.

89. There can be no justification for the invocation of article 250(2) as the basis for the requirement of appointment by the President of the 3rd respondent as a member of the JSC. Where the framers intended to vest in the President the power to appoint members of the Chapter Fifteen commissions, they expressly provided for it. For example, the *Constitution* in various articles authorises the President to appoint members of four of the ten Chapter Fifteen commissions, namely, the Commission on Revenue Allocation; the

Public Service Commission; the Salaries and Remuneration Commission; and the National Police Service Commission. Two commissions, the Parliamentary Service Commission and JSC are created by articles 127 and 171, respectively, as self-executing commissions, with clear mode of identification, qualification, appointment and terms of their commissioners independent of a third party. The *Constitution* does not make provision on the composition, appointment and terms of office of commissioners of the remaining four commissions, the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; and Teachers Service Commission. The appointments envisaged in article 250 relates to the first and the last four categories of commissions, namely, where there is express power to the President to appoint members or where no express provision has been made, national legislation provides.

90. In view of the foregoing background, analysis and conclusion, we do not accept the 3rd respondent's argument that the power of the President to "appoint" him under that section is only ceremonial and anchored on article 132 (2)(f) of the *Constitution*. Unfortunately, our reading of article 132(2) does not yield this conclusion. The article provides that:

> "(2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—
>
> a. the Cabinet Secretaries, in accordance with article 152;
>
> b. the Attorney-General, in accordance with article 156;
>
> c. the Secretary to the Cabinet in accordance with article 154;
>
> d. Principal Secretaries in accordance with article 155;
>
> e. high commissioners, ambassadors and diplomatic and consular representatives; and
>
> f. in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss." (our emphasis)

91. This article applies to State or public officers, who are named in (b), (c), (d), (e) as well as those to whom the *Constitution* empowers the President to appoint or dismiss (f). The JSC commissioners are not such officers. We believe and hold the firm view that the President can only exercise the functions, whether formal or ceremonial, donated to him by the *Constitution*. The President has no ceremonial role in the appointment of elected and nominated commissioners of the JSC.

92. To "appoint", according to *Black's Law Dictionary*, 9th Ed at page 116, means;

> " the designation of a person, such as a non-elected public official, for a job or duty; especially naming of someone to a non-elected public office" (our emphasis).

93. As an act of assigning a position to an elected public official, then appointment in section 15 by the President of elected or nominated members of the JSC would offend article 171 of the *Constitution*.

94. The two past elections of the representative of the Court of Appeal in 2013 and 2018 were conducted by the Independent Electoral and Boundaries Commission, pursuant to article 88(4) of the *Constitution*, section 4 of the *Independent Electoral and Boundaries Commission Act* and later rule 3.1 of the Court of Appeal of Kenya Election Rule, 2013. Upon declaration of the 3rd respondent as duly elected representative of the court, the IEBC issued him with a certificate to confirm his election. This has been the practice with respect to elections of all members of the JSC under article 171(2)(b), (c), (d) and (f).

95. To complete the process, like in all cases where it conducts elections, the IEBC issues the elected member with a certificate of election and further publishes a gazette notice confirming the outcome of the elections of those members. This is followed by the taking of oath of office before the Chief Justice, in accordance with article 74 as read with section 40(1) of the *JS Act* before the members assume the functions of the office of Commissioner of the JSC.

96. Traditionally as a practice carried over from the old constitutional order, the President has always issued a gazette notice to signify the appointment of elected or nominated representatives in the JSC. With the new order, it is our view that this role ought to be played by the IEBC but certainly not the President. Article 260 of the *Constitution* defines gazette as "the Kenya gazette published by the authority of the national government, or a supplement to the Kenya Gazette." This court considered the significance of a gazette notice as a medium of general public information in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR.

97. In the context of chapter fifteen commissions, there are instances where national legislations specifically impose a duty on the President to publish in the official gazette the names of the chairpersons and members. Examples of such legislations are the *PSC Act*, the *IEBC Act*, the

National Police Service Act, and the *Salaries and Remuneration Act*, all of which provide in nearly identical terms that:

> "The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly".

98. While there is no similar provision in the *JS Act* in respect of the JSC nominees, the *Parliamentary Service Act* donates this function to its secretary. Rule 5 of the First Schedule of the *Parliamentary Service Act* provides:

> " If both Houses of Parliament approve a person recommended under paragraph 3, the Secretary shall, within seven days after the approval, publish the name of the person in the Gazette".

That is why we have stressed in the previous paragraph that with the new constitutional order, it is our view that this role ought to be played by the IEBC or even the commission's secretary, as is the case in the Parliamentary Service Commission, but certainly not the President.

99. We reiterate, in conclusion, that under article 171(2) the scope of the President's power to appoint members of the JSC is limited to two persons, a man and a woman, who are not lawyers, to represent the public. The *Constitution* does not require that the names of nominees, other than the representatives of the public, be submitted to the President for appointment. Contrary to this, section 15(2)(a) and (b) requires nominating bodies to submit nominees' names to the President for appointment as members of the Commission. To that extent, section 15(2)(a) and (b) is contrary to article 171(2)(b), (c), (d), (f) and (g) which insulates the process of appointment of nominated and elected members of the JSC and undergirds the independence of the Judiciary and JSC from manipulation by the Executive. There is nothing in article 131(a) or 132 of the *Constitution* to suggest that the President as the Head of State and Government can appoint elected members of the JSC.

100. To give the President power to appoint or even to "appoint" by mere gazettement of names is to forget our history and the mischief article 171 was intended to cure.

101. In the result, and to the extent that section 15(2)(b) of the *JS Act* donates to the President the power to appoint elected and nominated members of the JSC, it is void for being inconsistent with article 171 of the *Constitution* which does not recognize such power. We restate that section 15(2) goes against the letter and spirit of articles 1(3) and 2(2) which stipulates that sovereign power delegated to State organs, must be exercised strictly in accordance with the *Constitution* and that no person may claim or exercise State authority except as authorised under the *Constitution*.

102. The appeal is accordingly allowed.

G. Costs

103. Costs follow the event and is a discretion of the court. Being a matter of public interest, we direct each party to bear its own costs.

Dissenting Opinion of Njoki Ndungu, SCJ

104. I have had the advantage of reading the majority decision in this appeal and I find that I can only agree with them that this court has jurisdiction and is properly seized of the appeal. I am however, with profound respect, of a different opinion on their findings in response to the following issues:

i. Whether a member of the JSC elected under article 171(2)(b), (c), (d), (f) and (g) ought to be vetted and approved by the National Assembly before appointment;

ii. Whether section 15(2) of the *Judicial Service Act* is inconsistent with the *Constitution* to the extent that it gives the President a role in appointment of JSC Commissioners elected and/or nominated under article 171(2)(b), (c), (d), (f) and (g) or for failure to require that all persons elected and or nominated as JSC Commissioners be subject to approval by the National Assembly.

I proceed to explain why.

105. In my view, to determine whether section 15(2) of the *JS Act* is inconsistent with the *Constitution*, three questions that come to the fore must be answered. Namely, does the President have a constitutional obligation to appoint JSC Commissioners? If the answer is in the affirmative, can the President do so without approval of the National Assembly? And, in appointing elected JSC Commissioners, will the President interfere with the independence of the JSC?

i. Can the President appoint elected JSC Commissioners?

106. The President as the Head of State and Government derives his powers from article 131 of the *Constitution*. In that regard, article 1(1) of the *Constitution* provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*. The people may exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power under the *Constitution* is therefore, delegated to among other State organs, the National Executive (headed by the President) and Parliament.

107. Article 132(2)(f) of the *Constitution* provides that 'the President shall nominate and, with the approval of the National Assembly, appoint and may dismiss in accordance with the *Constitution*, any other State or public officer whom the *Constitution* requires or empowers the President to appoint or dismiss'.

108. Pursuant to article 260 of the *Constitution*, a state officer is interpreted to mean 'a person holding a State office.' This same provision also interprets a state office to mean, among other offices, a member of a commission to which chapter fifteen applies. article 248(2)(e) of the *Constitution*, clearly stipulates that the JSC is one of the Commissions to which chapter fifteen of the *Constitution* applies, except to the extent that the *Constitution* provides otherwise. Therefore, all Commissioners of the JSC are State officers.

109. Article 250 of the *Constitution* makes general provisions on the composition, appointment, and terms of office of chapter fifteen commissions. The appointment process of members of chapter fifteen commissions is in three stages, unless provided for otherwise elsewhere in the *Constitution*. These stages pursuant to article 250(2) of the *Constitution* are: identification or recommendation for appointment in a manner prescribed by national legislation; approval by the National Assembly; and appointment by the President.

110. A clear reading of the majority decision is that these three stages of appointment are not mandatory and that an appointment can be concluded at the first stage of identification and recommendation, without going through the second step of parliamentary approval and the third step of appointment by the President. I disagree, as to do so, in my opinion, would be to disregard the carefully woven constitutional architectural design of separation of powers, and constitutional checks and balances between the arms of Government and the different state organs.

111. The composition of the JSC is established under article 171 (2) of the *Constitution*, as comprising the Chief Justice, who shall be the chairperson of the Commission; one Supreme Court judge elected by the judges of the Supreme Court; one Court of Appeal judge elected by the judges of the Court of Appeal; one High Court judge and one magistrate, one woman and one man, elected by the members of the association of judges and magistrates; the Attorney General; two advocates, one a woman and one man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates; one person nominated by the Public Service Commission; and one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly. Article 172 of the *Constitution* provides for the functions of the JSC.

112. It is the majority's view that article 171 of the *Constitution* is self-executing. I do not agree because chapter 15 of the *Constitution* also pertains to JSC and the provisions therein are

applicable to it. The *Constitution* must always be read purposively, holistically and construed in a manner that promotes complementary processes within it. Having interrogated articles 171 and 172 of the *Constitution*, I am unable to find any provision disallowing the President from appointing elected JSC Commissioners, being state officers as Commissioners. As demonstrated above, the President has a constitutional duty to appoint as Commissioner, individuals identified by the various bodies under article 171 of the *Constitution*. The President has a duty to appoint JSC Commissioners both under the powers conferred to him under article 132(4) of the *Constitution* and by virtue of section 15(2) of the *JS Act*. There is no express exception to article 132 of the *Constitution* that would exclude members of the JSC. The "reading in", by the Majority of such an exception, where there is none specifically provided for in line with article 132, 248, and 250 of the *Constitution*, is legally unsound. In fact, with respect, it amounts to amending specific provisions of the *Constitution* (relating to appointment of State officers by the President), a function which cannot be undertaken by any court of law.

113. To this end, I agree with the Court of Appeal's finding which upheld the trial court's finding that the appointment of nominees as JSC Commissioners by the President is an executive function conferred on the President by article 132(4) of the *Constitution* and section 15(2) of the *JS Act*. I also concur with the appellate court's conclusion that there is no constitutional invalidity in section 15(2) of the *JS Act* by virtue of the President's appointing role.

114. I, however, do find that section 15(2) of the *JS Act* is inconsistent with the *Constitution* in as far as it purports to direct a specific timeline in which the President appoints individuals selected under article 171; that is, "to appoint within three (3) days". This timeline, other than being extremely short and limiting, does not take into account any other necessary constitutional processes that must be carried out by the Executive and Parliament before such appointment. I will address that particular concern shortly.

ii. Can the President appoint elected JSC Commissioners without the National Assembly's approval? Is there an exception to article 132 or 250 of *the Constitution*?

115. Having determined that the appointment of JSC Commissioners is within the realm of the President's constitutional functions, it is necessary to answer the next question. Can the President make such appointment without the National Assembly's approval? From the history of constitution-making in Kenya, it is without doubt that it was the intention of the drafters of the *Constitution* and of the people of Kenya that ours was going to be a presidential system, where political and administrative powers are divided between the Executive, Legislative and Judicial arms of government. Pre-2010 Constitution, the President appointed State officers without approval by Parliament.

116. Other than specifying who shall be chairperson and members of the JSC, their term of office, and the mode of identifying representatives from the bodies listed thereunder, article 171 of the *Constitution* is silent on the approval and appointment of such elected representatives. This Court has pronounced itself on the holistic interpretation of the *Constitution in the Matter of Kenya National Commission on Human Rights* SC Reference No 1 of 2012; [2014] eKLR where it stated as follows:

> "(26) ...But what is meant by a 'holistic interpretation of the *Constitution*'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

117. In the case of the *Attorney General & 2 others v Ndii & 79 Others; Prof Rosalind Dixon & 7 others (amicus curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), I spoke to constitutional silences in the following terms:

> "[1188] The unsaid is influential in constitutional law. Some matters of constitutional relevance are sometimes left unaddressed. Sometimes, knowingly, or unknowingly, the drafters of the *Constitution* may underappreciate how much power rests in the silence around the text. Constitutional silences are functional and inevitable. Enabled by the lack of very strict textual restraints, constitutions have the capacity to grow with time, experience, societal needs, and changes, thus allowing successful constitutions to thrive. In India, for example, courts have used the doctrine of constitutional silence to expand the ambit of rights and to make democracy substantive.
>
> [1189] The Supreme Court of India in *Manoj Narula v Union of India*, 2014 (Writ Petition (Civil) No 289 of 2005) observed on the principle of constitutional silence:
>
> > The said principle is a progressive one and is applied as a recognized advanced constitutional practice. It has been recognized by the court to fill up the gaps in respect of

> certain areas in the interest of justice and larger public interest...."
>
> Further that:
>
> Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the *Constitution* that they evoke, rather than the content or substance of their strictures (p 10)."
>
> [1190] This Supreme Court plays a crucial role in interpreting silences in the *Constitution* since it is the final interpreter of constitutional provisions. It must be cautious, though, so as to avoid judicial legislation. It must interpret silences judiciously."

118. In my opinion, having found that articles 171 and 172 of the *Constitution* are silent on the appointment of the elected members of the JSC, the Majority ought to have searched for the intention of the drafters elsewhere in the *Constitution*.

119. According to *Black's Law Dictionary 11th edition*, 'to approve' is to give formal sanction to; to confirm authoritatively.' 'Approval' is defined in the Longman Dictionary to mean 'when a plan, decision, or person is officially accepted'. As stated earlier, although article 171 of the *Constitution* makes provisions for the first stage, identification through an election, the same is silent on their approval and appointment. *In the Matter of the National Land Commission*, SC Advisory Opinion Reference No 2 of 2014; [2015] eKLR (In the Matter of the National Land Commission) this court was persuaded by the finding of the High Court in the case of *Judicial Service Commission v Speaker of the National Assembly & 8 Others*, HC Petition No 518 of 2013; [2014] eKLR. The High Court found that the JSC, a chapter fifteen commission, is subject to Parliamentary oversight. It also held that Parliamentary oversight over the JSC was not an infringement of the Commission's independence. It held as follows:

> 213 Like other constitutional commissions and independent offices, the JSC must however operate within the confines of the *Constitution* and the law. While enjoying financial and administrative independence, the JSC is accountable to Parliament. The JSC is also a partner to Parliament in supporting constitutional democracy.
>
> ...

> 237 In carrying out its oversight role, Parliament must respect the independence of the JSC and other independent offices. This is particularly important because of the pivotal role assigned by the *Constitution* to the JSC to facilitate and promote the independence and accountability of the Judiciary under article 172. As we have stated before, the JSC plays a complementary role to Parliament in overseeing the entire Judiciary. It is not a competitor or intended to be a competitor against Parliament. It is ideally a partner in the constitutional scheme."

120. This court, in the Matter of the National Land Commission, opined that the independence of Commissions does not exempt them from being overseen, and held accountable in their operations. I add that the independence of JSC, like any other chapter fifteen commission, does not exempt the appointment of its elected individuals from going through the approval process under article 250(2) of the *Constitution* to ensure compliance with articles 10 and 73 of the *Constitution*, considering that the JSC is not self-executing.

121. Learned counsel for the appellant urged that a commissioner elected under article 171 of the *Constitution* need not undergo the approval by the National Assembly having already been elected in a 'free and fair election'. The Majority agree with them. On my part, I find this contention difficult to understand and support particularly when I probe the definition and purpose of such an election as provided under article 171 of the *Constitution*. I find that it is necessary to determine whether an election anticipated under article 171 of the *Constitution*, is the same as that anticipated under article 73(2)(a) of the *Constitution*. Does the Supreme Court, the Court of Appeal, the High Court, and the LSK have criteria for approving or vetting their nominees? Do those nominating bodies afford ordinary Kenyans an opportunity to participate, as required under article 10 of the *Constitution*, in any way in the appointment process?

122. In my opinion, a free and fair election in the context of article 73(2) of the *Constitution* is the one referred to under article 81(e) of the *Constitution*. A free and fair election referred to under article 73(1) concerns representation of the people – that is an election by universal suffrage; and not representation of bodies under article 171 of the *Constitution*, that is, an election by an exclusive set of individuals of 'one of their own'. These two types of elections are manifestly and fundamentally different, as is their constitutional meaning and import. Importantly, chapter six of the *Constitution* separates appointed State officers from elected State officers by disallowing the former from holding office in a political party – a clear indication of the different processes of choosing appointive and as opposed to purely elective positions provided under article 81 of the *Constitution*. The provisions of chapter six that apply to appointed State officers are the ones that apply to commissioners. Such

that commissioners, including those of the JSC cannot hold office in a political party, unlike a member of Parliament, a County Governor or a Member of County Assembly who fall within the constitutionally recognized electoral system and processes under article 81 of the *Constitution*. The election of JSC Commissioners does not fall under this detailed electoral system set up under the *Constitution*; this is because they enter into their offices through an appointive process provided by article 248, 250 as read with article 171 of the *Constitution*, rather than the elective process by universal suffrage as defined under article 81 of the *Constitution*.

123. This appointive process therefore, as I stated earlier, is a combination of three mandatory steps: (1) Nomination by the various bodies (whose selection process of their nominee is an elective process by their select members – not the public); (2) Public vetting and approval of those nominees through elected representatives of the people and finally (3) appointment of those nominees by the Head of the state after which they perform duties as State officers.

124. The crux of the arguments made by the JSC and the LSK, on this particular point, has been that no one should interfere with the decision of the nominating bodies under article 171 of the *Constitution* and subsequent recommendations by the JSC. Further that the President should simply "appoint" the nominees upon receipt of the names. However, for me, the issue is bigger than the President's appointing powers: it concerns the rationale for, or mischief for restraining the President's power to make senior public appointments as previously was in the repealed Constitution. It is well known in our Constitutional history that it was the views of the people that informed the structure of governance in the *Constitution-* making process. In the *Final Report of the Constitution of Kenya Review Commission* (CKRC Final Report) (at page 190), the people had the following to say about the Legislature in the *Constitution*:

> " The people told the Commission:
>
> (a) that Parliament should
>
> i) take over the vetting and approval of senior appointments to various constitutional and public offices from the President, for example, the Attorney General, the Auditor-General, Permanent Secretaries, the Chief Justice, Judges, and so on;"

125. Thereafter, the Commission recommended that one of the functions of Parliament should be: "to act as a watchdog over the Executive; this would be an effective system of checking the excesses of the executive; vet and approve key presidential appointments to public and other constitutional offices; for instance, appointments of the Attorney General, the Auditor General, permanent secretaries; the Chief Justice, heads of commissions, and so on;"

126. Further, when collecting views on the nature of the Executive that the people of Kenya wanted, the *CKRC Final Report* at page 198 states that people wanted: "the powers of the President to be curtailed; Kenyans felt the President should not have the exclusive power to appoint senior government officers; it was suggested that for many of the appointments be vetted by Parliament;" Furthermore, the Commission at page 320 of its final report observed that in the repealed Constitution, Commissions enjoyed little independence as appointments were made by the President. It is for this reason that it was recommended at page 324 that the members of Commissions should be appointed by the President subject to the approval of Parliament through the relevant Parliamentary Committee.

127. Article 124(4) of the *Constitution* sets the procedures that Parliament shall follow when approving appointments under the *Constitution*. In that context, such appointments shall be considered by a committee of the relevant house; recommendations of that committee tabled in the House for approval; and the proceedings of the committee and the House made open to the public. Parliament's role in vetting presidential appointments has also been legislated in the *Public Appointments (Parliamentary Approval) Act*. Under the *Act*, a person who has been proposed or nominated for appointment to a public office, shall not be appointed unless the appointment is approved or deemed to have been approved by Parliament. From the foregoing legal provisions, it is clear to me that Parliamentary vetting serves an important check on the Presidency; ensures that all nominees are truly qualified for the job they have been nominated for; allows the opportunity for public participation and allows the President the ability to choose from qualified people to work for the government.

128. Therefore, if I were to agree with the submissions of the JSC and the LSK, as have the majority, that is, allowing the President to appoint JSC nominees without first being vetted by Parliament, it would be contrary to the intention of the drafters of the *Constitution* and indeed against the will of the people. It may also have the effect of unwittingly opening a door, a pandoras box, relating to the manner in which the President appoints other commissioners and other public and State officers. In that context, it is my finding that the President, under articles 132 and 250 the *Constitution*, does not have an option of appointing JSC Commissioners without the approval of the National Assembly. If he did so, he will be depriving Kenyans their right to participate in the appointment of such commissioners, a role played by Parliament pursuant to articles 1(2) & (3), 124(4), and 250 of the *Constitution*. All constitutional authority must derive and can only be held and exercised on behalf of the people. The constituent power of the people must be reflected in the design of all aspects of the *Constitution* and particularly, in appointments, control and dismissal of holders of State offices such as those of JSC Commissioners.

129. Furthermore, having perused the Final Report of the Committee of Experts on Constitutional Review, I find that it was never the intention of the drafters of the

Constitution to exclude the members of the JSC from the approval process by the National Assembly. The justification for involving the National Assembly in the approval of JSC commissioners is cemented by article 95(5)(a) of the *Constitution* which accords the National Assembly the role of reviewing the conduct in the office of the President, Deputy President and other State officers and initiates the process of removing them from office. Additionally, article 251(2) of the *Constitution* provides that a person desiring the removal of a member of a Commission or of a holder of an independent office on any ground may present a petition to the National Assembly setting out the alleged facts constituting that ground. Therefore, it will be illogical to involve the National Assembly in the removal of JSC Commissioners but exclude it in their appointment.

130. It is obvious from the text of the foregoing constitutional provisions, that the contention by the majority, that article 171 is self-executing and exempts selected individuals under article 171 of the *Constitution* from undergoing parliamentary approval is utterly erroneous. Indeed, I find the Majority's position that out of the eleven JSC Commissioners, only six of them can become state officers by mere act of an election of their peers, without the approval of Parliament and without the appointment of the President, a constitutional absurdity. Consequently, I am unable to agree with the Majority that, having been elected by his peers in the Court of Appeal as a member of the JSC, the 3rd respondent – Justice Mohammed Warsame - was not subject to approval by the National Assembly.

131. The Majority agrees with both the appellant and the JSC on the assertion that the President's appointing role of JSC Commissioners and the National Assembly's approval role will interfere with the independence of the Judiciary and that of the JSC. Again, I find I cannot agree with them on this. In interrogating their stated position, I must ask and answer two questions. Firstly, whether the provisions on Judicial Authority and independence of the Judiciary as provided under articles 159 and 160 of the *Constitution* extend to the JSC? Secondly, whether the JSC is part of the Judiciary? The answers to both questions are in the negative. In the Matter of the National Land Commission this court clearly demarcated the role and place of constitutional commissions, as from Paragraph 171, as follows:

> 171. The definition clauses of the *Constitution*, therefore, leave no doubt that commissions are state organs. Although many bodies mentioned in the *Constitution* are categorised as State organs, a plain reading of article 1(3) shows only three specific State organs in which the people's sovereign power is vested: the Executive, the Legislature and the Judiciary. This perception is further supported by the description of the distinctive roles of the three State organs. Article 94(1) states that legislative authority is derived from the people and, at the national level, is exercised by Parliament; article

> 129 affirms that Executive authority is derived from the people; and article 159 provides that Judicial authority is derived from the people, and vests in and is to be exercised by courts and tribunals...
>
> 172. The wording of chapter 15 of the *Constitution*, in our perception, does not signal the vesting of the sovereign power of the people in commissions and independent offices. This is not to say that commissions and independent offices are excluded from exercising public power. Indeed, as State organs, they are part of Government, and one of their core mandates is to protect the sovereignty of the people; so they ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence the depiction 'people watchdogs' or 'constitutional watchdogs'. They are to be distinguished from the three arms of Government through the functions they discharge." (Emphasis added)

On the independence of commissions, this court, in the same matter, considered that issue comprehensively and stated as follows:

> [184] It emerges that independence is a pivotal feature in the newly-established commissions and independent offices. This court, in In *Re IIEC* and the *CCK case*, and the High Court in *JSC v Speaker of the National Assembly and others, and in Independent Policing Oversight Authority & another*, have defined certain key features of the independence of commissions. From the precedent in the earlier decisions, we would set out such principles as are coming forth, in relation to the object of independence in a commission.Functional independence: this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies. This has also been referred to as administrative independence (See *JSC v. Speaker of the National Assembly and others*; and the South African Constitutional Court decision in New National Party of South Africa.) Functional independence is in line with the general functions and powers of commissions, as provided under articles 252 and 253 of the *Constitution*.Operational independence: this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition

> of the commission; and procedures of the commission. Article 255(1)(g)[11] provides an elaborate procedure for the amendment of the *Constitution* in matters dealing with the independence of the Judiciary, as well as commissions and independent offices to which chapter 15 applies.Financial independence: it means that a commission has the autonomy to access funds which it reasonably requires for the conduct of its functions. However, according to article 249(3) of the *Constitution*, Parliament is mandated to set for the commission the budget considered adequate for its functions.Perception of independence: this means the commissions must be seen to be carrying out their functions free from external interferences. In *CCK and Independent Policing Oversight Authority & another*, this court and the High Court respectively held that the perception of independence is crucial in showing proof of independence.Collaboration and consultation with other State organs: it emerges from precedent, that independence of commissions and independent offices does not, perforce, entail a splendid isolation from other State organs. This is demonstrated by article 249(1), which expressly entrusts the National Land Commission with the duty to "protect the sovereignty of the people", "secure the observance by all State organs of democratic values and principles", and "promote constitutionalism". By the broad and diffuse nature of such a mandate, commissions acting in isolation, have no capacity to discharge their mandate. So they have to consult with other State organs, and work with such State organs in co-operation and harmony. The commissions are required to promote the national values and principles entrenched in article 10 of the *Constitution*. .....
>
> 186. Clearly, independence, as an attribute of the various constitutional commissions, is not an end in itself. Ultimately, what matters to the people, from the governance-docket, is the operational benefits that flow from the role of the public agency in question." (Emphasis Added)

132. Thus, the independence of the Judiciary is provided for under article 160(1) of the *Constitution* and is in respect of the judicial authority exercised by the courts under article 159 of the *Constitution*. The constitutional mandate of the Judiciary and the JSC should never be confused. The Judiciary is an arm of Government; the JSC is a chapter 15 service providing commission whose functions are clearly set out including recommending to the President persons for appointing as judges; reviewing and making recommendations on

the conditions of service of Judges, Judicial officers, and staff of the Judiciary; appointing, receiving complaints against, investigating and removing from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary; preparing and implementing programmes for the continuing education and training of judges and judicial officers; and advising the national government on improving the efficiency of the administration of justice.

133. As demonstrated above, and provided in the *Constitution*, the JSC is meant to promote and facilitate the independence and accountability of the judiciary as well as the efficient, effective and transparent administration of justice. However, the JSC does not itself enjoy the independence of the Judiciary enshrined under article 160 of the *Constitution*. This is the preserve of an arm of Government known as the Judiciary. The JSC does not exercise judicial power, and as such cannot benefit from the independence of the Judiciary. (In the same way that the Parliamentary Service Commission does not command legislative authority, which belongs exclusively to Parliament.)

134. The JSC does however, enjoy the protection and independence under article 249 of the *Constitution*. This independence however is not unlimited. The JSC like other chapter fifteen commissions must make an annual report to Parliament and the National Assembly; further the President or any of the Houses of Parliament can require the Commission to report to them on a particular issue. Therefore, this 'independence' of Commissions is distinct from that provided to the Judiciary under article 160 of the *Constitution*. Additionally, the independence of Commissioners is not affected in any way by the President's appointing role, the National Assembly's approval and removal, reporting processes of those Commissioners to the President or Parliament, all of which are expected and anticipated of all chapter fifteen commissions provided for under articles 248, 250, 251 and 254 of the *Constitution*.

135. It is therefore clear to me that there is no constitutional provision exempting elected JSC members from undergoing the approval stage by the National Assembly, when all other nominees for chapter fifteen Commissioners do so. There can be no justification for this. From the appellant's submissions, I am not convinced that the respective nominating bodies can effectively vet their own nominees and remain objective. Therefore, i differ with majority position that the President's appointing role upon approval by Parliament will interfere with the independence of the Judiciary and that of the JSC. This is because the approval process is meant, firstly, to check the President's powers of appointment; secondly, to ensure that the members nominated to serve at the JSC meet the integrity test under chapter six of the *Constitution*, and thirdly, to ensure strict compliance of the national values and principles of governance as stipulated in article 10 of the *Constitution*, particularly, participation of the people, integrity, transparency and accountability. This compliance with national values is

specifically provided for in the appointment and approval of chapter 15 commissions under article 250(4) in the following terms:

> " 250(4). Appointments to commissions and independent offices shall take into account the national values referred to in article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya".

136. Therefore, all members of chapter fifteen constitutional commissions, the JSC not excepted, must therefore be subject to the approval process by the National Assembly. This, I state with a singular qualification that, in view of the fact that the Commissioners elected under article 171(b), (c) and (d), serve concurrently as Judges and Judicial officers, roles separate and distinct from that of other Commissioners, the vetting processes set out by the National Assembly must be read holistically with other constitutional provisions including article 160 of the *Constitution*. Such that, for Judges such as the 3rd respondent, the vetting ought to be appropriately tailored to ensure and safeguard the sanctity of decisional independence of such nominees in strict compliance with the provisions protecting the Judiciary in accordance with article 160 of the *Constitution*. In addition to and in conformity with this edict, the necessary and relevant amendments to the *Public Appointments (Parliamentary Approval) Act*, would then be made before any judge or judicial officer who is nominated to the Commission is subjected to the approval process. Another notion, on the flip side, is for Parliament to rethink the composition of the JSC: it may be more prudent to have retired Judges or Judicial officers as its members, instead of the current sitting members of the Judiciary, as this would dispose of the difficulty of dealing with the provisions of article 160 in the approval process.

137. I would have, for the foregoing reasons, after having considered the constitutional questions in this matter as outlined above, made the following orders:

i. That Judgment of the Court of Appeal is hereby upheld only to the extent that it finds that under section 15(2) of the *JS Act* and article 132 of the *Constitution*, the President has a constitutional duty, as a Head of State to make State and public appointments, including that of appointing JSC Commissioners.

ii. A declaration is issued declaring section 15(2) of the *JS Act* unconstitutional only in as far as it directs the President to appoint Commissioners nominated through elections within three days, and without approval of the National Assembly.

138. However, the majority have a different view having evaluated this matter from a different perspective, which in my opinion and with the utmost respect, undermines the

constitutional architecture and design with regard to the approval processes of public appointments. Thus, I am unable to agree with them. However, as my views are in the minority, the decision of the court is that of the majority.

H. Orders

139. In light of the above, we order and declare that:

i. The petition dated November 22, 2019 has merit and is hereby successful:

ii. There is no basis, constitutional or legal for a member of the JSC elected or nominated under article 171(2)(b), (c), (d), (f) and (g) to be vetted and approved by the National Assembly before appointment:

iii. Only those commissioners of the JSC upon whom there is a constitutional obligation for vetting before appointment have to be approved by the National Assembly:

iv. To the extent that section 15(2)(b) of the *JS Act* donates to the President the power to appoint elected and nominated members of the JSC under article 171(2)(b), (c), (d), (f) and (g), it is void for being inconsistent with article 171 of the *Constitution*:

v. Parties to bear their own costs.

It is so ordered.

Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties) (Petition 9 of 2019) [2023] KESC 20 (KLR) (31 March 2023) (Judgment)

Supreme Court of Kenya

SC Wanjala, MK Ibrahim, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 20 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals involving constitutional interpretation or matters of general public importance – appeals of matters filed before the formation of the Supreme Court - whether the Supreme Court had the jurisdiction to determine appeals filed before the promulgation of the Constitution of Kenya, 2010 that formed the Supreme Court - whether the instant appeal involved constitutional interpretation or exceptional circumstances or a distinctive opportunity for the Supreme Court to provide guidance, which warranted an appeal to the Supreme Court – Constitution, article 163(4)(a)*

Brief facts

The dispute originated from a letter of allotment dated June 7, 1977, granting the appellant unsurveyed agricultural land, whose terms the appellant did not fulfill, with the result that it reverted to the Government, which in turn allocated it to third parties, including the interested parties in 1984. The appellant was a beneficiary of 50 acres in the second phase of allotment. He filed a judicial review application at the High Court for prerogative orders of *mandamus* and prohibition.

The High Court dismissed the application on January 19, 2010, seven months before the promulgation of the Constitution citing the appellant's failure to comply with the requirement of developing the suit land within 3 years from June 1977. Further, the High Court held that an order of prohibition was infective to deal with third parties who had been allotted parts of the suit land. The appellant, the court concluded, ought to have applied for cancellation of those allotments by an order of *certiorari* but failed.

On appeal, the Court of Appeal confined its consideration of the first appeal to the inordinate delay of over 15 years to institute the judicial review proceedings; that at the time the appellant moved the High Court, the land had been allocated to third parties and its character changed. The court also held, in agreement with the High Court, that in the absence of a registered lease and having failed to fulfill the mandatory conditions for the grant of lease, the appellant had no legal or equitable proprietary interest in the suit land which could be enforced by an order of *mandamus*; and that without an order of *certiorari* to quash the fresh allotments, an order of *mandamus* would not be efficacious or appropriate.

Aggrieved the appellant filed the instant appeal.

Issues

i. Whether the Supreme Court had the jurisdiction to determine appeals filed before the promulgation of the Constitution of Kenya, 2010, that established the Supreme Court.

ii. Whether the instant appeal involved constitutional interpretation or exceptional circumstances or a distinctive opportunity for the Supreme Court to provide guidance, which warranted an appeal to the Supreme Court.

Held

1. Jurisdiction was fundamental to any cause or dispute before a court, and without it, a judgment was a nullity, lacking authority and binding effect. Courts had to exercise restraint to avoid overstepping their constitutional role and ensure their legitimacy. Jurisdiction had to be present from the commencement of proceedings, and it could be challenged at any stage by any party, or raised by the court *suo motu*. It was also the court's duty to verify its jurisdiction over any matter before proceeding. Moreover, it was the court's duty to ensure that it had proper jurisdiction over any matter before it. Thus, the Supreme Court had a duty of jurisdictional inquiry to satisfy itself that it was properly seized of any matter before it. Jurisdiction was a legislative function and could only be conferred by the Constitution or statute; it could not be granted by judicial craft, nor could parties, by consent, confer upon a court power it did not possess.
2. Appeals from the Court of Appeal would lie as of right to the Supreme Court under article 163(4)(a) and (b) of the Constitution, if they involved constitutional interpretation and application, or upon certification, by either the Court of Appeal or the Supreme Court, that they involved matters of general public importance. To ascertain whether or not the jurisdiction had been properly invoked, the court considered the nature of the pleadings and proceedings in the trial court, the remedy or remedies sought and the decisions of the superior courts below. The onus of proving that the appeal involved a question of constitutional interpretation or application, was upon the party relying on article 163(4)(a). The court did not automatically acquire jurisdiction merely because a party claimed in their pleadings or submissions that the appeal concerned an issue of constitutional interpretation or application.
3. A party had to also identify with precision the relevant articles of the Constitution that were the subject of interpretation or application and show that the subject of the appeal before the Supreme Court was the same one upon which both the High Court and the Court of Appeal based their respective decisions. Where the decision being challenged on appeal had nothing or little to do with the interpretation or application of the Constitution, such a decision could not be the subject of a further appeal to the Supreme Court under the provisions of article 163(4)(a) of the Constitution. The considerations were constant and had to be satisfied whether a matter was originated as a judicial review application or a constitutional reference.
4. Although the cause of action arose during the repealed constitutional order, violations committed in that period could be redressed under the Constitution of Kenya, 2010. In entertaining an appeal from a matter that arose before the promulgation of the Constitution, the court had to be satisfied that they met the strictures of article 163(4).

5. The instant matter was presented to the High Court as a judicial review application for prerogative orders of *mandamus* and prohibition. Whether a matter was originated as a judicial review application or a constitutional reference, the considerations of article 163(4)(a) of the Constitution were the same.
6. In the motion for judicial review, the appellant was concerned, not with a breach of any of his constitutional rights and fundamental freedoms but with the respondent being directed to issue to him a lease of the entire suit land and to be prohibited from proceeding with the sub-division of the suit land or alienating it to the interested parties. In the entire motion, the statement, and affidavit there was no mention of a single provision of the Constitution. There was no determination of any question of constitutional nature. The Court of Appeal affirmed the decision of the High Court and found no substance in the application and dismissed it. In the entire judgment, there was no reference to any provision of the Constitution.
7. The question raised in the application of the right to property was not presented or determined before the High Court or Court of Appeal. The appellant had referred to sections 75, 82 and 84 of the repealed Constitution for the first time in the pleadings before the Supreme Court. The mere citation of constitutional provisions in the pleadings did not bring an appeal within the scope of article 163(4)(a) of the Constitution. The appeal did not present exceptional circumstances or a distinctive opportunity for the Supreme Court to provide guidance.

Appeal dismissed.

Orders

Costs awarded to the respondent and the interested parties.

Citations

Cases

Kenya

1. *Evelyn College of Design Ltd v Director of Children's Department & another* Petition 228 of 2013; [2013] KEHC 2186 (KLR) - (Mentioned)
2. *Imanyara, Gitobu & 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] KECA 557 (KLR) - (Explained)
3. *In the Matter of the Speaker of the Senate & Senate of the Republic of Kenya* Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
4. *Joho & another v Shahbal & others* [2014] 1 KLR 111 - (Explained)
5. *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge* Civil Appeal 266 of 1996; [1997] KECA 58 (KLR); [1997] KLR 65 - (Explained)
6. *Kiliswa, Peninah Nadako v Independent Electoral & Boundaries Commision (IEBC) & 2 others* Petition 28 of 2014; [2015] eKLR - (Explained)

7. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Mentioned)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Explained)
9. *Opore, Zebedeo John v Independent Electoral and Boundaries Commission & 2 others* Petition 32 of 2018; [2018] KESC 5 (KLR) - (Explained)
10. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 - (Explained)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR); [2013] 1 KLR 685- (Explained)
12. *Republic v District Land Adjudication Officer Tana Delta District & another ex-parte Paul Mariga & 192 others* Judicial Review Miscellaneous Application 30 of 2010; [2014] KEHC 3080 (KLR) - (Mentioned)
13. *Sonko v Clerk, County Assembly of Nairobi City & 11 others* Petition 11 (E008) of 2022; [2022] KESC 26 (KLR) - (Explained)
14. *Wamwere & 5 others v Attorney General* Petitions 26, 34 & 35 of 2019; [2023] KESC 3 (KLR) (Consolidated) - (Explained)

New Zealand

Fitzgerald v Muldoon (1976) 2 NZLR 615 (HC) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 2(4); 40; 163(4)(a)(b) - (Interpreted)
2. Constitution of Kenya (Repealed) sections 75(2); 82; 84 - (Interpreted)
3. Government Lands Act (Repealed) (cap 280) sections 3(a); 136 - (Interpreted)
4. Supreme Court Act, 2011 (cap 9B) section 15(2) - (Interpreted)
5. Supreme Court Rules, 2011 (cap 9B Sub Leg) rules 30, 32 - (Interpreted)

Advocates

Dr. Kamau Kuria (Kamau Kuria & Co. Advocates) for the appellant
Mr. Oscar Eredi (Office of the Attorney General) for the respondent
Mr. James Makori (James T. Makori Advocate) for the interested parties

March 31, 2023, the Court delivered the following Judgment:

A. Introduction

1. Land as a resource is one of the most important means of livelihood for many people in developing countries and remains an emotive issue. It has been cited as an obstacle to social cohesion and economic growth in Kenya since independence. That should explain why Kenya's Vision 2030 (2008) identified the absence of a national land policy as the reason the country has had weak land administration, which in turn has led to historical land injustices

amongst some communities. Today, the *Constitution* devotes the entire chapter 5 to matters relating to land and environment, and directs that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. It guarantees equitable access to land; security of land rights; as well as transparent and cost- effective administration of land.

2. The *Constitution* further outlines definitions of land and land systems in Kenya and sets out a land legislative obligation on Parliament, to revise, consolidate and rationalise existing land laws. Pursuant to this edict, Parliament has enacted new land laws to replace some of the past land law regimes.

3. One of such repealed laws is the *Government Lands Act* (cap 280), which conferred powers upon the President of Kenya to make grants or dispositions of any estates, interests or rights over unalienated government land. The powers were delegated in specified cases to the Commissioner of Lands.

4. At the heart of this appeal is a controversy concerning proprietary interest over unalienated government land which was allocated to Dickson Ngigi Ngugi, the appellant under the *Government Lands Act* (repealed).

B. Background

5. Sometime in 1969, the appellant's application for grant of unalienated government land in Nakuru was approved by the then Minister for Lands and Settlement. Subsequently, the Commissioner of Lands (the respondent) issued him with a letter of allotment dated June 7, 1977 to an unsurveyed parcel of land described as LR No 519/223 (the suit land) located in Njoro Township and comprising 118 hectares (approximately 291 acres). The grant was subject to a number of conditions. For example, the appellant was required to accept the offer contained in the letter of allotment and to pay allotment fees in the sum of Kshs 6,484.15/-; the land was to be used for agricultural purposes only; the allocation was initially for a period of three years; payment of annual rent of Kshs 2,354 within the first three years; and upon expiration of the three years, the appellant was entitled to a free hold title provided that he had developed the land to the satisfaction of the District Agricultural Officer and paid a purchase price of Kshs 235,400/-.

6. The appellant accepted the offer and paid the allotment fees. Consequently, the respondent directed the Director of Surveys to undertake the survey of the suit land. However, the surveyor, by a letter dated January 10, 1978 to the Director of Surveys expressed his inability to complete the exercise due to interference by the District Commissioner of the area through the police. The matter was escalated to the Provincial Surveyor, who upon consulting the District Commissioner, directed the suspension of the survey.

7. It was the Clerk of the then County Council of Nakuru who in his letter of July 20, 1981 explained to the appellant that at the time the suit land was allotted to him, the people of Njoro had been cultivating it with the authority of the Government for several years; and that as a matter of fact, the District Commissioner of Nakuru had in the past encouraged the people in the area to continue utilising the suit land until they were otherwise instructed by the Government.

8. A new development arose in 1982 when the Rift Valley Provincial Planning Officer submitted to the respondent for approval a part development plan (PDP) with respect to a portion of the suit land which was set apart for the construction of Egerton College (now Egerton University) staff residential houses. Initially, the request was declined by the respondent. However, after exchange of numerous letters and being satisfied that the proposed PDP did not encroach on any private property, the respondent approved it and the sub-division of portions of the suit land began in 1984 with local residents seeking to benefit from the sub-division exercise.

9. So as not to be left behind, the appellant too approached the Provincial Commissioner of the former Rift Valley Province with a request to be considered afresh for allocation of a portion of the suit land disclosing his long-running interest over it. This time round, the Provincial Commissioner supported his bid by writing to the respondent on May 21, 1984 to consider allocation of a portion of the suit land to the appellant, justifying this intervention on the ground that the appellant was unable to fully benefit from the initial allocation of the suit land due to occupation by local people who had been authorized to cultivate it.

10. To support the appellant's application, the District Agricultural Officer also wrote to the respondent on December 10, 1985 to confirm that the appellant had developed and utilized about 48 of the 50 acres of the suit land by planting sunflower; and that he had paid Kshs 40,500 being the purchase price for this portion. It was on that basis that the appellant was granted a lease over 50 acres out of the said land.

11. It would appear that the appellant was still aggrieved by the respondent's decision allocating part of the suit land to other parties and ignoring the letter of allotment it had itself issued to him.

C. Litigation History

i. Before the High Court

12. The foregoing events precipitated the institution of judicial review proceedings before the High Court in Misc Applic No 18 of 1993 for orders that:

i. *mandamus* do issue directed to the respondent to issue a lease in respect of the entire LR No 519/223 in the appellant's name.

ii. prohibition do issue prohibiting the respondent, his servants and/or agents from further proceedings with the sub-division and alienation of LR No 519/223.

13. To support his claim, the appellant contended that upon receiving the letter of allotment dated June 7, 1977, he immediately complied with the stipulated conditions; that thereafter the survey was carried out in accordance with the PDP before the respondent, in collusion with the defunct County Council of Nakuru and the provincial administration allowed strangers to move onto and remain on the suit land to the appellant's prejudice; and that the respondent did not only purport to sub-divide the suit land into smaller portions but also allocated the resultant portions to third parties without the appellant's knowledge or consent and contrary to the letter of allotment. The appellant explained that his efforts and attempts to develop the suit land within the period stipulated in the letter of allotment were frustrated by public officers.

14. For these reasons, he urged the court to hold that upon payment of the allotment fees he was entitled to the suit land unless it was forfeited in accordance with the procedure set out in the Government Lands Act (repealed).

15. In response, the respondent through Phoebe Amiani, a senior lands officer in the then Ministry of Lands and Settlement, swore an affidavit in which she deposed that the allotment of the suit land to the appellant was cancelled after he failed to develop it in contravention of the terms and conditions of the letter of allotment. Following that failure, the suit land reverted to the government. It was subsequently sub-divided and allocated to various public bodies for the benefit of the public. She explained that as a matter of fact, part of the suit land had been earmarked for a proposed airport.

16. Some of the beneficiaries of the sub-division and subsequent allotment were joined in the proceedings as interested parties both in the High Court and before this court by a consent order dated August 3, 2022. On their behalf, Anthony Karanja, the chairman of their Welfare Association, swore an affidavit in opposition to the application to the effect that the appellant did not fulfil the conditions of the letter of allotment or take any legal action against those who were on the suit land when the letter of allotment was issued to him; and that upon expiry of the 3 years, the suit land reverted back to the government in terms of the offer.

17. He added that at the time of commencing the judicial review proceedings, LR No 519/223 (the suit land) was non-existent, having been allocated to them and the appellant; that, as a result, the orders sought were of no effect without the quashing of the titles registered in their

favour; that the appellant ought to have filed the proceedings in 1984 and before accepting the subsequent allocation of 50 acres of the suit land which was tantamount to relinquishing his claim to the rest of the suit land. In conclusion, Anthony Karanja deponed that, should the orders sought be granted they would suffer huge and irreparable damage and loss.

18. Upon considering these rival arguments, Dulu, J by a judgment dated January 19, 2010 dismissed the appellant's review application with costs to the respondents, holding that it was devoid of merit on two fronts. Firstly, that the appellant had failed to demonstrate that he had been prevented from developing the suit land by anyone with the support of the government. That notwithstanding, the letter of allotment expired on June 7, 1980 after the 3 years period hence there was nothing for the appellant to enforce as against the respondent. Secondly, that he ought to have first sought an order of certiorari to quash the allotment to the interested parties in line with the well-known case of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge*, Civil Appeal No 266 of 1996; [1997] eKLR, because the orders of *mandamus* and prohibition were inefficacious.

ii. Before the Court of Appeal

19. Aggrieved by this outcome, the appellant sought to overturn it in the Court of Appeal on 9 grounds, summarised as follows- that the High Court erred in;

    i. Failing to find that the appellant had made out a case to warrant the orders of mandamus and prohibition being granted.

    ii. Holding that the appellant ought to have sought an order of certiorari to quash the respondent's decision to allocate land to the interested parties.

    iii. Failing to hold that the appellant had failed to comply with the condition of development of the suit land due to sufficient reasons beyond his control; and as such, the same could not be a ground for cancelling allocation of the suit land to him.

    iv. Failing to hold that the executive actions could not hold or suspend the operation of the law and in particular, the Government Lands Act.

    v. Failing to hold and find that the respondent lacked power to allocate private land to private individuals.

20. In support of his appeal, the appellant reiterated his arguments in the High Court. The respondents and interested parties similarly maintained that the appellant had not complied with the conditions in the letter of allotment and was not entitled to the suit land; that a letter of allotment could not be the basis of his claim as it was not proof of title, but rather, a process of allocation of land; and that legal rights over land could only crystalize after registration of title. In the absence of any registrable interest, the suit land reverted to the government,

that in turn properly allocated it to the interested parties as well as to the appellant in the manner it deemed fit.

21. The Court of Appeal in upholding the High Court's judgment was equally satisfied that, in law a Letter of Allotment is a mere contingent right to a grant of a lease; that for one to be entitled to a grant of lease of unsurveyed government land, the land had to be surveyed; a lease for a term of three years could only be issued upon meeting the conditions contained in the Letter of Allotment; and finally, that the lease had to be registered in accordance with the Government Lands Act. In the Court of Appeal's view, the survey of the suit land was not completed and the appellant did not take possession. As a result, the court found that the Letter of Allotment lapsed before its implementation which meant that the appellant had no legal or equitable proprietary interest in the suit land.

22. In the circumstances, the court found that an order of mandamus would be tantamount to compelling the respondent to grant a freehold title contrary to the *Government Lands Act*. In any event, the appellant had sought judicial review orders after a period of 15 years from the date of the allotment letter; and after portions of the suit land had been sub-divided and allocated to third parties and himself. Therefore, like the High Court, the Court of Appeal held that in absence of an order of certiorari, the orders of mandamus and prohibition would not be efficacious in the circumstances; and would occasion great injustice to third parties. Ultimately, by a judgment dated February 8, 2019, the court dismissed the appellant's appeal with costs to the respondents.

iii. Before the Supreme Court

23. Undeterred, the appellant lodged this appeal on the grounds that the learned Judges of the Court of Appeal erred by holding that:

    i. In the absence of a registrable lease granting the appellant a leasehold interest to the suit land and without fulfilment of the mandatory condition of development, the letter of allotment lapsed before its implementation; and that the appellant had no legal or equitable proprietary interest in the suit land capable of being enforced by an order of *mandamus*.

    ii. An order of mandamus would compel the respondent to grant a freehold title to government land in contravention of the provisions of *Government Lands Act* and public policy.

    iii. Without an order of *certiorari* quashing the previous allocations an order of mandamus would require the respondent to perform a duty which is legally impossible.

iv. If the orders sought were issued, they would occasion great injustice to innocent third parties.

24. Accordingly, the appellant seeks that the judgments of both the superior courts below be set aside and substituted with an order allowing his notice of motion dated February 12, 1993 filed before the High Court.

25. The respondent's objection to the appeal is premised on the grounds that the appeal does not raise matters of general public importance since the appellant's claim has throughout been private in nature. There is no cogent and recurrent constitutional issue(s) or point(s) of law that would require interpretation or application by the court. On merit, the respondents and interested parties advanced the same arguments they presented before the two superior courts below.

D. Parties Submissions

i The Appellant

26. The appellant sought to persuade us from the onset that his appeal falls within the court's appellate jurisdiction under article 163(4)(a) of the *Constitution*. In particular, he claims that his case before the superior courts below was to the effect that his right to property within the meaning of section 75 of the former *Constitution* was violated in so far as the government failed to allocate to him the entire 118 Hectares of the suit land, despite issuing to him a letter of allotment; that he had a right not to be subjected to arbitrary exercise of public power under section 82 of the repealed *Constitution*. Citing *Fitzgerald v Muldoon* (1976) 2 NZLR 615 (HC), the appellant submitted that the Executive arm of Government, through the Provincial Commissioner of Rift Valley Province lacked power to suspend the provisions of the Government Lands Act which conferred the power to administer the said Act solely on the respondent; and that, for these reasons, he had a right to redress under section 84 of the repealed Constitution which are in the nature of declaration of rights, injunctions conservatory orders and judicial review orders.

27. The appellant further submitted that he was entitled to the entire suit land and that by allocating to him only 50 acres out of 118 hectares the respondent was in violation of his right to private property guaranteed under section 75(2) of the former *Constitution* which has been preserved under article 40 of the current *Constitution*.

28. Relying on the High Court decision in *Evelyn College of Design v Director of Children's Department and another*, HC Petition No 228 of 2013; [2013] eKLR, the appellant contends that what the State did amounted to a deprivation of his interest or right over the

suit land without due process. That being the case, the subsequent letters of allotment issued to the interested parties were a nullity and incapable of conferring any interest.

29. Further, the appellant posited that the respondent was at all material times aware that there was interference with his possession of the suit land due to squatters' invasion but took no action to evict them. In his view, a legitimate expectation arose in his favour that the time within which he was to comply with the conditions set out in the letter of allotment would be extended.

ii. The Respondent

30. According to the respondent, the appeal turns on three issues namely, whether the court has jurisdiction to entertain the appeal; whether the appellant was entitled to freehold title over the suit land under the *Government Lands Act*; and whether the appellant was entitled to judicial review orders.

31. The respondent contended that the appeal as drawn does not raise any issue of constitutional interpretation or application and reiterates further that the allotment of the suit land to the appellant was cancelled on account of his failure to develop it as required by the letter of allotment. He argues that at the time the application for judicial review was instituted in the High Court, the only property which would qualify as the appellant's private property, was the 50 acres granted to him as opposed to the entire suit land.

32. The respondent also submits that the superior courts below correctly found that the judicial review orders of mandamus and prohibition sought in the application were ineffective in the absence of an order of certiorari. Over and above this, the respondent has asked us to note that the suit land had been sub- divided and titles issued to third parties; and that the appellant was guilty of laches, bringing an action after an inordinate delay of over 15 years after the letter of allotment was cancelled. Consequently, the respondent urged the court to dismiss the appeal.

iii. The Interested Parties

33. Similarly, the interested parties contend that the court lacks jurisdiction to entertain the appeal. That notwithstanding, it is their position that the appellant's claim is marred with laches, and no explanation proffered as to why he took out judicial review application many years after the alleged grievance contrary to Section 136 of the *Government Lands Act*. Citing section 3(a) of the *Government Lands Act*, they submit that the President through his representatives could grant interest over unalienated government land. This was done the moment the appellant failed to meet the conditions in the letter of allotment and the suit land reverted to the government.

34. Making reference to *Republic v District Land Adjudication Officer Tana Delta District & another Exparte Paul Mariga and 192 others*, Misc Applic No 30 of 2010; [2014] eKLR, the interested parties urged that the appellant had not met the threshold of granting the orders sought. Moreover, they submitted that having been in occupation of part of the suit land coupled with the fact that some subdivisions therein have been resold to third parties, the issuance of the orders would result in confusion and anarchy. Finally, in urging the court to dismiss the appeal, they insisted that the appellant's alleged ownership of the suit land never crystalised.

E. Issues For Determination

35. Having carefully re-evaluated the arguments in this appeal, the pleadings and the decisions of the two superior courts below, we are of the considered view that the following issues arise;

    i. Whether the court has jurisdiction under article 163(4)(a) of the *Constitution* to determine the merits of this appeal; and

    ii. If the answer to i) above is in the affirmative, whether the Court of Appeal erred in its decision of February 8, 2019.

    Of course, should our answer to the first question be in the negative, it may be unnecessary to proceed to consider the second issue.

F. Analysis and Determination

Jurisdiction under article 163(4)(a) of the *Constitution*

36. Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is *coram non judic*e and amounts to a nullity because, as Nyarangi, JA famously said in the *locus classicus*, *Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd* [1989] KLR 1,

> "jurisdiction is everything. Without it, a court has no power to make one more step".

37. It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even

by the court suo motu. As a matter of practice, this court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.

38. It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by the *Constitution* or statute. It cannot be conferred by judicial craft. See *Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others*, SC Application No 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.

39. Applying these principles to this appeal, we have in the previous paragraphs noted that both the respondent and interested parties in their respective submissions have questioned our jurisdiction to determine this appeal since it does not raise any issue or issues involving the interpretation or application of the *Constitution*.

40. Article 163(4) has been the subject of interpretation by this court in a long line of decisions as we are shortly to demonstrate. By those authorities, it is now firmly settled that appeals from the Court of Appeal will lie as of right to this court under article 163(4)(a) and (b) of the *Constitution*, if they involve constitutional interpretation and application, or upon certification, by either the Court of Appeal or this court, that they involve matters of general public importance.

41. To ascertain whether or not the jurisdiction has been properly invoked the court will consider the nature of the pleadings and proceedings in the trial court, the remedy or remedies sought and the decisions of the superior courts below. The onus of proving that the appeal involves a question of constitutional interpretation or application, is upon the party relying on article 163(4)(a). The court does not automatically acquire jurisdiction merely because a party claims in their pleadings or submissions that the appeal concerns an issue of constitutional interpretation or application.

42. A party must also identify with precision the relevant Articles of the *Constitution* that were the subject of interpretation or application and show that the subject of the appeal before this court was the same one upon which both the High Court and the Court of Appeal based their respective decisions. Where the decision being challenged on appeal has nothing or little to do with the interpretation or application of the *Constitution*, such a decision cannot be the subject of a further appeal to this court under the provisions of article 163(4)(a). These considerations are constant and have to be satisfied whether a matter is originated as a judicial review application or a constitutional reference.

43. These are the *ratio decidendi* to be extracted from our decisions in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd*, SC Petition No 3 of 2012; [2012] eKLR, *Hassan Ali Joho & another v Suleiman Said Shahbal & others*, SC Petition No 10 of 2013; [2014] eKLR, *Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2*

others, SC Petition No 28 of 2014; [2015] eKLR and *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 32 of 2018; [2018] eKLR.

44. The appeal before us is expressed to be brought pursuant to the provisions of articles 2(4) and 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act, 2011*, rules 30 and 32 of the *Supreme Court Rules, 2011*. This is so even though the events giving rise to the cause of action took place before the promulgation of the *Constitution* in 2010. The appellant has been categorical that his appeal falls squarely within article 163(4)(a).

45. The genesis of the dispute is a letter of allotment dated June 7, 1977 granting the appellant an unsurveyed agricultural land, whose terms he admittedly did not fulfill, with the result that it reverted to the government, which in turn allocated it to third parties, including the interested parties in 1984. The appellant himself was a beneficiary of 50 acres in the second phase of allotment. He went to court in 1993 to challenge the new allotments, way before no one imagined there would be constitutional reforms which would culminate in the passage of the *2010 Constitution*.

46. The High Court (Dulu, J) dismissed the application on January 19, 2010, seven months before the promulgation of the *Constitution*. The first appeal to the Court of Appeal was determined on February 8, 2019, and the instant appeal lodged on March 18, 2019. These dates are significant to show that, although the cause of action arose during the former constitutional order, violations committed in that period can be redressed under this *Constitution*. Indeed, the court has consistently entertained appeals from the Court of Appeal arising from decisions on violations of the former *Constitution*. For example, *Hon Gitobu Imanyara & 2 others v The Honourable Attorney General*, SC Petition No 15 of 2017 and *Monica Wangu Wamwere & 5 others v The Honourable Attorney General*, SC Petition No 26 of 2019 (Consolidated with Petition Nos 34 & 35 of 2019), in a long list of others. In entertaining all those appeals, the court had to be satisfied that they met the strictures of article 163(4).

47. The question before us, is whether this appeal meets the criteria for invocation of article 163(4)(a) as enunciated in *Lawrence Nduttu* (*supra*), *Hassan Ali Joho* (*supra*), *Peninah Nadako Kiliswa* (*supra*), among other decisions. In other words, does this appeal involve constitutional interpretation or application; if the grievance presented before this court is one involving a question or questions of constitutional interpretation or application, is it the same question or questions that engaged the two courts below, and upon which both courts based their respective decisions?

48. The cause was presented to the High Court as a judicial review application for prerogative orders of mandamus and prohibition. In *Peninah Nadako Kiliswa* (*supra*), the court

proclaimed that whether a matter is originated as a judicial review application or a constitutional reference, the considerations of article 163(4)(a) are the same.

49. We have studied the entire record and observe that in the motion for judicial review, the appellant was concerned, not with breach of any of his constitutional rights and fundamental freedoms but with the respondent being directed to issue to him a lease of the entire suit land and to be prohibited from proceeding with the sub-division of the suit land or alienating it to the interested parties. In the entire motion, the statement and affidavit there is no mention of even a single provision of the *Constitution*.

50. The two reasons for the dismissal of the application by the High Court were to do with the appellant's failure to comply with the requirement of developing of the suit land within 3 years from June 1977. Secondly, the court held that an order of prohibition was infective to deal with third parties who had been allotted parts of the suit land. The appellant, the court concluded, ought to have applied for cancellation of those allotments by an order of certiorari but failed. In other words, there was no determination of any question of constitutional nature.

51. There having been no constitutional question before the High Court, none was expected to arise in the Court of Appeal, which affirmed the decision of the High Court. The Court of Appeal confined its consideration of the first appeal to the inordinate delay of over 15 years to institute the judicial review proceedings; that at the time the appellant moved the High Court, the land had been allocated to third parties and character changed. The court also held, in agreement with the High Court, that in the absence of a registrable lease and having failed to fulfill the mandatory conditions for grant of lease, the appellant had no legal or equitable proprietary interest in the suit land which could be enforced by an order of mandamus; and that without an order of certiorari to quash the fresh allotments, an order of mandamus would not be efficacious or appropriate. For these reasons, the Court of Appeal too found no substance in the application and dismissed it. Again, it is important to note that in the entire judgment there is no reference to any provision of the *Constitution*.

52. Before this court however, the appellant expressly cites article 163(4)(a) of the *Constitution* on the face of the petition but proceeds to ask the court to determine whether his right to property within the meaning of section 75 of the former *Constitution* was violated in so far as the government failed to allocate to him the entire 118 Hectares of the suit land, despite issuing to him a letter of allotment; that he had a right not to be subjected to arbitrary exercise of public power under section 82 of the repealed Constitution; and that he had a right to redress under Section 84 of the repealed Constitution.

53. From the decisions of the two superior courts below which we have summarized above, no such question was presented or determined. As a matter of fact, the appellant has referred to

sections 75, 82 and 84 of the retired *Constitution* for the first time in his pleadings before this court. The mere citation of constitutional provisions in the pleadings itself does not bring an appeal within the scope of article 163(4)(a) of the *Constitution*.

54. We come to the inevitable conclusion, on this issue, that the appellant has failed to directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the *Constitution*; and that the matter turned on purely factual issues as applied to a statute, the *Government Lands Act* (repealed), for which reason this court lacks jurisdiction to determine this appeal.

55. Having arrived at this conclusion, and as intimated earlier, we can only consider the second issue in this appeal, if in our opinion the appeal presents exceptional circumstances or distinctive opportunity for the court to provide interpretive guidance on the question, as was the case in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2013] eKLR; *In the Matter of the Speaker of the Senate & another*, Advisory Opinion Reference 2 of 2013; [2013] eKLR; and *Sonko v Clerk, County Assembly of Nairobi City & 11 others*, SC Petition 11 of 2022; [2022] KESC 26 (KLR).

56. This is another of those cases where we must down tools at this stage, as no purpose will be served in considering the merits of the appeal beyond what we have said on the jurisdiction, which is sufficient to dispose of the appeal.

57. We accordingly dismiss this appeal for want of merit.

G. Costs

58. Costs follow the event but are in the discretion of the court, as enunciated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR. The party who calls forth the event by instituting a suit, will bear the costs if the suit fails but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. We note too that this is not a public interest matter. For these reasons, we award costs to the respondent and the interested parties who have successfully defended this matter from the High Court to this court.

H. Orders

59. In light of the above, we order that:

    i. The petition dated March 18, 2019 is hereby dismissed.

    ii. Costs are awarded to the respondent and the interested parties.

    It is so ordered.

Ingang'a & 6 others v James Finlay (Kenya) Limited (Petition 7 (E009) of 2021) [2023] KESC 22 (KLR) (31 March 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2023] KESC 22 (KLR)

Civil Practice and Procedure *– orders – interlocutory orders - interlocutory orders by foreign courts – recognition and enforcement of interlocutory orders by foreign courts - whether interlocutory orders of foreign courts could be recognized and enforced in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act - whether judicial assistance was a prerequisite in enforcing interlocutory orders of a foreign court - what was the appropriate method for foreign courts to seek judicial assistance in Kenya in the examination of witnesses, carrying out local investigations, examination or adjustment accounts; or making a partition – Civil Procedure Act, cap 21, sections 22, 52, 54 and 55*

Civil Practice and Procedure *– judgments – foreign judgments - recognition and enforcement of foreign judgments – doctrine of comity - effect of allowing universal recognition and enforcement of foreign decisions - whether decisions by foreign courts and tribunals must be examined by Kenyan courts for them to gain recognition and to be enforced – whether a court presented with a foreign judgment for recognition and enforcement could rehear the same on merits or as an appeal - Civil Procedure Act, cap 21, section 9; Foreign Judgments (Reciprocal Enforcement) Act, cap 43, section 3*

Civil Practice and Procedure *– doctrine of res judicata – nature of res judicata – what was the nature of the doctrine of res judicata - Civil Procedure Act, cap 21, section 7*

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction in appeals as of right in appeals involving interpretation or application of the Constitution - what was the nature of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution as of right in appeals involving interpretation or application of the Constitution - Constitution, article 163(4)(a)*

Words and Phrases *- comity – definition of comity - a practice among political entities (as nations, states, or courts of different jurisdictions) involving esp. mutual recognition of legislative, executive and judicial acts - Black's Law Dictionary, 9th Edition*

Words and Phrases *– commission – definition of commission - a warrant or authority from the government or a court, that empowers the person named to execute official acts. The authority under which a person transacts business for another. A body of persons acting lawful authority to perform certain public services - Black's Law Dictionary, 9th edition*

Brief facts

The appellants were either serving or former employees of the respondent, who owned and managed tea estates. The respondent was a company incorporated under the Companies Act of Scotland with its registered office being in Scotland. The appellants filed seven suits at the All-Scotland Sheriff Personal Injury Court (Scottish Court) at Edinburgh in Scotland in respect of each appellant. The appellants claimed to have suffered work-related injuries while at work in the respondent's various

tea estates and factories in Kericho, Kenya. They alleged breach of duty to provide a safe working environment on account of negligence on the respondent's part.

The Scottish Court was asked, *inter alia*, to issue *locus* inspection orders (locus inspection orders) for a site visit of the respondent's tea estates and factories in Kericho. The Scottish Court granted the locus inspection orders, in respect of the seven appellants for the respondent's premises. The respondent sought to halt the execution of those orders. Aggrieved, the respondent, filed a petition at the Employment and Labour Relations Court (trial court). The trial court held that interlocutory orders required judicial aid to ensure that the orders of a foreign court were not inconsistent with the public policies of Kenya. The trial court found that the locus inspection orders directly impacted the right to fair hearing as well as the sovereign and territorial integrity of Kenya. The trial court concluded that the experts listed could not travel to Kenya to enforce the orders without the consent of the Kenyan authorities, judicial or Executive.

Aggrieved by the decision of the trial court, the appellants filed an appeal, at the Court of Appeal. The Court of Appeal found that though there was no provision in statute or procedure on how interlocutory orders issued by foreign courts could be enforced in Kenya, a broad reading of the statutes dictated that foreign courts were required to seek assistance either from the Kenyan Judiciary or other Kenyan authorities before enforcing court orders. Consequently, the Court of Appeal dismissed the appeal with costs to the respondent. Further aggrieved, the appellants filed the instant appeal.

Issues

i. Whether decisions by foreign courts and tribunals must be examined by Kenyan courts for them to gain recognition and to be enforced.
ii. Whether interlocutory orders of foreign courts could be recognized and enforced in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act.
iii. Whether a court presented with a foreign judgment for recognition and enforcement could rehear the same on merits or as an appeal.
iv. Whether judicial assistance was a prerequisite in enforcing interlocutory orders of a foreign court.
v. What was the appropriate method for foreign courts to seek judicial assistance in Kenya in the examination of witnesses, carrying out local investigations, examination or adjustment accounts; or making a partition?
vi. What was the effect of allowing universal recognition and enforcement of foreign decisions?
vii. What was the nature of the doctrine of comity?
viii. What was the nature of the doctrine of *res judicata*?
ix. What was the nature of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution as of right in appeals involving interpretation or application of the Constitution?

Relevant provisions of the Law

Foreign Judgments (Reciprocal Enforcement) Act, cap 43

Section 3 - Judgments to which the Act applies

(1) Subject to subsections (2) and (3), this Act applies with respect to—

(a) a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;

(b) a judgment or order of a designated court in civil proceedings under which movable property is ordered to be delivered to any person, including an order for the delivery of movable property as part of a scheme for the provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;

(c) a judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person;

(d) a judgment given in any court on appeal against a judgment or order of a designated court referred to in paragraphs (a) to (c);

(e) a judgment of a designated superior court for the costs of an appeal from a subordinate court, whether or not a designated court, or from an award referred to in paragraph (f); and

(f) an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.

(2) This Act applies to a judgment referred to in subsection (1) if it—

(a) requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or

(b) is final and conclusive as between the parties thereto,

but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(3) This Act does not apply to a judgment or order—

(a) whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty;

(b) to the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages;

(c) for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;

(d) in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable;

(e) in proceedings in connection with the custody or guardianship of children;

(f) in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs;

(g) in a matter of succession to, or administration of, estates of deceased persons whereby a sum of money is payable or movable property is deliverable;

(h) in a matter of social security or public assistance whereby a sum of money is payable by or to a public authority or fund;

(i) in bankruptcy proceedings or in proceedings for the winding-up or re-organization of a corporation or in proceedings for judicial arrangements, compositions or similar matters;

(j) in proceedings relating to damage, death or injury caused by occurrences involving nuclear matter or the emission of ionising radiation;

(k) of a designated court in any proceedings if—

(i) the bringing of those proceedings in that court was contrary to an agreement, or to an instrument in respect of which the proceedings were instituted, whereby the dispute, or the proceedings, were to be settled otherwise than in the courts of the reciprocating country; and

(ii) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given;

(iii) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court;

(l) which is regarded for the purposes of its enforcement as a judgment of a designated country but which was given in another country;

(m) given by a designated court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of the latter judgment.

Civil Procedure Act, cap 21

Section 9 - When foreign judgment is not conclusive

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in Kenya.

Held

1. The manner of enforcement, application or compliance of the orders from the Scottish Court had been in contention right from the trial court and progressed by way of appeal to ultimately reach the instant court. Articles 1, 50, 159, and 238 of the Constitution had been the subject of construction and interpretation. Accordingly, the appeal fell squarely within the ambit of article 163(4)(a) of the Constitution. The court had jurisdiction to consider it.
2. One of the cornerstones of international law was the principle of territoriality, under which, sovereign states had sole authority over their own territory. Article 2(5) and (6) of the Constitution, recognized international law (both customary and treaty law) as a source of law in Kenya. Kenya, being a member of the international community, was bound by the provisions of the United Nations Charter. The centerpiece of the United Nations was the sovereign equality of the Member States as enshrined under article 2(1) to (4) of the United Nations Charter.
3. Due to the territorial nature of jurisdiction, the laws of one State did not apply to other states. Different States had different laws in place depending on the State's history, culture and priorities. Sovereignty and the principle of territoriality prevented foreign judgments from having direct operations in other countries. The effect of that principle was ultimately, no judgment of a court of one country could be executed *proprio vigore* (of or by its own force independently) in another country.
4. To allow universal recognition and enforcement of foreign decisions would result in recognizing that foreign courts were superior to the national courts, thereby infringing on the sovereignty of a country. Further, due to the diversity of laws, automatic recognition may result in the enforcement of decisions that go against the laws or public policies of the enforcing country. It was for that reason that there must be adequate safeguards in place. The citizens or residents of the country where the decision was sought to be enforced should not be left without protection in respect to arbitrary measures which might be taken against them in foreign countries.
5. Parliament enacted various statutes to deal with different scenarios. For instance, in extradition proceedings, there was the Extradition (Commonwealth Countries) Act, cap 77, and Extradition (Contiguous and Foreign Countries) Act, cap 76. Extradition cases, being criminal in nature the appropriate office to initiate extradition proceedings was the Director of Public Prosecutions (DPP). The Attorney General however retained the Executive authority to receive requests for extradition and to transmit the same to the DPP for necessary action before a Magistrates Court in Kenya.
6. In the case of foreign judgments, Parliament enacted the Foreign Judgments (Reciprocal Enforcement) Act, cap 43, for the enforcement of judgments given in countries outside

Kenya which accorded reciprocal treatment to judgments given in Kenya. Courts had an active role to play where foreign decisions were concerned.

7. Under the Constitution, it was in the courts and tribunals established in Kenya through article 159, that the people of Kenya vested judicial authority. That was what informed the view that, of the three arms of Government, the Judiciary was the better suited authority to scrutinize the decisions of a foreign court. It was also at the juncture of such scrutiny that the courts of an enforcing country examined a decision by the foreign court or tribunal to determine if the same adhered to the Constitution and laws of the country. It was there that the country's public policy became crucial, as decisions that went against the enforcing country's public policy considerations would not gain recognition.

8. Kenya being a former colony and a member of the Commonwealth, its history was intricately tied to the United Kingdom. The need for recognizing and enforcing decisions by foreign courts or tribunals was anchored upon the doctrine of comity. The application of the doctrine of comity meant that the recognition of foreign decisions was not out of obligation, but rather out of convenience and utility. That approach prioritized citizen protection while taking into account the legitimate interests of foreign claimants. That approach was consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts.

9. The principles of territoriality and sovereignty were reflected in various articles of the Constitution. Pursuant to article 2(1), the Constitution was the supreme law of the land and bound all persons and all State organs at both levels of Government. According to article 2(4) of the Constitution, any law that was inconsistent with the Constitution was void, and any act or omission in contravention of the Constitution was invalid. Any foreign decision that was not consistent with the Constitution was void and would not be recognized.

10. Judicial authority in Kenya derived from and was exercised pursuant to the Constitution. The domestic courts therefore exercised donated power that the people democratically consented to. Democratic self-rule would be threatened where foreign courts, to whom the people had not donated judicial authority, could directly exercise influence within the polity without intermediation with domestic bodies.

11. Decisions by foreign courts and tribunals were not automatically recognized or enforceable in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced. Consequently, Kenya as a sovereign State could not automatically allow citizens, individuals or officers of a foreign state to carry out upon its own territory the decisions of a foreign court, without authorization from the Kenyan Government upon recognition of the decision of the foreign court or tribunal. Such an action would violate the principle of sovereignty enshrined in the Constitution. Therefore, the appellants' experts/examiners could not enter Kenya to execute the locus inspection orders without authorization.

12. One of the avenues Kenya had for the recognition and enforcement of decisions from foreign courts and tribunals was the Foreign Judgments (Reciprocal Enforcement) Act. That was the first port of call. The preamble of the statute provided that the Act served to make new provisions in Kenya for the enforcement of judgments given in countries outside Kenya which accorded reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith. Section 3(2) of the Act complemented section 3(1) as it stipulated the two conditions that the judgments must meet. Section 3(3) listed out the nature of judgments that the Act did not apply to.
13. Scotland was one of the constituent countries of the United Kingdom, and therefore was one of the reciprocating countries under the Foreign Judgments (Reciprocal Enforcement) Act. However, interlocutory orders such as the impugned locus inspection orders issued by the Scotland Court did not fall within the parameters of the statute for two reasons;
    a. they were not on the list of decisions that the Act applied to; and
    b. the locus inspection orders were not final and conclusive.
14. The need for decisions to be final and conclusive was founded on two principles, the conclusiveness rule and *res judicata*. These two concepts were interlinked and were consistent with two maxims interest *reipublicae ut sit finis litium* meaning it was interest of the State that there should be a limit to litigation and *nemo debet bis vexari pro eadem causa* meaning no person should be punished twice for the same offence.
15. The conclusive judgment reached by the foreign court or tribunal created an indefeasible right in favour of the judgment debtor and was to be exercised against the judgment creditor. It was not the judgment but the right vested under that judgment which was recognized and enforced.
16. The principle of *res judicata* resonated with Kenyan laws as it was codified under section 7 of the Civil Procedure Act. *Res judicata* was a doctrine of substantive law, its essence being that once the legal rights of parties had been judicially determined, such edict stood as a conclusive statement as to those rights. That was not to say that when a court was presented with a foreign judgment for recognition and enforcement it proceeded to rehear the same on merits or as an appeal on the correctness or otherwise of the judgment. The issues for consideration for the courts in Kenya when examining a foreign decision were outlined in section 9 of the Civil Procedure Act, cap 21.
17. Additional considerations on the jurisdiction of the foreign court were set out in sections 4 and 5 of the Foreign Judgments (Reciprocal Enforcement) Act. Broadly they were considerations on whether there was an opportunity for full and fair trial, whether the court was competent to hear and determine the matter, whether the defendant had notice of the trial, whether the legal system ensured impartial justice and was devoid of fraud in procuring the judgment.
18. The locus inspection orders issued by the court in Scotland did not meet the finality test and therefore did not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement)

Act. The locus inspection orders were part of the discovery process in litigation. Discovery at the very basic level entailed a pre-trial procedure to ascertain facts to be presented at the trial it had constitutional underpinning in the right to access information enshrined in article 35 of the Constitution.

19. Section 22 of the Civil Procedure Act empowered a court, either on its own motion or application by the parties, to make any orders as may be necessary for discovery. Sections 54 and 55 of the Civil Procedure Act fell under Part IV of the Civil Procedure Act which dealt with incidental proceedings, more specifically commissions. Section 52 therein made provision for the power of the court to issue a commission. The word 'commission' was not defined in the Civil Procedure Act or Rules.

20. Sections 54 and 55 of the Civil Procedure Act empowered the High Court to issue commissions for the examination of witnesses outside Kenya and required the commissions from foreign courts for the examination of witnesses be approved by the High Court before execution respectively. The procedural provisions were a demonstration that judicial assistance was a prerequisite in enforcing interlocutory orders. There was a procedure to be followed when a foreign court or tribunal issued orders geared toward the discovery of evidence.

21. Order 28 of the Civil Procedure Rules, 2010 on commissions and references activated sections 52 to 55 of the Civil Procedure Act. Order 28 rule 4 made provision for the courts in Kenya to request for the commission to take evidence of a witness outside Kenya. Conversely, order 28 rule 5 was on the courts in Kenya receiving commissions from foreign courts and tribunals for the examination of a witness.

22. Part V of the High Court (Practice and Procedure) Rules provided a standard form of a letter of request to a foreign tribunal to examine witness abroad. The import of sections 54 and 55 of the Civil Procedure Act, order 28 of the Civil Procedure Rules, as well as the High Court (Practice and Procedure) Rules made pursuant to section 10 of the Judicature Act, was that the appropriate method of seeking judicial assistance was through the issuance of commission *rogatoire* or letter of request to the High Court in Kenya seeking assistance. Those provisions were specific to the examination of witnesses. However, section 52 of the Civil Procedure Act listed the various types of commissions that the court had the power to issue and those were not limited to examination of witnesses. Rather, it included the power to make a local investigation; to examine or adjust accounts; or to make a partition.

23. The nature of the orders was useful in discovery, whose purpose, was to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they would face at the trial. The orders may also be issued in the course of trial when the court observed the need for them to better discern the root of the controversy and arrive at a fair and just determination. That was why order 28 of the Civil Procedure Rules was elaborate on commissions as evinced in the Rules.

24. The procedure of foreign courts seeking judicial assistance in Kenya for examination of witnesses was the same procedure to be followed for carrying out local investigations, examination or adjustment accounts; or to making a partition. That procedure was through the issuance of commission *rogatoire* or letter of request to the High Court in Kenya seeking assistance. That procedure was not immediately apparent. The High Court and Court of Appeal were wrong to extend the spirit of the Foreign Judgments (Reciprocal Enforcement) Act beyond its application as that was not the appropriate statute that was applicable to the instant case.
25. Ignorance of the law was not a defence. However, where the law was not easily discernible or the proper course of action to follow was not easily perceptible by both courts and litigants, then that spoke to the clarity of the law or lack thereof, rather than the fault of the litigant. The appellants could not be faulted for stumbling through the complexity of ambiguous and abstruse statutes, and failing to find a solution.
26. The procedural steps to be undertaken as set out under Part VII – Evidence For Foreign Tribunal of the High Court Practice and Procedure Rules made pursuant to section 10 of the Judicature Act, cap 8, were not clear. It was not explicitly clear whether the letter of request was to be sent to the Attorney General, the Minister (Cabinet Secretary) or directly to the Registrar of the High Court. However, for procedural propriety, the appellants were directed to pursue having the court in Scotland channel a commission *rogatoire* or letter of request to the Registrar of the High Court in Kenya for assistance. That would then activate or trigger the High Court in Kenya to implement the Rules as contained in order 28 of the Civil Procedure Rules, 2010 in executing the request.
27. The laws in place regarding the issue at hand, required updating in order to be brought in line with the Constitution. There was also a need to harmonize those laws with the other existing laws such as the Civil Procedure Act, Rules, 2010 any other relevant laws. The High Court (Practice and Procedure) Rules in the Judicature Act were stuck in time warp. It was surprising that the law in that regard was yet to be updated. Those procedures in their current state remained a hindrance to Kenyans realizing their right to access to justice as guaranteed by article 48 of the Constitution.
28. The United Kingdom had since repealed the Foreign Tribunals Evidence Act, 1856 and had the Evidence (Proceedings in other Jurisdictions), Act, 1975 as read together with Part 34 (II) of the Civil Procedure Rules, 1998 for assistance in proceedings in foreign courts. The assistance related to the examination of witnesses, either orally or in writing; for the production of documents, the inspection, photographing, preservation, custody or detention of any property, the taking of samples of any property and the carrying out of any experiments on or with any property, the medical examination of any person or even for the taking and testing of samples of blood from any person. There was no reason why Kenya's laws should not be updated to include advancements in technology and case management systems.

29. In order to achieve compliance with the judgment, the court directed that the Attorney General, Kenya Law Reform Commission, and Parliament to commence an enquiry and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.

Appeal dismissed.

Orders

i. *Each party shall bear their own costs of the appeal.*

ii. *The court directed that the judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to the judgment and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.*

Citations

Cases

Kenya

1. *Director of Public Prosecutions v Okemo & 4 others* Petition 14 of 2020; [2021] KESC 13 (KLR) - (Explained)
2. *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)
3. *Ibren, Nasra Ibrahim v Independent Electoral & Boundaries Commission & 2 others* Election Appeal 9 of 2018; [2018] KECA 500 (KLR) - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition10 of 2013; [2014] 1 KLR 111 - (Explained)
5. *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motion No 42 & 43 of 2014; [2016] eKLR (Consolidated) - (Explained)
6. *Kenya Shell Limited v Kobil Petroleum Limited* Civ Application 57 of 2006; [2006] eKLR - (Explained)
7. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Followed)
8. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
9. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
10. *Mwangi, Eliud Muturi (Practising in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/ Africa GMBH & LSG Sky Chefs Kenya Limited* Civil Case 154 of 2014; [2015] KEHC 6774 (KLR) - (Explained)
11. *National Rainbow Coalition Kenya (NARC) v Independent Electoral & Boundaries Commission; Tharaka-Nithi County Assembly & 5 others* Petition 500 of 2017; [2019] KEHC 5987 (KLR) - (Explained)

12. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] 2 KLR 804 - (Explained)
13. *Ngoge t/a O P Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co Advocates & 725 others* Petition 13 of 2013; [2014] KESC 8 (KLR) - (Explained)
14. *Njehia, Daniel Kimani v Francis Mwangi Kimani & another* Civil Application 3 of 2014; [2015] eKLR - (Explained)
15. *Ombongi, Brian Makori v Kenya National Examination Council* Constitutional Petition 17 of 2015; [2017] KEHC 4808 (KLR) - (Explained)
16. *Oracle Productions Limited v Decapture Limited & 3 others* Commercial Civil Suit 567 of 2011; [2022] KEHC 16146 (KLR) - (Explained)
17. *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* Civil Appeal 50 of 1989; [1989] KLR 1 - (Followed)
18. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] 2 KLR 253 - (Followed)
19. *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* Election Appeal 4 of 2017; [2018] KECA 629 (KLR) - (Mentioned)

South Africa

Paulsen and another v Slip Knot Investments 777 (Pty) Limited [2015] ZACC 5; 2015 (3) SA 479 ; 2015 (5) BCLR 509 - (Explained)

United Kingdom

1. *Henderson, Nouvion v Freeman* [1889] LR 15 AC 1 - (Explained)
2. *McLoughlin v O'Brian* [1982] UKHL 3 - (Explained)

India

1. *Central Inland Water Transport Corporation Limited & another v Brojo Nath Ganguly & another* [1986]AIR 1571; [1986] SCR (2) 278 - (Explained)
2. *Raja of Faridkot v Gurdyal Singh* (1895) ILR 22 Cal 222 - (Explained)

United States

Hilton v Guyot 159 US 113 (1895) - (Explained)

Canada

1. *Laferriere v Gariepy* 1920 CanLII 78 (SCC), 62 SCR 557 - (Explained)
2. *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 - (Explained)

Regional Court

Christ for all National v Apollo Insurance Company Limited [2002] 2 EA 366 - (Applied)

Ireland

HAH v SAA & others [2017] IESC 40 - (Explained)

Texts

1. Castel, JG., (Ed) (1971), *"Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada"* Montreal: McGill Law Journal

2. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
3. H.E. Read (1934), *HE Read's Recognition and Enforcement of Foreign Judgments in the Common Law Unity of the British Commonwealth (1934), pp 52-53, 125* Common Law Unity of the British Commonwealth (1934), pp 52-53, 125
4. Loughlin, M., (Ed) (2004), *The Idea of Public Law* Oxford: Oxford University Press pp 84-85
5. Marussia, BR., (Ed) (1954), *Recognition and Enforcement of Foreign Judgments' International and Comparative Law Quarterly,* Cambridge: Cambridge University Press Vol 3 No 1 pp 49-92
6. Mehren, AT., Trautman, DTM., (Eds) (1968), *"Recognition of Foreign Adjudications: A Survey and A Suggested Approach"* Cambridge: Harvard Law Review p 1603
7. Smith, JW., et al (Eds) (1929), *Smith's Leading Cases on Various Branches of the Law with Notes* London: Sweet & Maxwell Ltd 13th Ed, pp 717-18

Statutes

Kenya

1. Civil Procedure Act (cap 21) sections 6, 7, 9, 22, 52, 54, 55; part IV - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 5 rules 29, 30; order 28 rules 14, 17 - (Interpreted)
3. Constitution of Kenya articles 1, 2(1)(4)(5)(6); 4(1); 35(1) (b); 48; 50(1); 55; 159(1); 160(1); 163 (4)(a); 238 - (Interpreted)
4. Extradition (Commonwealth Countries) Act (cap 77) In general - (Cited)
5. Extradition (Contiguous And Foreign Countries) Act (cap 76) In general - (Cited)
6. Foreign Judgments (Reciprocal Enforcement) Act (cap 43) sections 3(1)(2)(3); 4; 5 - (Interpreted)
7. High Court (Practice & Procedure) Rules (cap 8 Sub Leg) parts V, VII; regulation 7 - (Cited)
8. Judicature Act (cap 8) sections 3(1)(b); 10 - (Interpreted)
9. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 33 - (Interpreted)

United Kingdom

1. Civil Procedure Rules, 1998 part 34(II) - (Interpreted)
2. Companies Act of Scotland, 2006 In general - (Cited)
3. Evidence (Proceedings in other Jurisdictions) Act, 1975 In general - (Cited)
4. Foreign Tribunals Evidence Act, 1856 (Repealed) In general - (Cited)

Advocates

Mr. Isaac E. N. Okero (Behan &Okero Advocates) for Petitioners
Mr. Geoffrey Orao Obura (Obura Mbeche & Company Advocates) for Respondent

March 31, 2023, the Court delivered the following Judgment:

A. Introduction

1. The appellants moved this court vide petition of appeal dated August 12, 2021 and lodged on August 13, 2021 pursuant to article 163(4)(a) of the *Constitution* and rule 33 of the *Supreme Court Rules, 2020*. They are challenging the Judgment of the Court of Appeal (Nambuye, Karanja and Kantai JJA) in Civil Appeal No 297 of 2019 delivered on May 21, 2021.

B. Background

2. The appellants were either serving or former employees of the respondent, who owned and managed tea estates including Tiluet– Chomogonday factory, Marinyn, Kaproret and Kapsongoi Kitumbe factory all situated in Kericho County. The respondent is a company incorporated under the *Companies Act of Scotland* with its registered office at Swire House, Souter Head Road Altens, Aberdeen, Scotland.

3. The appellants filed seven suits at the All-Scotland Sheriff Personal Injury Court (hereinafter referred to as the "Scottish Court") at Edinburgh in Scotland, Court Ref No PLC PN 1055, 1056, 1057, 1058, 1052, 1053 and 1051 in respect of each appellant. The appellants were claiming to have suffered work related injuries while at work in the respondent's various tea estates and factories in Kericho, Kenya. They alleged breach of duty to provide a safe working environment on account of negligence on the respondent's part.

4. The Scottish court was asked, *inter alia*, to issue *locus* inspections orders (hereinafter referred to as "locus inspection orders") for a site visit of the respondent's tea estates and factories in Kericho for the purpose of observing the following activities: tea pickers picking tea manually and with equipment, taking measurements of the tea plants and areas where workers were required to work, including distance workers are required to walk to weigh tea; photocopying and videoing work undertaken by the workers; considering Personal Protective Equipment (PPE) available to the workers; weighing the tea baskets when full of tea; observing and videoing picking, transporting and weighing of the tea; observing medical facilities available to the workers, and, weighing mechanical harvesting equipment for one, two and three users.

5. In an order dated November 22, 2018 and amended on December 18, 2018, the Scottish Court granted the locus inspection orders, in respect of the seven appellants for the respondent's premises in Tiluet Chomogonday Factory, Marinyn, Kaproret and Kapsongoi

Kitumbe Factory in Kericho County. It is those orders that the respondent sought to halt their execution.

C. Litigation History

i. At the Employment and Labour Relations Court

6. Aggrieved, the respondent, filed Constitutional Petition No 30 0f 2019 via an amended originating notice of motion dated January 31, 2019 at the Employment and Labour Relations Court (ELRC) at Nairobi.

7. In allowing the amended originating notice of motion, the court (Radido J) found that the purpose and objective of the *locus* inspection orders was to help sustain the actions commenced by the appellants before the Scottish court. The report by the experts would be presented as evidence for consideration at the trial. He found that once a competent court had issued orders for discovery, the same became self-executing and failure by a party to comply would attract further orders such as stay and/or debarment from defending. He however pointed out that difficulties arose where discovery was ordered outside the jurisdiction of the trial court, as was the case. He elaborated that these difficulties were traceable to the theory of sovereignty and territoriality as well as the doctrine of comity, which necessitated the need for codification in the *Foreign Judgments (Reciprocal Enforcement) Act*, cap 43 Laws of Kenya and the *High Court (Practice & Procedure) Rules*. These provisions broadly required domestication of foreign judgments before execution. He noted that the *Foreign Judgments (Reciprocal Enforcement) Act* was silent on enforcement of interlocutory orders.

8. The court was of the view that interlocutory orders required judicial aid to ensure that the orders of a foreign court were not inconsistent with public policies of Kenya such as the need for legal certainty, avoidance of re-litigation in domestic courts and reciprocity. The court added that procedural concerns were also factors to be considered and these included reciprocity, personal jurisdiction, subject matter jurisdiction and forum conveniens.

9. The court held that without judicial assistance, it would not be possible to discern whether due process followed before the issuance of the locus inspection orders was in consonance with the rights guaranteed under the *Constitution of Kenya*. The court found that the locus inspection orders directly impacted the right to fair hearing in article 50(1) as well as the sovereign and territorial integrity of Kenya. It was for these reasons that the court concluded that the experts listed could not travel to Kenya to enforce the orders without the consent of the Kenyan authorities, judicial or executive. The court further held that it was the location of the conduct of the locus inspections and not the ultimate purpose of the inspections

that would implicate the involvement of the court in the exercise of its delegated sovereign mandate.

10. The court noted that our procedural laws contemplated judicial assistance in suits involving foreign jurisdiction before final judgment. The learned trial judge pointed out several such provisions including section 54 of the *Civil Procedure Act* empowering the High Court to issue commissions (letter of request) for the examination of witness outside Kenya; section 55 requiring the imprimatur (authorization) of the High Court before commissions (letter of request) issued by the foreign courts are executed; order 5 of the *Civil Procedure Rules* envisaging grant of leave of court before service of summons/process outside the jurisdiction of court; order 5 rule 29, requiring the involvement of the Ministry of Foreign Affairs in the service of notice of summons; order 5 rule 30 providing for the need for assistance of the High Court in respect of service of the public legal process in Kenya; order 28 set out similar provisions in respect of commissions by foreign courts.

11. It was the court's conclusion that judicial assistance would not be a merit re-examination of the litigation processes in the Scottish Court. In allowing the amended originating notice of motion, the learned judge proceeded to issue the following orders:

    1. That the orders issued by the All Scotland Sheriff Personal Injury Court (hereinafter referred to as the "Scottish Court") dated November 22, 2018 as amended on December 18, 2018 and more particularly listed herein below have to be adopted and recognized as orders of this court before being executed as required by article 159(1) of the *Constitution* and the provisions of the *Foreign Judgments (Reciprocal Enforcement) Act* chapter 43 of the Laws of Kenya:

        a. The order for Inspection Reference No PIC PG 10 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018 issued by the Scottish Court in the Elly Okongo Inganga against James Finlay (Kenya) Limited filed at Edinburgh in the Scottish Court under Court Ref No PIC – PN1055 – 17 dated Ninth day of May 2017.

        b. The order for Inspection Reference No PIC PG 6 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018 issued by the Scottish Court in the Lucas Onduso Omoke against James Finlay (kenya) Limited filed at Edinburgh in the Scottish Court under court Ref No PIC PN1056 – 17 dated Ninth day of May 2017.

        c. The order for Inspection Reference No PIC PG 7 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018issued by the Scottish Court in the Vitalis Muga against James Finlay (kenya) Limited

filed at Edinburgh in the Scottish Court under Court Ref No PIC PN1057 – 17 dated Ninth day of May 2017.

d. The order for Inspection Reference No PIC PG8 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018 issued by the Scottish Court in the Rebecca Okenyuri Nyakondi against James Finlay (kenya) Limited filed at Edinburgh in the Scottish Court under court Ref No PIC PN1058 – 17 dated Ninth day of May 2017.

e. The order for Inspection Reference No PIC PG5 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018 issued by the Scottish Court in the Joice Mongare Ochoi against James Finlay (kenya) Limited filed at Edinburgh in the Scottish Court under court Ref No PIC PN1052 – 17 dated Ninth day of May 2017.

f. The order for Inspection Reference No PIC PG11 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018 issued by the Scottish Court in the Christopher Omwamba Chuma against James Finlay (kenya) Limited filed at Edinburgh in the Scottish Court under court Ref No PIC PN1053 – 17 dated Ninth day of May 2017.

g. The order for Inspection Reference No PIC – PG9 -18 dated November 22, 2018 as amended by a subsequent order dated December 18, 2018 issued by the Scottish Court in the Getuna Masela Idinga against James Finlay (kenya) Limited filed at Edinburgh in the Scottish Court undercourt Ref No PIC – PN1051 – 17 dated Ninth day of May 2017.

2. That the respondents their agents and or servants must abide by and observe the provisions of the *High Court (Practice and Procedure) Rules* part VII being part of the written laws of England applicable to Kenya by virtue of section 3(1)(b) of the *Judicature Act*, cap 8 of the Laws of Kenya before conducting any locus inspection as ordered by the Scottish Court such as locus inspection having the sole purpose of collecting evidence to be used in the Scottish Court.

3. That failure by the respondents, their agents and or servants to observe the provisions set out in part VII of the *High Court (Practice and Procedure) Rules* will be in breach of the sovereignty of Kenya and an abuse of protocol as between the two sovereign states of United Kingdom and Kenya.

4. That any execution of the Scottish Court orders before being adopted by this honourable court will be contrary to the legal spirit set out in the provisions of *Foreign Judgments (Reciprocal Enforcement) Act* chapter 43 Laws of Kenya.

ii. At the Court of Appeal

12. Aggrieved by the decision of the Employment and Labour Relations Court, the appellants filed an appeal, Civil Appeal No 297 of 2019 wherein they faulted the learned Judge for *inter alia*: finding that the locus inspection orders issued by the Scottish Court required judicial aid as a matter of public policy, without specifying the public policy considerations; invoking sections 54 and 55 of the *Civil Procedure Act* (cap 21), orders 5 and 28 of the *Civil Procedure Rules* as bases for the justification of judicial assistance in relation to the locus inspection orders; invoking the *Foreign Judgments (Reciprocal Enforcement) Act* (cap.43) against the locus inspection orders on the basis of 'antecedents in sovereignty and territorial concerns'; using the need of judicial assistance as a means for scrutinizing adherence of the appellants rights under the *Constitution* without any allegation of breach of said rights while conversely ignoring the appellants' rights under article 50 which were invoked; misapprehending the status of the experts authorized by the locus inspection; and failing to appreciate that the respondent sought to clothe its breach of the locus inspection orders and to frustrate the appellant's suit before the Scottish Court in violation of their rights to access to justice and fair trial. The appellants prayed for setting aside of the Judgment of the trial court as well as the dismissal of the Petition with costs.

13. The Court of Appeal determined that the main issue calling for their consideration was whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities.

14. The learned Judges of appeal agreed with the trial judge. They found that a reading of articles 1, 2 and 159 of the *Constitution* showed that sovereign power belonged to the people of Kenya and they exercised this power themselves and through their representatives. Further, that power could be delegated to State organs such as the Judiciary, and that the Scottish Court was not one of the courts established in the *Constitution*. The Court of Appeal found that though there was no provision in statute or procedure on how interlocutory orders issued by foreign courts could be enforced in Kenya, a broad reading of the statutes dictated that foreign courts are required to seek assistance either from the Kenyan Judiciary or other Kenyan authorities before enforcing court orders.

15. The learned judges of appeal agreed with the trialcourt that there were public policy issues involved, necessitating judicial aid to ensure that the orders of the foreign court were not inconsistent with the public policies of Kenya. They added that the Kenyan court whose assistance was sought would examine the case from the foreign court and ascertain whether the proper judicial process had been followed in obtaining such orders, whether that process was consistent with Kenyan laws and policy and whether the experts were qualified under Kenyan law to undertake such exercise, amongst other considerations.

16. Consequently, in their Judgment delivered on May 21, 2021, they dismissed the appeal with costs to the respondent.

iii. Before the Supreme Court

17. Aggrieved by the Judgment of the Court of Appeal, the appellants have preferred the present petition of appeal, whereby they set out seven grounds of appeal, that:

    1. The learned judges of appeal erred in upholding the determination of the superior court that interlocutory orders such as the locus inspection orders issued by the Scottish Court require judicial aid as a matter of public policy, without stipulating specifically what public policy considerations dictate this requirement in relation to the locus inspection orders.

    2. The learned judges of appeal erred in law by determining that compliance by the respondent with the locus inspection orders of the Scottish court which are self-executing and interlocutory in nature, are orders to be executed by a Kenyan court in the exercise of the delegated sovereign power of the people of Kenya under articles 2, 5 and 159 of the *Constitution*.

    3. The learned judges erred in law and in fact by questioning with no basis whatsoever whether 'a sovereign State, and Kenya is one, allows (s) foreigners to walk into its territory and undertake such and related activities without supervision or assistance' given that the 'such and related activities' concerned the [making of] certain observations – of tea pickers picking tea; [the taking of] certain measurements of the tea estates and factories, [the taking of] videos of various activities at the estates and factories and even photocopying of various documents and equipment all at the private premises in Kenya of a Scottish company that had willingly submitted to the jurisdiction of the Scottish Court and was not of any state, government of military facilities whose access is restricted by Kenyan Law.

    4. The learned judges of appeal misdirected themselves by holding that 'The Kenyan court whose assistance is sought would examine the case from the foreign court and ascertain whether proper judicial process has been followed in obtaining such orders, whether that process is consistent with Kenyan laws and policy and whether the experts were qualified under Kenyan law to undertake such exercise, amongst other considerations' and yet this would invite violation of the *lis alibi pendens* doctrine.

    5. The learned judges of appeal misdirected themselves by invoking the *Foreign Judgments (Reciprocal Enforcement) Act* (cap 43) and the *Civil Procedure Act* (cap 21) against the locus inspection orders on the basis that 'a broad reading of the statutes would dictate that the foreign court, like the Scottish court here, be moved to seek

assistance of the Kenyan Judiciary and other Kenyan authorities for enforcing orders issued by such a court'.

6. The learned judges of appeal erred in failing to appreciate that the respondent's petition before the superior court sought to invoke the court's authority with which to clothe its breach of the locus inspection orders and to frustrate the petitioners' actions before the Scottish Court in violation of their rights to access justice and to fair trials.

7. The learned judges of appeal erred in penalizing the appellants with the costs of the appeal given the emerging practice that where a petition involves interpretation of constitutional provisions the courts are reluctant to penalize any party with costs.

18. As a result, the appellants seek the following reliefs:

a. This appeal be allowed.

b. The Judgment of the Court of Appeal in Civil Appeal No 297 of 2019 be aside.

c. The order for costs made against the appellants by the Court of Appeal be set aside.

d. The judgment of the Employment and Labour Relations Court, Nairobi in Nairobi ELRC Petition No. 30 of 2019 be set aside and be substituted with a dismissal of the respondent's petition.

19. The petition of appeal is opposed by the respondent, which filed three documents in opposition. First is a notice of grounds dated July 21, 2021 affirming the decision of the Court of Appeal on several additional grounds. Firstly, where there is a clear procedure for redress prescribed either in the *Constitution* or in statute, such as the procedures set out in part VII of the *High Court (Practice Procedure) Rule* on modalities of collection of evidence for use in a foreign court, the same ought to be strictly followed. The respondent also adds that the orders granted by the trial court were discretionary and the appellants have failed to demonstrate how the court misdirected itself, or if the decision was manifestly wrong so as to occasion injustice, therefore this court should not interfere with that exercise of discretion.

20. Second, the respondent filed grounds of objection dated July 21, 2021 raising ten (10) grounds of objection. In summary, the respondent was contending that: the appeal was tantamount to asking the court to compromise on its major role of asserting the Supremacy of the *Constitution* and sovereignty of the people while exercising its judicial authority; the orders by the trial court did not misapply article 159 or infringe on the appellants' rights to access justice or fair trial before the Scottish Courts, rather the Court of Appeal merely reminded the appellants that if they wanted to seek justice in the Scottish Courts with some actions being performed in Kenya, then the actions that needed to be performed within

the country had to adhere to the constitutional and statutory provisions in Kenya. The respondent contended that both the trial court and the Court of Appeal did not merely invoke public policy but proceeded to set out the public policy parameters that a Kenyan court had to examine and evaluate before allowing the intended locus inspection.

21. The respondent was further opposed to the petition of appeal on the ground that the locus inspections were not self-executing orders but rather required several steps to be followed including; agreeing on a translator, the respondent admitting persons to its private property and further granting permission to carry out certain activities such as observing, taking measurements, photography, weighing. The respondent added that the examination of the foreign court order against the public policy considerations enumerated by the Court of Appeal did not amount to a substantive evaluation of the suit and therefore there was no violation of the doctrine of *lis alibi pendens*. For context *lis alibi pendens* arises from international comity and it permits a court to refuse to exercise jurisdiction when there is parallel litigation pending in another jurisdiction.

22. Relying on the sovereignty doctrine of international law, the respondent added that all states are equal and no state can exercise jurisdiction within the territory of another, without judicial authority of a Kenyan court or the intervention of any other branch of the government, failure to do so is considered an affront to the sovereignty of the Republic of Kenya. Additionally, that the superior courts did not invoke the *Foreign Judgments (Reciprocal Enforcement) Act* or the *Civil Procedure Act* as the guiding precedents, rather found that a broad reading dictated that the foreign court ought to seek assistance from the Kenyan Judiciary. Finally, that there is no evidence that the superior courts misdirected themselves in law or fact or considered or failed to consider any relevant issue or committed any other error or misapprehension and there was thus no basis whatsoever for interfering with their decision.

23. Third, the respondent filed a replying affidavit sworn on July 21, 2021 by Simon Hutchinson, the respondent's Managing Director. He deponed that contemporaneously with the notice of appeal against the decision of the trial court, the appellants through their counsel, wrote two letters to the respondent demanding release of the information which was the subject of the ELRC Petition No 30 of 2019. To wit, the respondent's counsel responded vide letter dated July 25, 2021 citing the pending appeal in Civil Appeal No 297 of 2019 and reiterating that the issues raised were sub judice. He further deponed that despite the pendency of Civil Appeal No 297 of 2019, the appellants instituted Kericho Petition No 7 & 8 of 2019 in which they sought inter alia the release of information held by the respondent on the working conditions of the tea workers at its operations in Kericho and Bomet counties pursuant to article 35(1)(b) of the *Constitution*. He further deponed that that was for the purpose of using the said information before the Scottish Court to prosecute their work injury claims. In the Petition before the High Court in Kericho, the

respondent raised a preliminary objection which was dismissed. However, while on appeal in Civil Appeal No 297 of 2019, the Court of Appeal directed counsel on record to inform the High Court (Mbaru J) in Kericho of the proceedings and cease her decision until the final outcome of the appeal. The judgment in Kericho was deferred to September 23, 2021. He averred that the suit in Kericho represented an attempt by the appellants to execute the locus inspection orders without proper judicial authority being sought and granted. He added that this was evidence that the locus inspection orders were not self-executing.

Rejoinder

24. The appellants filed a rejoinder to the grounds of objection dated July 27, 2021 specifically contending first, that the translator was to be part of the inspection team and would act as translator between the appellants, their counsel and the inspection experts, thus the respondent would not play a part in the selection of the translator. Second, that the respondent's admission of the inspection team into its private property would be an act of compliance with self-executing locus inspection orders and thereafter playing no other role in the specific exercises of the inspection team. Further, that the respondent granting access to its private property of persons lawfully in the territory of Kenya, was not a matter either in the control of, or concerning the affairs of the Government requiring intervention by any branch of government or the protection of the courts. Finally, that part VII of the *High Court (Practice and Procedure) Rules* under the *Judicature Act* was not relevant as the inspection team was collecting evidence for the appellants to use before the Scottish Court and not as agents of the Scottish Court.

25. Theappellants also rely on an affidavit of rejoinder sworn by the 1st appellant on July 26, 2021. Referring to exchange of letters between the appellants and the respondent's reply dated July 25, 2021, he deponed that in order to provide the Court with a full context of the correspondence, he annexed the appellants' response

26. He further deponed that it was inaccurate that the Court of Appeal directed their counsel on record to inform the Judge in the Kericho Petitions to arrest her judgment. He clarified that the Court of Appeal requested counsel to notify the Judge of their imminent delivery of their judgment in the appeal on May 7, 2021, which was eventually delivered on May 21, 2021. He further asserted that Mbaru J in the Kericho petitions was correct in dismissing the respondent's preliminary objection as the appellants' enforcing their constitutional right to information under article 35 was a separate and distinct matter from the locus inspection orders. Further, that the same cannot amount to an abuse of court process as this was unrelated to the issues in Petition 30 of 2019, the stay orders or the appeal before the Court of Appeal in Civil Appeal No 297 of 2019.

D. The Parties Respective Cases

27. When the matter came up before us for virtual hearing on June 16, 2022, learned counsel Mr Isaac EN Okero appeared for appellants while Mr Geoffrey Orao Obura appeared for the respondent.

a. Appellants Case Submissions

28. The appellants rely on their submissions dated and filed on November 30, 2021 as well as their submissions in final reply dated January 21, 2022and filed on January 25, 2021. They submit that there are two fundamental issues raised in the petition: the constitutional rights under article 50(1) of the *Constitution* of the appellants, ordinary Kenyan citizens, to a fair trial before a foreign court; and whether compliance in Kenya by a private person in regard to its private property with a self-executing discovery order issued by a foreign court in a valid ongoing litigation proceeding, is a matter affecting the sovereignty and national security of Kenya as expressed in articles 1 and 238 of the *Constitution* and concerning the judicial authority of Kenyan courts as prescribed by article 159(1) of the *Constitution*.

29. It is the appellants' argument that the superior courts erred in finding that public policy required the involvement of Kenyan authorities without disclosing which public policies were the subject of the test of consistency. It was contended that the examples of public policies given by the superior courts, whether proper judicial process had been followed in obtaining the orders, and whether that process is consistent with Kenyan laws and policies, were problematic as the courts cannot take positions that put them in breach of the *lis alibi pendens* doctrine.

30. It is their submission that the principles of law upon which public policy may be deemed a justiciable issue are well established in the House of Lords decision of *McLoughlin v O'Brian* [1982] UKHL 3, Supreme Court of Ireland in *HAH v SAA & ors* [2017] IESC 40 and Constitutional Court of South Africa in *Paulsen and aanother v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC. They assert that these decisions demonstrate that public policy, unless its nature and existence is properly established, must not be used to interfere to any unnecessary extent with the orderly application of rules or to deprive a litigant of their manifest legal rights. They urge that the invocation of public policy by the superior courts in their impugned decisions has resulted in breach of the *lis alibi pendens* doctrine requiring an unnecessary and additional proceedings before a Kenyan court. Further, it has resulted in an unjustified expansion of the application of the *Foreign Judgments (Reciprocal Enforcement) Act*, cap 43 far beyond the scope of words of the statute.

31. Regarding articles 1, 2 and 159 of the *Constitution*, the appellants are of the view that the inspection orders which were recognized as self-executing by the trial court, do not require a process of execution. All they require is compliance by the parties.

32. They submit that the inference that compliance by the respondent is a matter of sovereignty of the people, national security to the Republic of Kenya, and a threat to the judicial authority of Kenya's courts is a reductio ad absurdum (a method of proving the falsity of a premise by showing that its logical consequence is absurd or contradictory). There is nothing in the activities that the appellants together with their counsel and experts are to carry out on the private property of the respondent that may be construed as touching on or affecting the national security of Kenya. Hence, there is no legal justification that the appellants rights to fair trial are eroded. They drew inference that thousands of foreigners enter into Kenya, upon their compliance with the relevant immigration laws and engage in private business with private persons, on private property without the same being construed as threats to national security and without requiring judicial assistance.

33. It is further contended that the superior courts, without legal justification, created an impediment to the inspection ordered by the Scottish Court, thereby eroding their rights to fair trial.

34. Furthermore, it is posited that it is illogical that an expert witness of a foreign court, designated and identified for the purposes of proceedings in that court, must be found by a Kenyan court to have suitable qualifications under Kenyan law simply because they are undertaking an inspection exercise in Kenya on private property for the foreign case. Such a position again invites breach of the lis alibi pendens doctrine and therefore cannot be framed as Kenyan public policy.

35. As to costs, the appellants urge this court to follow the principle set out in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2016] eKLR and to take into account that this matter involves the interpretation of constitutional provisions and/or protection of constitutional rights. They submit that the interest of justice will be served by a decision that each party bears their own costs. They seek their petition be allowed setting aside the decision of the Court of Appeal and substituting it with a judgment allowing the appellants' petition of appeal with the consequence of dismissing the respondent's petition before the Employment and Labour Relations Court.

b. Respondent's Case Submissions

36. The respondent relies on its submissions dated August 8, 2021 and filed on December 14, 2021. The respondent submits that the issue for determination before this court is whether

the experts identified by the Scottish Court should be allowed to travel to Kenya and conduct locus inspection assignments without consent and supervision of Kenyan authorities.

37. The respondent submits that the issues framed by the appellants are flawed because: (a) article 50 would only be applicable to proceedings commenced in Kenya as proceedings commenced in a foreign country are conducted by different set of laws which Kenyan courts have no control over; and (b) this court being a judicial authority created under Chapter 10 of the *Constitution* can only issue orders within the confines of its constitutional and statutory mandate and cannot be seen to be aiding and abetting a trial before a foreign court unless its participation is sought. Moreover, it is important to determine whether any act by a foreign body is a risk to the sovereignty of Kenya and that can only be done by subjecting such acts to scrutiny through established legal procedures like judicial intervention.

38. The respondent affirms that the Learned Judges of the superior courts did identify the public policy they based their decisions on. Since there is no provision in our legislations on enforcement of interlocutory orders, the trial Judge was persuaded to adopt the spirit enunciated in the *Foreign Judgments (Reciprocal) Enforcement Act* in concluding that judicial assistance is needed. The mere fact that the Scottish court is not one of the courts clothed with judicial authority over the people of Kenya as required by article 159 is a matter of public policy that the judicial authorities need to intervene to ascertain such orders are in the interest of the people of Kenya. Furthermore, legislative enactments like part VII of the *High Court (Practice and Procedure) Rules*, the *Civil Procedure Act*, order 5 rule (29) and Order 28 of the *Civil Procedure Rules* are themselves embodiment of public concern in dealing with foreign judicial orders.

39. Additionally, in the case of *Central Inland Water Transport Corporation Limited & another v Brojo Nath Ganguly & another* (1986) SCC 156 quoted in *Kenya National Examination Council* [2017] eKLR confirms that public policy is not necessarily the policy of a particular government but "it connotes some matter which concerns the public good and public interest". The respondent further emphasizes that in the case of *Christ for all National v Apollo Insurance Company Limited* [2002] 2EA 366 Ringera J (as he then was) defined public policy to be an issue: which is inconsistent with the *Constitution* or other laws of Kenya whether written or unwritten; inimical to the national interests of Kenya; or contrary to justice and morality. Consequently, public policy can be considered by courts as a matter of discretion to refer to ideas which, for the time being are prevailing in a country and the conditions necessary for the country's welfare. See also *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR.

40. Subsequently, article 1 and 2 as well as article 159 of the *Constitution* delegates supremacy and sovereignty to be exercised by Kenyan judicial system as opposed to Scottish court. The respondent submits that any judicial order issued by the latter court is null and void

unless first sanitized by Kenyan judicial authorities before being executed. It is added that this sanitizing is not restricted to cases involving government, and/or security issues. The respondent contends that determination by a judicial authority in Kenya would not violate the doctrine of *lis alibi pendens* and the appellants argument in this regard is misplaced considering section 6 of the *Civil Procedure Act* is categorical that pendency of a suit in a foreign court shall not preclude a court in Kenya from trying a suit in which the same matters or any of them are in issue in such a foreign court.

41. The respondent submits that the reluctance of the appellants to adhere to established legal procedures of obtaining the required information through official means of Letters of Rogatoire is merely meant to circumvent the legal checks and balances which such letters would guarantee in the interest of both parties.

42. With regard to the award of costs, the respondent asserts that the appellants have failed to point out the arguments against the award of costs which they tabled before the judges of appeal and was ignored by them. It is asserted that mere assumption that in constitutional cases, costs should not be awarded is not enough. Ultimately, the respondent prays for the petition of appeal to be dismissed and costs awarded to it.

E. Analysis and Determination

43. The following issues emerge for the court to determine

i. Whether this court is clothed with the requisite jurisdiction to determine this appeal?

ii. Whether the *locus* inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities

iii. Who should bear the costs of the appeal?

i. Does this court have the requisite jurisdiction to determine this appeal?

44. Before embarking on determining the merits of any appeal, the court must assess whether its jurisdiction is properly invoked. As was held in the celebrated case of *Owners of the Motor Vessel "Lillians" v Caltex Oil Kenya Limited* [1989] KLR 1, without jurisdiction a court has no power and must down tools in respect of the matter in question. Equally, as this court held in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the *Constitution* exhaustively provides for the jurisdiction of a court, the court must operate within those limits. It cannot expand its jurisdiction through judicial craft or innovation.

45. In *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* Sup Ct Petition No 3 of 2012; (2012) eKLR, we delineated this court's jurisdiction under article 163(4)(a) of the *Constitution* that it must be demonstrated that the issues of contestation revolved around the interpretation or application of the *Constitution*. It is the interpretation or application of the *Constitution* by the Court of Appeal that forms the basis of a challenge to this court. So that, where the dispute has nothing or little to do with the interpretation or application of the *Constitution*, this court under article 163(4)(a) will have no jurisdiction to entertain the appeal.

46. These principles are reiterated in the cases *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Pet No 10 of 2013 [2014] eKLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC App No 5 of 2014 [2014] e KLR, *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013]eKLR, *Daniel Kimani Njehia v Francis Mwangi Kimani & another* [2015] eKLR, *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* [2018] eKLR, *Nasra Ibrahim Ibren v Independent Electoral Boundaries & 2 others* [2018] eKLR and *National Rainbow Coalition Kenya (NARC Kenya) v. Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party)*, SC Petition 1 of 2021; [2022] KESC 6 (KLR) (Civ) (17 February 2022). It is against this background that we examine whether the Petition raises issues of Constitutional interpretation and application.

47. The appellants' have filed the present petition of appeal pursuant to article 163(4)(a) of the *Constitution* and rule 33 of the *Supreme Court Rules*, 2020. The appellants contend that there are two main issues for this court to determine; whether their right to fair trial under article 50 was infringed by the trial court and Court of Appeal and whether execution of the orders from the Scottish Court is a matter affecting the sovereignty and national security of Kenya as expressed in articles 1 and 238 of the *Constitution* and concerning the judicial authority of Kenyan courts as prescribed by article 159(1) of the *Constitution*.

48. Having perused the record, we note that it is the manner of enforcement, application or compliance of the orders from the Scottish Court that has been in contention right from the trial court and progressed by way of appeal to ultimately reach this court. We also take note that it is articles 1, 50, 159 and 238 of the *Constitution* that have been the subject of construction and interpretation. Accordingly, we arrive at the conclusion that the appeal falls squarely within the ambit of article 163(4)(a) of the *Constitution*. We therefore find that we have jurisdiction to consider it.

ii. Can the locus inspection orders issued by the Scottish Court be executed in Kenya without intervention by Kenyan authorities?

49. The appellants submit that the *locus* inspection orders which they assert as self-executing by the trial court do not require a process of execution. All they require is compliance by the parties. They take the position that the enforcement of the orders did not touch on the sovereignty of the people, national security to the Republic of Kenya, or threatened the judicial authority of Kenya's courts. They base this argument on the submission that there was nothing in their activities together with their legal counsel or the work the experts intended to carry out on the respondent's private property that could be construed as touching or affecting the national security of Kenyans. They also faulted the trial court and the Court of Appeal for invoking public policy consideration as a basis for declining to allow them enforce the orders while they failed to disclose the specific public policies they were relying on.

50. The respondent argues that it is only through subjecting foreign decisions to scrutiny through the established procedures like judicial intervention that these decisions can be ascertained not to be a risk to the sovereignty of the people. It is further urged that superior courts identified the public policies they based their decisions on. It is argued that the mere fact that the Scottish court is not one of the courts clothed with judicial authority over the people of Kenya as required byarticle 159 is a matter of public policy that the judicial authorities need to intervene to ascertain such orders are in the interest of the people of Kenya. Furthermore, legislative enactments like Part VII of the *High Court (Practice and Procedure) Rules*, the *Civil Procedure Act*, order 5 rule (29) and order 28 of the *Civil Procedure Rules* are themselves embodiment of public concern in dealing with foreign judicial orders. The respondent also pointed out that pursuant to articles 1 and 2 of the *Constitution* and by virtue of article 159, supremacy and sovereignty was donated to the Kenyan judicial system as opposed to the Scottish Court. Therefore, any judicial order by the Scottish Court was void unless sanitized by Kenyan authorities before execution.

51. One of the cornerstones of international law is the principle of territoriality, under which, sovereign states have sole authority over their own territory. As this court found in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR), article 2(5) and (6) of the *Constitution*, recognizes international law (both customary and treaty law) as a source of law in Kenya. It is why Kenya being as a member of the international community is bound by the provisions of the UN Charter. The centerpiece of the United Nations is the sovereign equality of the Member States as enshrined under article 2(1) to (4) of the United Nations Charter provides:

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

52. Due to the territorial nature of jurisdiction, laws of one state do not apply to other states. And rightly so, as different states have different laws in place depending on the state's history, culture and priorities. Sovereignty and the principle of territoriality prevents foreign judgments from having direct operation in other countries. The effect of this principle is ultimately, no judgment of a court of one country can be executed *proprio vigore* (of or by its own force independently) in another country.

53. This has been the subject of interpretation and application, more so by the English Courts and within the Commonwealth countries, that dates as far back as the 19th Century. One such decision is that of *Raja of Faridkot v Gurdyal Singh* (1895) ILR 22 Cal 222 by the High Court in Calcutta. Here the court firmly reinforced the concept of territorial jurisdiction of nations and stated as follows:

> "6. All jurisdiction is properly territorial, and "*extra territorium jus dicenti, impune non paretur*." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory.
>
> .....
>
> 7. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no

> obligation of any kind to obey it, and it must be regarded as a mere nullity by the courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced."

54. To allow universal recognition and enforcement of foreign decisions would result in recognizing that foreign courts are superior to the national courts, thereby infringing on the sovereignty of a country. Further, due to the diversity of laws, automatic recognition may result in enforcement of decisions that go against the laws or public policies of the enforcing country. It is for this reason that there must be adequate safeguards in place. The citizens or residents of the country where the decision is sought to be enforced should not be left without protection in respect to arbitrary measures which might be taken against them in foreign countries.

55. How then do foreign decisions gain recognition and force of law? Which government office or agency is tasked with scrutinizing foreign decisions?

56. It is our considered opinion that Parliament enacted various statutes to deal with different scenarios. For instance, in Extradition proceedings, we have the *Extradition (Commonwealth Countries) Act* (cap 77) and *Extradition (Contiguous and Foreign Countries) Act* (cap 76). In the case of *Director of Public Prosecutions v Okemo & 4 others* (Petition 14 of 2020) [2021] KESC 13 (KLR) where the court found that extradition cases, being criminal in nature the appropriate office to initiate extradition proceedings was the Director of Public Prosecutions. The Attorney General however retains the Executive Authority to receive Requests for Extradition and to transmit the same to the Director of Public Prosecutions for necessary action before a Magistrates Courts in Kenya. In the case of foreign judgments, Parliament enacted the *Foreign Judgments (Reciprocal Enforcement) Act* (cap 43) for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. We shall be shortly be unravelling the conundrum of how judicial assistance is accorded to interlocutory decisions. However, what is evident, is that the courts have an active role to play where foreign decisions are concerned.

57. Under the *Constitution*, it is in the courts and Tribunals established in Kenya through article 159, that the people of Kenya vested judicial authority. This is what informs our considered view that, of the three arms of government, the Judiciary is the better suited authority to scrutinize the decisions of a foreign court. It is also at the juncture of such scrutiny that the courts of an enforcing country examine a decision by the foreign court or tribunal to determine if the same adheres to the *Constitution* and laws of the country. It is here that the country's public policy becomes crucial, as decisions that go against the enforcing country's public policy considerations would not gain recognition.

58. Castel, Jean-Gabriel in "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada" (1971), 17 McGill L.J. 11 writes that the concept of recognizing foreign decisions developed around the 18th century due to growth in English colonies world-over as well as the growth of English foreign trade. Kenya being a former colony and now a member of the Commonwealth, our history is intricately tied to the United Kingdom. This need for recognizing and enforcing decisions by foreign courts or tribunals was anchored upon the doctrine of comity. The *Black's Law Dictionary*, 9th Edition defines comity as follows:

> "A practice among political entities (as nations, states, or courts of different jurisdictions) involving esp mutual recognition of legislative, executive and judicial acts."

59. The application of the doctrine of comity means that the recognition of foreign decision is not out of obligation, but rather out of convenience and utility. One of the more influential statements of the doctrine of comity still applicable today was made in *Hilton v Guyot*, 159 US 113, 143 (1895) where Justice Gray of the Supreme Court defined comity as follows:

> "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent of which the law of one nation... shall be allowed to operate within the dominion of another nation, depends upon... the "comity of nations"... "
>
> Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws..."

60. This approach prioritizes citizen protection while taking into account the legitimate interests of foreign claimants. This approach is consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts.

61. The Supreme Court of Canada in the case of *Morguard Investments Ltd v De Savoye,* [1990] 3 SCR 1077 highlighted the fact that the meaning and tenor of the doctrine of comity has evolved over the years to facilitate the flow of wealth, skills and people across boundaries. This has become ever more crucial with the globalization trend in which the

world's economies, cultures, and populations are highly interdependent due to cross- border trade in goods and services, technology, and flows of investment, people, and information. Mehren and Trautman have observed in *"Recognition of Foreign Adjudications: A Survey and A Suggested Approach"* (1968), 81 Harv L Rev 1601, at p 1603: "The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted." The Supreme Court of Canada in the of *Morguard Investments Ltd v De Savoye*, [*supra*] held as follows:

> " Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.
>
> But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.
>
> For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the Unites States in *Hilton v Guyot*, 159 US 113 (1895)."

62. Turning back to the dispute before the court, these principles of territoriality and sovereignty are reflected in various articles of the *Constitution of Kenya*. Pursuant to article 2(1), the *Constitution* of Kenya is the supreme law of the land and binds all persons and all State organs at both levels of government. Pursuant to article 2(4) of the *Constitution*, any law that is inconsistent with the *Constitution* is void, and any act or omission in contravention of the *Constitution* is invalid. It goes without saying, that any foreign decision that is not consistent with the *Constitution* is void and would not be recognised.

63. Article 1 of the *Constitution of Kenya* lays out the expression of sovereignty of the people of Kenya as follows:

> " Sovereignty of the people
>
> (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
>
> (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
>
> (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
>
> a. Parliament and the legislative assemblies in the county governments;
>
> b. the national executive and the executive structures in the county governments; and
>
> c. the Judiciary and independent tribunals.
>
> 4. The sovereign power of the people is exercised at—
>
> a. the national level; and
>
> b. the county level."

64. Article 4(1) declares Kenya to be a sovereign republic. The people of Kenya exercise this sovereign power themselves and through the delegated state organs such as the Judicial arm of government. Article 159(1) provides that judicial authority of thecourts 'is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.' While article 160(1) provides that 'in the exercise of judicial authority, the Judiciary, as constituted by article 161, shall be subject only to this

Constitution and the law and shall not be subject to the control or direction of any person or authority.'

65. This court in *Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co Advocates & 725 others*, SC Petition No 13 of 2013 stated that judicial authority in Kenya derives from and is exercised pursuant to the *Constitution*. The domestic courts therefore exercise donated power that the people democratically consented to. The legal philosopher Martin Loughlin in '*The Idea of Public Law'* (Oxford University Press, 2003) at pages 84-85 argues that sovereignty as power is an essential precondition of any legal order. This is based on the fact that it is the people who are the 'repository of sovereignty in those regimes that adopt formal constitutions and allocate legal authority to designated organs of government'. Democratic self-rule will therefore be threatened where foreign courts, to whom the people have not donated judicial authority, can directly exercise influence within the polity without intermediation with domestic bodies.

66. We have no difficulty finding that decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced. Consequently, it is also our finding that Kenya as a sovereign state cannot automatically allow citizens, individuals or officers of a foreign state to carry out upon its own territory the decisions of a foreign court, without authorization from the Kenyan Government upon recognition of the decision of the foreign court or tribunal. Such an action would violate the principle of sovereignty enshrined in our Constitution. It is therefore our finding that the appellants' experts/examiners cannot enter the country to execute the locus inspection orders without authorization.

67. It is for the aforementioned reasons that one of the avenues Kenya has for the recognition and enforcement of decisions from foreign courts and tribunals is the *Foreign Judgments (Reciprocal Enforcement) Act*, cap 43 Laws of Kenya. This is our first port of call. This preamble of the statute provides that the Act serves 'to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith'.

68. Section 3(1) of this *Act* stipulates which judgments the act applies to and lists the following:

> "(a) a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;

(b) a judgment or order of a designated court in civil proceedings under which movable property is ordered to be delivered to any person, including an order for the delivery of movable property as part of a scheme for the provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;

(c) a judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person;

(d) a judgment given in any court on appeal against a judgment or order of a designated court referred to in paragraphs (a) to (c);

(e) a judgment of a designated superior court for the costs of an appeal from a subordinate court, whether or not a designated court, or from an award referred to in paragraph (f); and

(f) an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country."

69. Section 3(2) complements (1) aforesaid as it stipulates the two conditions that the judgments above must meet. It provides as follows:

" 2) This Act applies to a judgment referred to in sub section (1) if it—

a. requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or

b. is final and conclusive as between the parties thereto,

but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court."

70. Section 3(3) lists out the nature of judgments that the *Act* does not apply to. These are the following:

> " This Act does not apply to a judgment or order—
>
> a. whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty;
>
> b. to the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages;
>
> c. for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;
>
> d. in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable;
>
> e. in proceedings in connection with the custody or guardianship of children;
>
> f. in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs;
>
> g. in a matter of succession to, or administration of, estates of deceased persons whereby a sum of money is payable or movable property is deliverable;
>
> h. in a matter of social security or public assistance whereby a sum of money is payable by or to a public authority or fund;
>
> i. in bankruptcy proceedings or in proceedings for the winding-up or re-organization of a corporation or in proceedings for judicial arrangements, compositions or similar matters;
>
> j. in proceedings relating to damage, death or injury caused by occurrences involving nuclear matter or the emission of ionising radiation;

k. of a designated court in any proceedings if—

(i) the bringing of those proceedings in that court was contrary to an agreement, or to an instrument in respect of which the proceedings were instituted, whereby the dispute, or the proceedings, were to be settled otherwise than in the courts of the reciprocating country; and

(ii) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given;

(iii) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court;

l. which is regarded for the purposes of its enforcement as a judgment of a designated country but which was given in another country;

m. given by a designated court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of the latter judgment."

71. Scotland is one of the constituent countries of United Kingdom, and therefore is one of the reciprocating countries under the *Foreign Judgments (Reciprocal Enforcement) Act*. However, as is already evident from the aforementioned provisions, interlocutory orders such as the impugned locus inspection orders issued by the court in Scotland do not fall within the parameters of the statute for two reasons. First, they are not on the list of decisions that the Act applies to and second, the locus inspection orders are not final and conclusive.

72. The need for decisions to be final and conclusive is founded on two principles, the conclusiveness rule and *res judicata*. These two concepts are interlinked and are consistent with two maxims *interest reipublicae ut sit finis litium* meaning it is interest of the state that there should be a limit to litigation and *nemo debet bis vexari pro eadem causa* meaning no person should be punished twice for the same offence. Marussia Borm-Reid in her article '*Recognition and Enforcement of Foreign Judgments' International and Comparative Law Quarterly,* Vol 3 No 1 (1954) pp 49-92 cited *Smith's Leading Cases*, (1929) 13th ed, ii 717-18 where one of the justifications for the need for conclusiveness was that 'facts can never be enquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them'.

73. The conclusive judgment reached by the foreign court or tribunal creates an indefeasible right in favour of the judgment debtor and is to be exercised against the judgment creditor. It is not the judgment but the right vested under that judgment which is recognized and enforced. This position is reiterated by Jean Gabriel Castel's article where she quotes *HE Read's Recognition and Enforcement of Foreign Judgments in the Common Law Unity of the British Commonwealth (1934), pp 52-53, 125*. Dr Read stated as follows:

> "a foreign judgment is recognized because it establishes the existence of a foreign judicially-created substantive fight. A right which has been duly acquired under the law of any civilized country by virtue of the judgment is to be recognized and enforced by the forum. He states that the true basis of the recognition of a foreign judgment, lies in the fact that:
>
> ... a vested right has been created through the judicial process by the law of a foreign law district. This basis not only supports and explains the finality requirement and conclusiveness rule; it is implicit in the doctrine of territoriality of law. This however, is not to say that the Anglo-Dominion common law of foreign judgments gives effect to the so-called vested rights doctrine of conflict of laws to the extent of recognizing every right created by a foreign-territorial law through the judicial process.
>
> To be recognized as an operative fact the right must have been created by the law of a district which had judicial jurisdiction in the international sense and have satisfied other requirements." (Emphasis added)

74. In the Canadian case of *Laferriere v Gariepy* (1920) 62 Can SCR 557, the Supreme Court held that the doctrine of *res judicata* is based on a presumption that the conclusion reached by a judge is true and having become absolute can longer be questioned and is a bar to any further action between the same parties regarding the same matter. It therefore follows that as a matter of law and international comity, the receiving state should allow a foreign judgment its full effect, without trying the merits of the case afresh, as on a new trial or appeal.

75. The test of finality was settled in the old English case of Re *Henderson, Nouvion v. Freeman* (1889) LR 15 AC 1 where the Court of Appeal, Lindley LJ held that

> "The test of finality and conclusiveness of any judgment is to be found in the view taken of it by the tribunals of the country in which it is pronounced and if a judgment leaves the rights of the parties uninvestigated and undetermined and avowedly leaves those rights to be determined in some other proceedings

> the judgment cannot be treated here as imposing some obligations which our tribunals ought to enforce."

On appeal to the House of Lords, Lord Herschell held as follows:

> " In order to establish that a (final) judgment has been pronounced it must be shown that in the court by which it was pronounced it conclusively, finally and forever established the existence of the debt of which it sought to be made conclusive evidence in this country, so as to make it res judicata between the parties."

76. The principle of *res judicata* resonates with our Kenyan laws as it is codified under section 7 of the *Civil Procedure Act* which provides as follows:

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

77. It has also been the subject of interpretation and application by the courts including by this court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*, SC Motion No 42 & 43 of 2014 Consolidated [2016] eKLR held as follows regarding the doctrine of *res judicata*:

> " *Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights."

78. This is not to say that when acourt is presented with a foreign judgment for recognition and enforcement it proceeds to rehear the same on merits or as an appeal on the correctness or otherwise of the judgment. The issues for considerations for thecourts in Kenya when examining a foreign decision are outlined insection 9 of the *Civil Procedure Act*, cap 21 Laws of Kenya and include the following:

> 9. When foreign judgment not conclusive
>
> A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—

a. where it has not been pronounced by a court of competent jurisdiction;

b. where it has not been given on the merits of the case;

c. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

d. where the proceedings in which the judgment was obtained are opposed to natural justice;

e. where it has been obtained by fraud;

f. where it sustains a claim founded on a breach of any law in force in Kenya.

Additional considerations on the jurisdiction of the foreign court are set out in sections 4 and 5 of the *Foreign Judgments (Reciprocal Enforcement) Act*. Broadly they are considerations on whether there was opportunity for full and fair trial, whether the court was competent to hear and determine the matter, whether the defendant had notice of the trial, whether the legal system was one that ensured impartial justice and was devoid of fraud in procuring the judgment.

79. From the foregoing, it is manifestly clear that the locus inspection orders issued by the court in Scotland do not meet the finality test and therefore do not fall within the ambit of the *Foreign Judgments (Reciprocal Enforcement) Act*.

80. Be that as it may, we take note of the fact that the superior courts found that our procedural laws contemplated judicial assistance. The superior courts made reference to various sections of the *Civil Procedure Act*, cap 21 Laws of Kenya and rules, 2010, as well as provisions of the *Judicature Act*.

81. As rightly noted by the trial court, the locus inspection orders are part of the discovery process in litigation. Discovery at the very basic level entails a pre-trial procedure to ascertain facts to be presented at the trial, and as noted by the High Court (Gikonyo J) in *Eliud Muturi Mwangi (practicing in the name and style of Muturi & Co Advocates) v LSG Lufthansa Services Europa/Africa GMBH & another,* HC Civil Case No 154 of 2014 [2015] eKLR, it has constitutional underpinning in the right to access information enshrined in article 35.

82. Section 22 of the *Civil Procedure Act*, cap 21, empowers a court, either on its own motion or application by the parties, to make any orders as may be necessary for discovery. Section 22 provides as follows:

" 22. Power to order discovery and the like

> Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—
>
> a. make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
>
> b. issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
>
> c. order any fact to be proved by affidavit.

83. Some of the provisions the trialcourt referred to were sections 54 and 55 of the *Civil Procedure Act*. These fall under part IV of the *Civil Procedure Act* which deals with 'Incidental Proceedings', more specifically commissions. Section 52 therein makes provision for the power of the court to issue commission. It provides as follows:

> " 52. Power of court to issue commission
>
> Subject to such conditions and limitations as may be prescribed, the court may issue a commission—
>
> a. to examine any person;
>
> b. to make a local investigation;
>
> c. to examine or adjust accounts; or
>
> d. to make a partition."

84. The word 'commission' is not defined in the *Civil Procedure Act* or Rules. In the *Black's Law Dictionary*, 9th edition it is defined as follows:

> " 1. A warrant or authority from the government or a court, that empowers the person named to execute official acts. 2. The authority under which a person transacts business for another. 3. A body of persons acting lawful authority to perform certain public services."

85. Sections 54 and 55 of the *Civil Procedure Act* are pertinent to the present appeal as they empower the High Court to issue commissions for the examination of witnesses outside Kenya and require the commissions from foreign courts for examination of witnesses be approved by the High Court before execution respectively.

86. For us this is a demonstration that the trial court was correct in its supposition that the procedural provisions are a demonstration that judicial assistance is a prerequisite in enforcing interlocutory orders. In tandem with this, there is a procedure to be followed when a foreign court or tribunal issues orders geared towards discovery of evidence.

87. Order 28 of the *Civil Procedure Rules*, 2010 on 'Commissions and references' further activates sections 52 to 55 of the *Civil Procedure Act*. We take note that order 28 rule 4 makes provision for the courts in Kenya to make a request for commission of taking evidence of a witness outside Kenya. While conversely, order 28 rule 5 is on the courts in Kenya receiving commissions from foreign courts and tribunals for the examination of a witness. These provisions, provide as follows:

> " 4. Request to examine witness abroad [order 28, rule 4]
>
> Where any court to which application is made for the issue of a commission for the examination of a person residing at any place not in Kenya is satisfied that the evidence of such person is necessary, the court may issue such commission or a letter of request.
>
> 5. Court to examine witness pursuant to commission [order 28, rule 5]
>
> Every court in Kenya receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

88. Order 28 rule 17 provides as follows:

> " 17. Commissions issued by foreign courts [order 28, rule 17]
>
> The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by—
>
> a. courts situated in any part of the Commonwealth other than Kenya; or
>
> b. courts of any foreign country for the time being in alliance with Kenya."

89. The *High Court (Practice and Procedure) Rules* made pursuant to section 10 of the *Judicature Act*, cap 8 Laws of Kenya are also instructive. Part V provides a standard form of a letter of request to a Foreign Tribunal to Examine Witness Abroad. Part VII – Evidence for Foreign Tribunal, Regulation 1, provides as follows:

> " 1. Application to court
>
> Where, under the Foreign Tribunals Evidence Act, 1856, a civil or commercial matter or a criminal matter, is pending before a court or tribunal of a foreign country and it is made to appear to the court or a judge, by commission rogatoire, or letter of request, or other evidence as hereinafter provided, that that court or tribunal is desirous of obtaining the testimony in relation to the matter of any witness or witnesses within the jurisdiction, the court or a judge may on the ex parte application of any person shown to be duly authorized to make the application on behalf of the foreign court or tribunal, and on production of the commission rogatoire, or letter of request, or of a certificate signed in the manner and certifying to the effect mentioned in section 2 of the *Foreign Tribunals Evidence Act*, 1856, or such other evidence as the court or a judge may require, make such order or orders as may be necessary to give effect to the intention of the Acts above-mentioned in conformity with section 1 of the *Foreign Tribunals Evidence Act*, 1856.

90. Regulation 7 of the *High Court (Practice and Procedure) Rules* made pursuant to section 10 of the *Judicature Act*, provides as follows:

> 7. Application of rules to British Tribunals
>
> This part applies, so far as may be, to applications under the Evidence by Commission Act, 1859 for the purpose of giving effect to a commission or letter of request from a Commonwealth Tribunal out of the jurisdiction, but in those cases the duly certified depositions and letter of request, if any, shall be returned to the authority which forwarded the commission or letter of request, unless they are returned under the provisions of rule 9.

91. Regulations 8 and 9 therein provide as follows:

> 8. Application to court by Attorney-General

> Where a commission rogatoire or letter of request mentioned in rule 9 is transmitted to the High Court by the Minister with an intimation that it is desirable that effect should be given to it without requiring an application to be made to thecourt by the agents in Kenya of any of the parties to the action or matter in the foreign country, the Registrar of the High Court shall transmit it to the Attorney-General, who may thereupon make such applications and take such steps as may be necessary to give effect to the commission rogatoire or letter of request in accordance with rules 1 to 6.
>
> 9. Return of commission direct to court or Foreign Tribunal
>
> Where a commission rogatoire or letter of request has been received from a Foreign Court or Tribunal direct, without having been transmitted through the Minister, then, notwithstanding anything contained in rule 4, the Registrar may, after the commission rogatoire or letter of request has been complied with, if in his opinion the course would tend to avoid undue inconvenience and delay, return the depositions duly certified direct to the court or Foreign Tribunal from which the commission rogatoire or letter of request emanated.

92. We therefore find, the import of sections 54 and 55 of the *Civil Procedure Act*, order 28 of the *Civil Procedure Rules*, as well as the *High Court (Practice and Procedure) Rules* made pursuant to section 10 of the *Judicature Act*, is that the appropriate method of seeking judicial assistance is through the issuance of commission rogatoire or letter of request to the High Court in Kenya seeking assistance.

93. As we have highlighted these provisions are specific for the examination of witnesses. However, we note thatsection 52 of the *Civil Procedure Act* lists the various types of commissions that the court has the power to issue and these are not limited to examination of witnesses. Rather, it includes the power to 'make a local investigation; to examine or adjust accounts; or to make a partition'.

94. The nature of these orders is useful in discovery, whose purpose, as stated in the often-cited case of *Oracle Productions Ltd v Decapture Limited & 3 others*, HCCC No 567 of 2011 [2014] eKLR "....is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial." These orders may also be issued in the course of trial when the court observes the need for them in order to better discern the root of the controversy and arrive a fair and just determination. It is our considered opinion, that

this is why Order 28 is elaborate on commissions as evinced in the Rules and includes the following:

> "6. Return of commission with deposition of witness [order 28, rule 6]
>
> Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall form part of the record of the suit.
>
> 7. Commissions to make investigations [order 28, rule 7]
>
> On the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining—
>
> (a) any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties; or
>
> (b) the value of any property or the extent of any damage thereto, or the amount of returns, profits, damages or mesne profits.
>
> 8. Procedure of commissioner [order 28, rule 8]
>
> (1) The commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the court.
>
> (2) The report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court, or, with the permission of the court, any of the parties to the suit, may examine the commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

> (3) Where the court is for any reason dissatisfied with the proceeding of the commissioner, it may direct such further inquiry to be made as it shall think fit."

95. It also includes order 28 rule 14 on the powers of the commissioner:

> " 14. Powers of commissioner [order 28, rule 14]
>
> Any person appointed under this order may, unless otherwise directed by the order of appointment—
>
> a. examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the person appointed thinks proper to call upon to give evidence in the matter referred to him;
>
> b. call for and examine documents and other things relevant to the subject of the inquiry; or
>
> c. at any reasonable time enter upon or into any land or building mentioned in the order."

96. It is for the foregoing reasons, that thiscourt is of the view that the same procedure of foreign courts seeking judicial assistance in Kenya for examination of witnesses is the same procedure to be followed for carrying out local investigations, examination or adjustment accounts; or to make a partition. It bears repeating that this procedure is through the issuance of commission rogatoire or letter of request to the High Court in Kenya seeking assistance.

97. Be that as it may, we take cognizance of the fact that this procedure is not immediately apparent. Even the High Court and Court of Appeal were not able to promptly identify with precision the relevant applicable laws. The High Court and Court of Appeal were wrong for extending the spirit of the *Foreign Judgments (Reciprocal Enforcement) Act* beyond its application as this was not the appropriate statute that was applicable to the present case.

98. Needless to say, ignorance of the law is not a defence. However, where the law is not easily discernible or the proper course of action to follow is not easily perceptible by both Courts and litigants, then that speaks to the clarity of the law or lack thereof, rather than the fault of the litigant. For this reason, we cannot fault the appellants for stumbling through the complexity of ambiguous and obstruse statutes, and failing to find a solution.

99. Even now, the procedural steps to be undertaken as set out under part VII – Evidence For Foreign Tribunal of the *High Court Practice and Procedure Rules* made pursuant to section 10 of the *Judicature Act*, are not clear. It is not explicitly clear whether the letter of request is

to be sent to the Attorney General, the Minister (now Cabinet Secretary) or directly to the Registrar of the High Court. However, for procedural propriety, we direct the appellants to pursue having the Court in Scotland channel a commission rogatoire or letter of request to the Registrar of the High Court in Kenya for assistance. This would then activate or trigger the High Court in Kenya to implement the Rules as contained in order 28 of the *Civil Procedure Rules*, 201o in executing the request.

100. For the forestated reasons and for the avoidance of doubt, we find no merit in the appeal and dismiss the same.

101. We have taken keen note that the laws currently in place regarding this issue, require updating in order to be brought in line with the *Constitution*. There is also need to harmonize these laws with the other existing laws such as the *Civil Procedure Act*, rules, 2010 any other relevant laws. The *High Court (Practice and Procedure) Rules* in the *Judicature Act* are stuck in time warp! We are surprised that the law in this regard is yet to be updated. These procedures in their current state remain a hindrance to Kenyans realizing their right to access to justice as guaranteed by article 48 of the *Constitution*.

102. The United Kingdom has since repealed the *Foreign Tribunals Evidence Act*, 1856 and now have the *Evidence (Proceedings in other Jurisdictions), Act*, 1975 as read together with part 34 (II) of the *Civil Procedure Rules*, 1998 for assistance in proceedings in Foreign Courts. The assistance relates to the examination of witnesses, either orally or in writing; for the production of documents, the inspection, photographing, preservation, custody or detention of any property, the taking of samples of any property and the carrying out of any experiments on or with any property, the medical examination of any person or even for the taking and testing of samples of blood from any person. We see no reason why our own laws should not be brought up to date and include the advancements both in technology and case management systems.

103. In order to achieve compliance with this judgement, we direct that Attorney General, Kenya Law Reform and Parliament do commence an enquiry and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.

Who should bear the costs of the Appeal?

104. According to this court's finding in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, the award of costs would normally be guided by the principle that "costs follow the event" the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. This court also observed that the vital factor in setting the preference, is the judiciously

exercised discretion of the court, accommodating the special circumstances of the case while being guided by ends of justice.

105. As we have found hereinabove, we cannot fault the appellants for the lack explicitness of the appropriate procedure they should have followed to enforce the locus inspection orders. Indeed, it would therefore be unjust and undeserved to condemn them to pay costs.

106. Accordingly, we order that each party bear their own costs of this appeal.

F. Orders

107. Consequent upon our conclusion above, we finally order that;

a. The petition of appeal dated August 12, 2021 and lodged on August 13, 2021 is hereby dismissed.

b. Each party shall bear their own costs of the Appeal.

c. We direct that this judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.

Orders accordingly.

MAK v RMAA & 4 others (Petition 2 (E003) of 2022)
[2023] KESC 21 (KLR) (2 March 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & W Ouko, SCJJ

Neutral citation: [2023] KESC 21 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine appeals from the Court of Appeal involving interpretation of the Constitution – issues on parental access of a child, custody of a child, the best interest of the child, parental rights after a child has attained the age of 18 years – whether such issues warranted an appeal to the Supreme Court as a case involving the interpretation or application of the Constitution – Constitution, article 163(4)(a).*

Family Law *– custody - rights of the child – best interests of the child – parental rights and responsibilities - parental responsibility agreement - what was a parental responsibility agreement – what were the legal consequences of entering into a parental responsibility agreement - what guidelines should courts consider when balancing a child's best interests vis-à-vis the enforcement of parental rights and responsibilities.*

Jurisdiction *– jurisdiction of the High Court – jurisdiction over matters concerning the rights of the child – where a Kenyan High Court had issued an order that was not observed by a foreign court deciding over a case involving the same parties and the same subject matter - whether Kenyan Courts were bound by a decision of the High Court of England where the English Court pronounced itself on custody and parental responsibilities and the same parties were before the Kenyan courts - whether the High Court and the Court of Appeal deferred to the English Court by disregarding Kenyan Law as well as a High Court order that was in force while determining the matter that was before them - whether the rights and responsibilities issued by the Kenyan High Court in a parental responsibility agreement could be extinguished by a foreign court without considering Kenya's laws for the best interests of the child – Constitution, article 53; Children Act, No 8 of 2001 (Repealed), sections 6(1) and (2) and 24(1); United Nations Convention on the Rights of the Child, 1989, article 9; African Charter on the Rights and Welfare of the Child, article 19*

Brief facts

The appellant and the 1st respondent married under the African Christian Marriage and Divorce Act (repealed) and were blessed with a son. The marriage between the appellant and 1st respondent broke down and the appellant petitioned for dissolution. Before the dissolution, the parties had entered into a Parental Responsibility Agreement (PRA).

In 2014, the appellant, living with the minor in Kenya, moved to York in the United Kingdom to pursue a master's degree in Law. The 1st respondent gave the appellant his consent for her to be accompanied by the child to the United Kingdom. The parties turned on one another. It was the appellant's case that the 1st respondent used his influence in London and falsely accused her of having intentions to injure the child with the aim of having her arrested. On the other hand, the 1st respondent deposed that, as a consequence of complaints made to him by the child, he

contacted the National Society of Prevention of Cruelty to Children in the United Kingdom and they sent social services to speak to the minor. During all those incidents, the appellant averred that she succumbed to illness causing her to relocate back to Kenya. The appellant applied for a child's arrangement order, in the United Kingdom for the child to live with her. The 1st respondent cross-applied for a child arrangement order that the child would live with him.

The appellant also filed suit at the High Court that sought for the PRA to be adopted as an order of the court with the High Court granting the order sought. At the time the order to adopt the PRA had been granted, the 1st respondent had moved from the United Kingdom and was residing in Tanzania, but the child was still in boarding school in the United Kingdom. Armed with the order from the High Court adopting the PRA, the appellant went to the High Court at Dar-es-Salaam in Tanzania and sought to have the order enforced under the Reciprocal Enforcement of Foreign Judgments Act (cap 8, RE 2002) in Tanzania. The Tanzanian High Court found that under section 2 of the Judgment Extension Act (cap 7, RE 2002), decrees from Kenya that could be executed in Tanzania were only those that related to debts, damages, or costs and that the parental responsibility agreement did not fall in either of those categories.

The Family Court in the United Kingdom High Court of Justice Family Division determined that the minor was habitually resident in England and Wales, the minor was not habitually resident in any other jurisdiction, whilst the child continued to be habitually resident in England and Wales, the English Courts retained jurisdiction to determine any issue in respect of parental responsibility. The English Court also recorded that the appellant had on at least one occasion hit her son causing him physical harm; that the appellant had been charged with the criminal offence of child cruelty and a criminal trial was pending; that the appellant had failed to attend two hearings in respect of the criminal charges and a warrant had been issued for her arrest. The child was declared a ward of the court and needed permission of the court to travel out of the English Court's jurisdiction, custody was also awarded to the 1st respondent.

Subsequently, the appellant filed a petition at the High Court of Kenya in which she alleged that her constitutional rights and freedoms and those of the child had been contravened. She claimed that the 1st respondent caused the child to be admitted as a ward of the United Kingdom Court which infringed on the child's right to Kenyan nationality and citizenship. The High Court determined that the 1st respondent had not infringed or violated any of the fundamental rights and freedoms against the appellant or the child. Further aggrieved, the appellant filed an appeal at the Court of Appeal on the same grounds as in the High Court which was also dismissed.

The appellant filed the instant appeal before the Supreme Court where she contended that the decisions of the English Court and of the Kenyan High Court and Court of Appeal were against the best interest of the child and were derogation from the PRA which was in force.

Issues

i. Whether issues on parental access to a child, custody of a child, the best interest of the child, parental rights after a child has attained the age of eighteen (18) years warranted an

appeal to the Supreme Court as matters involving the interpretation or application of the Constitution

ii. What was a Parental Responsibility Agreement?

iii. Whether the High Court and Court of Appeal properly applied the decisions issued by the Family Court in the United Kingdom in arriving at their determination.

iv. What guidelines should courts consider when balancing a child's best interests vis-à-vis the enforcement of parental rights and responsibilities?

v. Whether Kenyan Courts were bound by a decision of the High Court of England where the English Court pronounced itself on custody and parental responsibilities and the same parties were before the Kenyan courts.

vi. Whether the rights and responsibilities issued by the Kenyan High Court in a Parental Responsibility Agreement could be extinguished by a foreign court without considering Kenya's laws for the best interests of the child.

vii. Whether the High Court and the Court of Appeal deferred to the English Court by disregarding Kenyan Law as well as a High Court order that was in force while determining the matter that was before them.

Held

1. The running theme in both superior courts was the enforcement of parental rights vis-à-vis the rights of the child. The instant appeal touched on parental rights, the child's best interests and the right to fair hearing. The instant matter was within the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution.

2. The determinations made by the superior courts relied on the findings of the English Court. However, the English Court did not consider the significance of the Parental Responsibility Agreement (PRA) and the consequences of its violation. Judgments from foreign courts did not fall within the purview of the issues for consideration on judicial notice under the Evidence Act. The Court of Appeal erred in placing credence on the findings of the family court in England which largely disregarded the PRA; an agreement that could not be violated without consequence. The PRA was a binding agreement between both the appellant and the 1st respondent and could only be terminated by the High Court.

3. There were express provisions on the procedure to follow to vacate a PRA. The PRA attained more force when it was adopted as an order of the High Court. The PRA was entered into voluntarily by both the appellant and the 1st respondent and neither of them had made any steps towards vacating it. The English Court alluded to the PRA and dismissed it ever so casually, without taking into account the Kenyan legal regime surrounding the PRA. Specifically, it ignored Kenya's article 53 of the Constitution on the rights of children, the Children Act, and case law concerning PRA. Most importantly, it overlooked the fact that there was a legally binding court order on the PRA. Those liberties could not be taken by Kenya's superior courts.

4. The English Court made orders on the PRA that disregarded the sovereignty of the Kenyan legal system over its nationals. The superior courts ought not to have succumbed to the same temptation. They should have had regard to section 26 of the Children Act (repealed). They needed to interrogate the status of the PRA seeing that the High Court had adopted it as an order of the court. Once adopted as an order of the court, it could not be violated without consequences. If one parent violated the agreement, then they were liable to legal proceedings. Not being vacated, the PRA remained a binding order of the High Court until the child attained eighteen years of age.
5. The superior courts erred by accepting and relying on the English Court's decision on the PRA. The error of their finding was compounded by the fact that the Children's Act had specific provisions on how a PRA was vacated. It was improper for the superior courts to rely on the English's court determination which did not refer to Kenyan laws, the Convention of the Rights of the Child (CRC), and the African Charter on the Rights and Welfare of the Child (ACRWC). That was the legal regime by which the PRA ought to have been considered. At the very least, the trial court ought to have heard the parties to the PRA before invalidating it. English court's orders of August 7, 2015, did not supersede the PRA.
6. The children's rights legal regime (the Constitution, Children Act (repealed), CRC, and the African Charter on the Rights and Welfare of the Child) emphasized the centrality of the best interest of the child. The best interest of the child was determined by the circumstances of the case as they specifically related to the child. That comprised the principles that prime the child's right to survival, protection, participation, and development above other considerations and included the rights contemplated under article 53 (1) of the Constitution. The focus had to be on the child and what was best for the child.
7. There was no hierarchy in the children's rights provided for under the Constitution. All the rights provided under article 53 were in the child's best interest. The 'best interests' concept was further strengthened by being the paramount consideration. The best interests of the child were to be the determining factor when deciding on the child. It was against that aspect that parental rights ought to be balanced. No right should be compromised by a negative interpretation of a child's best interest. The record did not provide any cogent evidence of the English Court balancing between parental rights and the best interest of the child.
8. The court could not tell which legal standards were applied to conclude that the appellant was an unfit mother because the superior courts did not test the evidence and no warrant of arrest was in the record as evidence.
9. The appellant produced as part of her testimony two medical reports by pediatricians from the United Kingdom and Kenya on the child which revealed that there was no indication of any form of abuse against the child. Although the English Courts did not find it necessary to determine each of the allegations made by the child, the superior courts erred by not considering and testing the evidence tendered before them by the appellant on the allegations of abuse. The instant court was unconvinced that the appellant received a fair hearing.

Nothing on the record indicated whether the appellant was heard at all on that issue. Nothing was indicative of whether the English or Kenyan courts considered the belt-beating discipline: excessive or otherwise. It remained unproven whether the appellant posed a continuous danger to the child.

10. The record reflected an email dated July 21, 2013 from the 1st respondent expressing gratitude to the appellant for her wonderful mothering skills. There wasn't sufficient cogent evidence on record to lead to the finding that the appellant was an unfit mother liable to zero direct contact with the child. The appellate court erred in endorsing the High Court decision which purported to extinguish the appellant's parental rights and responsibilities.

11. The Supreme Court could not endorse the decisions of the superior courts which embraced the decisions of the English court because the English court did not consider the totality of the circumstances of this case in the following ways. Firstly, the English court declared that the child was habitually resident in England and Wales while ignoring that he was first and foremost a Kenyan national with attendant rights. He was deprived of a country of his own and of its protection and support socially and culturally. The minor was made a ward of an alien court when he was a Kenyan national. In adopting the findings, the Court of Appeal did not consider that that was in contravention of the rights enshrined in article 53(1)(a) of the Constitution and the CRC.

12. The child's constitutional rights to nationality, parental care, and responsibility which included equal responsibility of the mother and father to provide for the child whether they were married to each other or not had been infringed. That finding was also in light of the English court's orders that the 1st respondent had care and control of the child. The mother was to have no direct contact with the child. The father could determine every aspect of the child's life: where he went to school, lived, or holidayed. The same courts determined that the child could ably articulate himself on the degree of integration in a social and family environment (how he saw his connections, social relationships, and support system). It was ironic because his perspective would largely be in the lens of the 1st respondent. He had been deprived of direct contact with his other parent, so even though his views and desires were heard, he could not have had a balanced assessment of the situation.

13. It was evident from sections 6(1) and (2) and 24 (1) of the Children Act (repealed), article 9 of the CRC, and article 19 of The African Charter on The Rights and Welfare of The Child that the child had a right to parental care and it was in the best interest of the child that he was brought up and cared for by his or her parent. That right could only be denied if it was proved with cogent evidence and valid grounds that a parent was not suitable or was incapable of taking care of the child. A child needed both of their parents which was their right, especially where a parent's incapacity had not been proven as in the instant case.

14. The society in which children grew up shaped who they were. Having both a mother and father involved in a child's life could provide significant social, psychological, and health benefits. The stability of having a relationship with both parents could provide security and

greater opportunities for children to find their paths to success. Even if circumstances may warrant limited access to a parent, a court should order supervised access. The Supreme Court had the constitutional obligation to ensure that the child had access to parental care and protection as enshrined in the Constitution.

15. The concept of the child's best interest was flexible and adaptable. It should be adapted and defined on an individual basis, according to the specific situation of the child concerned considering their personal context, situation, and needs.

16. Parental rights did not trump the best interests of the child. However, parental rights could not be ignored if they were in the best interests of the child. The concept of the child's best interests was aimed at ensuring both the full and effective enjoyment of all the children's rights recognized in the Constitution, the Children Act, the CRC, and the African Charter on The Rights and Welfare of The Child. They were all geared towards the holistic development of the child.

17. Courts while making a decision that would impact the child were mandated to consider all circumstances affecting the child. The following guidelines ought to be considered when balancing a child's best interests and parental rights and responsibilities:
    1. The existence of a PRA between the parties.
    2. The past performance of each parent.
    3. Each parent's presence including his or her ability to guide the child and provide for the child's overall well-being.
    4. The ascertainable wishes of a child who was capable of giving/expressing his/her opinion.
    5. The financial status of each parent.
    6. The individual needs of each child.
    7. The quality of the available home environment.
    8. Need to preserve personal relations and direct contact with the child by both parents unless it was not in the child's best interests, in which case supervised access to the child was to be granted.
    9. Need to ensure that children are not placed in alternative care unnecessarily.
    10. The mental health of the parents.
    11. The totality of the circumstances.

18. It was never in a child's best interest when the parents were engaged in a protracted court battle. Court battles relating to children were more often than not very selfish and it was easy to overlook the psychological and mental harm done to the child in the process. In the instant matter, the appellant had not had direct contact with the minor since August 7, 2015. That contravened Kenya's legal regime on the rights of the child. The child turned eighteen (18) on February 12, 2022. As such, the child was at liberty to choose whom to live with and whether or not he wanted the see the appellant.

Appeal allowed.

Orders

i. *Judgment of the Court of Appeal dated June 4, 2021 was set aside.*
ii. *Each party was to bear their own costs*

Citations

Cases

Kenya

1. *AOG v SAJ & another* [2011] 2 KLR 461 - (Applied)
2. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR) - (Mentioned)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR - (Mentioned)
4. *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* Petition 5 of 2012; [2012] eKLR; [2012] 2 KLR 454 - (Mentioned)
5. *FSL v FNK* Civil Appeal E060 of 2021; [2022] KEHC 1332 (KLR) - (Explained)
6. *Joho & another v Shahbal & 2 others* Petition10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Mentioned)
7. *MA v ROO* Civil Appeal 21 of 2009; [2013] eKLR - (Mentioned)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Mentioned)
9. *NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another* Petition 17 of 2014; [2019] KEHC 9196 (KLR) - (Explained)
10. *Republic v Senior Resident Magistrate Mombasa ex parte H L & F L* Miscellaneous Civil Application 3 of 2016; [2016] KEHC 4275 (KLR) - (Mentioned)
11. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)
12. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Mentioned)

United Kingdom

ZH (Tanzania) (FC) (appellant) v Secretary of State for the Home Department (respondent) [2011] UKSC 4 - (Mentioned)

Canada

Mckee v Mckee [1951] AC 352; [1951] 1 All ER 942 - (Mentioned)

Statutes

Kenya

1. African Christian Marriage and Divorce Act (Repealed) (cap 151) In general - (Cited)

2. Children Act, 2001 (Repealed) (Act No 8 of 2001) sections 4(3)(4); 6(1)(2); 23; 26(2) - (Interpreted)
3. Constitution of Kenya articles 27, 28, 29, 43, 45, 53,163(4) - (Interpreted)
4. Evidence Act (cap 80) In general - (Cited)
5. Supreme Court Act (cap 9B) section 21(4) - (Interpreted)
6. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 28(5) - (Interpreted)

Tanzania

1. Judgment Extension Act (cap 7) section 2 - (Interpreted)
2. Reciprocal Enforcement of Foreign Judgements Act (cap 8) section 3(1) - (Interpreted)
3. Reciprocal Enforcement of Foreign Judgments (Extension of Part II) Order (cap 8 Sub Leg) order 2 - (Interpreted)

Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 article 19
2. United Nations Convention on the Rights of the Child (CRC), 1989 articles 7, 8, 9(1)

Advocates

Ms. Rubeena Dar for the 1st respondent
Mr. Willis Otieno for the appellant

March 2, 2023, the Court delivered the following Judgment:

A. Introduction

1. This appeal raises fundamental legal issues pertaining to parental access of a child, custody of a child, best interest of the child, parental rights after a child has attained the age of eighteen (18), and the application of foreign judgments in our jurisdiction. This case also involves the protracted dispute between the appellant and the 1st respondent over the custody, upbringing, and welfare of their child.

2. The appeal challenges the decision of the Court of Appeal (Kiage, Sichale, and J Mohammed JJA) delivered on June 4, 2021 which affirmed the decision of the High Court (Muchelule, J). Both courts dismissed the appellants case for child custody and access.

B. Background

3. The appellant and the 1st respondent got married on August 2, 2002 under the *African Christian Marriage and Divorce Act* cap 151 (Repealed) and were blessed with a son, FKA (the child), born on February 12, 2004. The marriage between the appellant and 1st respondent broke down and the appellant petitioned for its dissolution in Milimani Chief Magistrate's Divorce Cause No 75 of 2008 .The marriage was dissolved on October 9, 2008.

4. Prior to the dissolution, the parties had entered into a Parental Responsibility Agreement (PRA) on May 15, 2008 before the Milimani Children's Court in Misc Case No 36 of 2008. The terms of the PRA were that:

   a) Both parents were to have joint legal custody of the child;

   b) The appellant was to have actual custody of the child, with the 1st respondent having unlimited access rights to the child with notice, and such access not being unreasonably denied;

   c) The 1st respondent was to secure the schooling needs of the child and be responsible for the child's school fees and all school-related expenses, and the decision as to which school the child would attend was to be agreed upon after mutual consultation;

   d) The 1st respondent was to provide the child with a medical cover with a reputable medical provider for both in-patient and out-patient, and was to further deposit Kshs 300,000/=being security to cover any medical and emergency and incidental case, and such money was to be in the petitioner's account;

   e) The 1st respondent was to pay Kshs 115,000/= monthly for maintenance, beginning July 1, 2008;

   f) The 1st respondent was to cause the transfer of a Flat at Zenith Gardens, Brookside LR No [particulars withheld] into the appellant's name and complete the payment by the remaining installments of the loan on the said property to Central Bank of Kenya; and

   g) The parties agreed to abide by the terms of the agreement and act in the best interests of the child.

5. In the year 2014, the appellant, who was living with the minor in Kenya, moved to York in the United Kingdom to pursue a Masters degree in Law. The 1st respondent gave the appellant his consent for her to be accompanied by the child to the United Kingdom. The situation turned murky at this point because the parties turned on one another. It was the appellant's case that the 1st respondent, who comes from an allegedly influential family which is highly revered and respected, used his influence in London and falsely accused her of having intentions to injure the child with the aim of having her arrested.

6. On the other hand, in his sworn testimony, the 1st respondent deposed that, as a consequence of complaints made to him by the child, he contacted the National Society of Prevention of Cruelty to Children in the United Kingdom and they sent social services to speak to the minor. During all these incidents, the appellant averred that she succumbed to illness causing her to relocate back to Kenya.

7. What is clear from the record is that the appellant applied for a Child's Arrangement Order, in the United Kingdom, dated December 22, 2014 for the child to live with her. The 1st respondent cross applied for a Child Arrangement Order that the child would live with him. He also applied for a prohibited steps order to prohibit the appellant from removing the child from the jurisdiction of England and Wales.

8. On August 7, 2015, the Family Court in United Kingdom High Court of Justice Family Division 2017 EWHC 2048 (Fam) Family Court Cause No YO14P00779 at York determined that it had jurisdiction to determine these applications. Heaton QC made several declarations key among them that: the minor was habitually resident in England and Wales, the minor was not habitually resident in any other jurisdiction, whilst the child continued to be habitually resident in England and Wales, the English Courts retained jurisdiction to determine any issue in respect of parental responsibility, and any application for the enforcement, clarification or in respect of contact between the child and the mother was to be made to the English Court and in particular HHJ Heaton QC or to the High Court Judge sitting in the Family court.

9. The English Court also recorded that the appellant had on at least one occasion hit her son causing him physical harm; the minor had made allegations that the appellant repeatedly hit him; the appellant had been charged with the criminal offence of child cruelty and a criminal trial was pending; the appellant had failed to attend two hearings in respect of the criminal charges and a warrant had been issued for her arrest.

10. The record reveals that, meanwhile, the appellant filed Nairobi High Court Misc Suit No 124 of 2015 seeking for the PRA to be adopted as an order of the court with the High Court (Muigai, J) granting the order on December 17, 2015. At this point, the 1st respondent had moved from the United Kingdom and was now residing in Tanzania, but the child was still in boarding school in the United Kingdom.

11. Armed with the order from the High Court adopting the PRA, the appellant went to the High Court at Dar-es-Salaam in Tanzania in Civil Application No 404 of 2016 seeking to have the order dated December 17, 2015 enforced under the *Reciprocal Enforcement of Foreign Judgments Act* (cap 8, R.E 2002). The appellant obtained an *ex parte* order on August 3, 2016 to register the order for purposes of enforcing the order against the 1st respondent, who was living in Tanzania at the time. The 1st respondent made an application in the High Court of Tanzania being Civil Application No 516 of 2016 asking the court to set aside this *ex parte* order.

12. We note that, at some point during the pendency of the Tanzanian proceedings, the appellant instituted proceedings at the Kenyan High Court.

13. The High Court of Tanzania meanwhile concluded the case before it and rendered its decision on July 22, 2017. It held that for a foreign judgment to be enforced in Tanzania under section 3(1) of the *Reciprocal Enforcement of Foreign Judgments Act* (cap 8) of the Laws of Tanzania as read with order 2 of the *Reciprocal Enforcement of Foreign Judgments (Extension of Part II) Order*, GN No 9 of 1936, the country from which the said judgment originated must be a country which is listed in the first column of the schedule of the order as one of the countries which have an agreement of enforcing their judgments with Tanzania and that Kenya did not have such an agreement with Tanzania. The court also found that, under section 2 of the *Judgment Extension Act* (cap 7, RE 2002), decrees from Kenya that can be executed in Tanzania are only those that relate to debts, damages or costs and that the parental responsibility agreement did not fall in either of those categories.

i. Proceedings in the High Court of Kenya

14. The appellant instituted proceedings at the High Court's Constitutional and Human Rights Division by way of a Constitutional Petition HCCC NO 1 of 2016. In her cause, the appellant invoked articles 27, 28, 29, 43, 45, and 53 of the *Constitution*. The petition dated April 11, 2016 was also filed pursuant to the *Children Act* and the *Convention on the Rights of the Child* (CRC).

15. We pause to note that the record shows that proceedings in the English Family Court were still ongoing. Judgments made on May 11, 2017 in United Kingdom High Court of Justice Family Division 2017 EWHC 2048 (Fam) Family Court Cause No FD16P00592 by Mrs Justice Parker are to the effect that the 1st respondent had made an application for wardship and the appellant made an application seeking adjournment for the hearing. The appellant did not appear and she was unrepresented. Her application for adjournment was refused. The child was maintained as a ward of the court and the prior orders of Judge Heaton QC affirmed. After the wardship order, the High Court of Justice directed that no important steps in the minor's life, including travel, consent to medical treatment or education, would be taken without permission being granted by the court until he attained the age of eighteen (18) years. The English court pointed out that the PRA dated August 15, 2008 was no longer reflective of the minor's legal or factual position. In addition, the appellant was prohibited from directly contacting the minor without the 1st respondent's consent.

16. Back in Kenya, the appellant amended her High Court petition on December 18, 2019. The amended petition was supported by an affidavit sworn on December 18, 2019. The appellant sought to join state agencies, the 2nd to 4th respondents, to the suit seeking orders for diplomatic intervention with the United Kingdom to ensure that the child's rights were protected and to enable her to access the minor.

17. The appellant contended that the 1st respondent had violated the child's rights to compulsory basic education, basic nutrition, shelter, healthcare, protection from abuse and inhuman treatment, parental care and protection as guaranteed by article 53 of the *Constitutio*n. The appellant prayed for the court to make a declaration that the child's social and economic rights had been violated by the 1st respondent. She also prayed for declarations seeking to protect both her rights and that of her child to; have their inherent dignity protected; her right to freedom and security and not to be subjected to torture whether physical or psychological by the 1st respondent as guaranteed in articles 28 and 29 of the *Constitution*; and she and the minor had a right to be treated equally before the law and not to be discriminated as guaranteed by article 27 of the *Constitution*. She also sought legal and actual custody of the minor and following the numerous violations of rights, she applied for an order that the 1st respondent should no longer have legal custody or unlimited access to the child.

18. The 1st respondent opposed the petitioner's case through a replying affidavit sworn on September 8, 2016 and a further replying affidavit and an answer to petition filed on February 4, 2020. The 1st respondent averred that the appellant's petition contained blatant lies, contradictions, fabrications and material non- disclosure aimed at misleading the court. The 1st respondent averred that the appellant was cruel and excessively abusive towards the minor resulting in child cruelty charges being leveled against her in York, United Kingdom. He asserted that the criminal hearing did not proceed and that a warrant of arrest was issued against the appellant. The 1st respondent produced the proceedings and orders issued by the Family Court in the United Kingdom where the court had noted that criminal charges of child cruelty by the appellant had been lodged.

19. The 1st respondent averred that a court adviser at a family court in the United Kingdom interviewed the child and prepared a report on December 20, 2016 that showed the minor was happy and in a safe environment. The 1st respondent averred that he regularly visited the child and provided for his education and medical needs.

20. Muchelule, J (as he then was) delivered his judgment on July 27, 2020. In resolving the dispute, the learned judge held that the main issue for determination related to custody, upbringing and welfare of the child under article 53(2) of the *Constitution* as read with sections 4(3) and 4(4) of the *Children Act, 2001* (now repealed). In making his findings, the learned judge relied on the proceedings, orders and judgment delivered by the Family Court in the United Kingdom (English court). He held that the appellant had physically and emotionally abused the minor and that the 1st respondent was aware of the said abuse and therefore persuaded the English Court that the appellant was not a fit parent to bring up the minor. The learned judge also found that the appellant had lost the right to actual

custody provided for in the parental agreement when she assaulted the child. The learned Judge for those reasons dismissed the petition and made a finding that the 1st respondent had not infringed or violated any of the appellant's fundamental rights and freedoms.

ii. Proceedings in the Court of Appeal

21. Dissatisfied with the judgment of the High Court, the appellant filed Civil Appeal E445 of 2020 praying for the court to set aside the judgment with costs. The grounds of appeal were that the learned judge erred in law and fact by:

    i. Concluding that the parental responsibility agreement that had been adopted as an order of the High Court of Kenya was not applicable and he sat on appeal against an order issued by a judge of equal status.

    ii. Concluding that the appellant had physically assaulted the minor and that there was a warrant of arrest in the United Kingdom when there was no evidence to support such a conclusion.

    iii. Failing to appreciate that parental rights of a parent are innate and inextinguishable and cannot be taken away in the manner that he purported to hold.

    iv. Failing to appreciate the full import of the disclosed facts and provisions of the *Constitution* that had been violated or threatened with violation by the 1st respondent.

    v. Failing to determine what would constitute the best interest of the child having not had occasion to hear from the child and relying on unsupported, unsubstantiated and erroneous information to reach a conclusion as to what constitutes the best interests of the child.

22. The Court of Appeal rendered its decision on June 4, 2021. In its determination, the Appellate Court found that the main issue on the appeal turned on whether the PRA between the appellant and 1st respondent was applicable, effective, and binding. The Appellate Court affirmed the High Court's judgment and held that the learned judge arrived at his conclusion based on the evidence availed. It noted that fundamental changes had occurred in the lives of the parties since the recording of the PRA with the minor no longer residing in Kenya.

23. On the proceedings before the United Kingdom High Court, the Appellate Court held that the foreign court had found that the assault accusation was true and that such finding was critical in determining the matter. The Appellate Court was also of the view that the PRA was no longer applicable to the parties. Further, the Appellate Court considered the ascertainable wishes of the child and held that the child had made an unequivocal expression

that he did not wish to be with the mother. Ultimately, in dismissing the appeal, the Court of Appeal was of the view that in the absence of evidence establishing want of competence or jurisdiction on the part of the foreign court in arriving at its determination of the matter, the learned High Court Judge could not be faulted in his conclusions that the PRA was inapplicable to the parties.

iii. Proceedings before the Supreme Court

24. The appellant being aggrieved by the decision of the Court of Appeal, filed a petition of appeal before this court. However, the appeal was filed out of time. By notice of motion dated September 24, 2021, the appellant filed an application for leave to extend time to file an appeal against the orders and Judgment of the Appellate Court. She sought leave of the court to file the appeal out of time, or to deem the appeal, Supreme Court Petition 014 of 2021, already lodged as duly filed with the court's leave.

25. We were satisfied that the application met the threshold set in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & Others*, Supreme Court Application No 16 of 2014, [2014] eKLR for extension of time the delay not being inordinate and the appellant having sufficiently explained her cause. However, we rejected the invitation that we deem the appeal herein as duly filed and directed that the parties appear before the Deputy Registrar for further directions as to the filing of the record of appeal and all related matters.

26. Properly filed, the petition of appeal dated February 25, 2022 raises four (4) grounds of appeal. That the Judges of the Court of Appeal erred in law by:

    i. Failing to determine the four grounds of appeal that were before them thereby denying the appellant a right to a fair hearing.

    ii. Failing to consider the import and effect of section 26(2) of the *Children Act* and failing to apply the same in the case before them thereby denying the appellant a right to equal benefit of the law.

    iii. Arriving at a determination that the appellant was not a proper and fit person to be with the minor and that the minor had expressed a desire not to be with the appellant when no such wish had been expressed by the minor before any court or tribunal.

    iv. Affirming that the foreign court can overturn a valid and legally competent parental responsibility agreement without hearing the parties to it.

27. The reliefs sought by the appellant are for us to allow the appeal, set aside the Court of Appeal judgment, and costs of this appeal and the costs before the Appellate Court be provided for.

C. Parties' Submissions

i. Appellant's Submissions

28. The appellant relied on her written submissions dated September 24, 2021 and filed on September 25, 2021. She submits that the Court of Appeal erred in finding that the PRA was no longer applicable by disregarding the provisions of section 26(2) of the *Children Act* on termination of a parental responsibility agreement which requires a court order or leave of the court to do so. She avers that she was denied the right to equal benefit and enjoyment of the law as provided for under article 27(1) of the *Constitution*. Further to this, the appellant argues that the attempt to overturn the High Court decision adopting the PRA while this order was not the subject of proceedings amounted to a violation of the right to a fair hearing.

29. The appellant contended that the Appellate Court judges erred when they invoked the jurisdiction of the United Kingdom Courts in determining the matter. Further, that the Appellate Court failed to consider that the trial court had erred in disregarding that the PRA was adopted as an order of the High Court. The appellant relied on the case of *AOG v SAJ & another* [2011] eKLR and *Republic v Senior Resident Magistrate Mombasa ex parte H L & Another* [2016] eKLR to urge that the PRA could not be overturned by the English Courts or even the High Court without following the provisions set out in section 26 of the *Children's Act*.

30. The appellant further submitted that the Appellate Court prejudiced and infringed on her right to a fair hearing by finding that she was not a fit and proper person to live with the minor despite the evidence in the medical record showing that the appellant never assaulted the minor. The appellant also contended that the trial court prejudiced the appellant's right to fair hearing by finding that there was an international warrant of arrest, whereas no such warrant existed.

31. The appellant submitted that parental rights of a parent and the rights of a child to parental care are innate and cannot be extinguished. she also urged that the character and the conduct of a parent does not extinguish those rights unless it is proven that the parent has not been desirous of the rights in the best interest of the child. The appellant submitted that the 1st respondent and herself were entitled to equal rights over the minor at all times and that the 1st respondent should not deny the appellant access to the minor because their marriage was dissolved and relied on the case of *MA vs ROO* [2013] eKLR in support of this submission.

32. The appellant submitted that by causing the minor to be admitted as a ward of the English Courts, the 1st respondent infringed on the minor's right to nationality and citizenship. She urged that the minor was born in Kenya and therefore entitled to his full rights, as a Kenyan under the *Constitution*. The appellant submitted that it is in the best interest of the child to

have access to both parents and urged us to be persuaded by the findings in the case of *ZH (Tanzania) (FC) (appellant) v Secretary of State for the Home Department (respondent)* and the Privy Council's decision in *Mckee v Mckee* [1951] AC 532 in considering what the best interests of the child in this case are.

ii. 1st Respondent's Submissions

33. The 1st respondent relied on his submissions dated March 9, 2022 and filed on March 10, 2022. It was his case that this court lacks jurisdiction to hear the matter. He submitted that the appeal neither stated which provisions of the *Constitution* had been violated nor demonstrated how a matter of general public importance was involved. He urged that the appellant was attempting to invoke the principles of constitutional avoidance which was brought out in this Court's decision in *Communication Authority of Kenya & others v Royal Media Services Limited & 5 others* [2014] eKLR.

34. The 1st respondent submitted that the order issued by the High Court adopting the agreement was invalid and unenforceable and that he did not participate in the proceedings. Without prejudice to the foregoing, he urged that the PRA was not applicable as it was no longer reflective of the minor's legal or factual situation. He urged that the minor was habitually resident in the United Kingdom and contended that this case was distinguishable from that cited by the appellant; *AOG v SAJ & Another* [2011] eKLR. He submitted that it was the appellant who initiated proceedings in the United Kingdom with regard to custody of the minor and therefore subjected herself to its jurisdiction.

35. It was the 1st respondent's submission that the appellant failed to dispute the allegations that she was an unfit parent to be with the minor. He contended that the English court considered the allegations of abuse against the appellant, which were investigated and substantiated. The 1st respondent urged that the finding by the English courts that the appellant was not fit to have custody of the minor was proper as it was made in the best interest of the child. The 1st respondent further submitted that though the appellant has rights and responsibilities over the minor, such rights do not trump the best interests of the child as provided for under the provisions of article 9(1) of the *CRC*. He concluded his submissions by urging that the appellant was lawfully denied custody of the minor to protect the best interests of the child.

D. Issues for Determination

36. Upon hearing the submissions by the parties and upon perusal of the records of appeal, the following issues have crystallized for determination by this court;

    i) Whether this court has jurisdiction under article 163 (4) (a) of the *Constitution* to hear and determine this appeal?

ii) Whether the High Court and Court of Appeal properly applied the decisions issued by the Family Court in the United Kingdom in arriving at their determination?

iii) What is the status of the PRA?

iv) Whether parental rights and responsibilities could be extinguished in this case?

E. Analysis

(i) Whether this court has jurisdiction under article 163 (4) (a) of the Constitution to hear and determine this appeal.

37. The 1st respondent contends that this court has no jurisdiction to entertain this matter as it neither raises issues of constitutional interpretation or application as provided for under article 163(4)(a) of the *Constitution* nor falls under the ambit of a matter of general public importance under article 163(4)(b) of the *Constitution*.

38. This court's decisions, as to whether the jurisdictional threshold set out under article 163(4)(a) of the *Constitution* has been met, are legion. See *Lawrence Nduttu and 6000 Others v Kenya Breweries Ltd & Anor*, SC Petition No 3 of 2012; [2012] eKLR; *Hassan Ali Joho and Anor v Suleiman Said Shalabal & 2 Others* [2014] eKLR; *Erad Supplies and General Contractors Ltd v NCPB*, SC Petition No 5 of 2012, [2012] eKLR and *Aviation and Allied Workers Union of Kenya v Kenya Airway Ltd & 3 others*, SC Petition No 4 of 2015; [2017] eKLR.

39. In particular, in *Rutongot Farm Ltd v Kenya Forest Service & 3 others*, SC Petition No 2 of 2016; [2018] eKLR this court held at paragraph 18:

> "(18) As can be deduced from the above quoted cases, in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior courts leading to the present appeal. In order to establish that fact, the court needs to ask itself the following questions:
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> (i) What was the question in issue at the High Court and the Court of Appeal?
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> (ii) Did the superior courts dispose of the matter after interpreting or applying the *Constitution*?
>
> (iii) Does the instant appeal raise a question of constitutional interpretation or application, which

> was the subject of judicial determination at the High Court and the Court of Appeal?"

40. In this context, as outlined in earlier parts of this judgment, in the High Court, the appellant invoked articles 27, 28, 29, 43, 45, and 53 of the *Constitution* in alleging that her constitutional rights and freedoms and that of the child had been contravened. She has consistently claimed, in both superior courts, that the 1st respondent caused the child to be admitted as a ward of the United Kingdom Court which infringed on the child's right to Kenyan nationality and citizenship.

41. However, in as much as the learned Judge in the trial court 'was not satisfied that the amended petition was precisely framed to disclose the facts relied on, and the injury suffered, to support the constitutional provisions alleged by the petitioner as having been violated and infringed', the learned Judge delved into the issue of the best interests of a child as enshrined in article 53 (2) of the *Constitution*. The learned judge at paragraphs 25 and 26 of his judgment stated:

> " 25. The primary subject of this dispute is a child. The case involves the protracted dispute between the petitioner and the 1st respondent over the custody, upbringing and welfare of their child. Under article 53(2) of the *Constitution* and section 4(3) of the *Act*, this court is commanded to treat the best interests of the child as the first paramount consideration.....
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> 26. The best interests of the child herein will be served where the court adopts a course of action that safeguards and promotes his rights and welfare. The court will ensure that he has shelter, food, clothing, education and medical care. His best interests will be served where he has parental guidance, and where such guidance is provided by, as much as it is possible, both parents. The child is entitled to be allowed a suitable, conducive and loving environment in which to grow and develop."

42. On this basis, learned trial judge determined what was in the best interests of the child according to article 53 of the *Constitution* but nevertheless concluded that the 1st respondent had not infringed or violated any of the fundamental rights and freedoms pleaded, either against the appellant or against the child. He was also of the view that it had not been shown that any such rights and freedoms were likely to be infringed or violated against the appellant or the child.

43. On its part, the appellate court though primarily focusing on the PRA, spoke on the best interests of the child in the following terms:

> " It is certainly not in the best interest of the minor that he should be left in the care of a mother who causes him physical and mental harm..... Moreover, courts are enjoined to consider the ascertainable wishes of a child when deciding on what is in his or her best interest."

44. It is evident that the running theme in both superior courts was the enforcement of parental rights vis a vis children's rights. This is still the case in the matter before us where the issues of parental rights and the child's best interests pursuant to article 53 of the *Constitution* are largely in issue. In addition, the appellant claims that her right to a fair hearing has been breached in both superior courts and she has been condemned, as an unfit mother, unheard. All these facts bring this matter within our jurisdiction under article 163 (4) (a) of the *Constitution*.

(ii) Whether the High Court and Court of Appeal properly applied the decisions issued by the Family Court in the United Kingdom in arriving at their determination.

45. The appellant was emphatic that the superior courts deferred to the English Court's judgment when they applied its decision and orders in the instant matter. She contended that the trial court proceeded on the premise that the English Court is superior to the High Court which, she argues, cannot be. She maintained that the High Court was bound by its determination and orders on parental responsibility. She urged that the superior courts could not abandon their responsibility to another foreign court. The 1st respondent on the other hand argued that the minor was residing in the United Kingdom all along thus it was proper for the English Courts to make its judgment which was the basis of the trial court finding that the parental agreement was no longer reflective of the child's legal or factual position.

46. The question that arises is whether the superior courts deferred to the English Court by disregarding Kenyan Law as well as a High Court order that was in force while determining the matter that was before them. In other words, were the superior courts bound by the English Court judgment?

47. At the High Court, the learned judge delivered himself as follows:

> " (34) I reiterate that the child was heard by the Family Court in London. He was categorical that he had been physically and emotionally abused by the petitioner, and did not want any contact with her. I find that in particular circumstances of this case, the best interests of the child will be served by the parties obeying the orders that were

granted by the Family Court in London in the United Kingdom on May 11, 2017. These orders, I find, were in line with the protection afforded to a Kenyan child under the *Constitution*, the *Children Act* and the international instruments that Kenya is party to."

48. The learned judges of the Court of Appeal in determining the appeal before them held as follows;

> " We further observe that based on the Cafcass Family Court report, the United Kingdom High Court made the minor a ward of the court, "until his 18th birthday or until further order to the contrary". The court further held that the parental responsibility agreement was not reflective of the child's current legal and factual position. The court directed that the appellant should not have direct contact with the minor. And it is these findings that largely informed the learned Judge's conclusions that the appellant's petition was unmeritorious.
>
> With respect, we concur with and affirm the learned Judge's conclusions as being based on the evidence availed and reflective of a proper exercise of discretion. It is noteworthy that fundamental changes have occurred in the lives of the parties and the minor since the recording of the parental responsibility agreement dated 2008, including the fact that the parties and the minor are no longer resident in Kenya. The assault accusation made by the appellant, an which the United Kingdom High Court found true, is especially critical in this matter and not one to be taken lightly.' (emphasis ours)"

49. It is evident that the determinations made by the learned judges of the superior courts relied on the findings by the English Court. However, the English Court did not consider the significance of the PRA and the consequences of its violation.

50. We have also considered the provisions of the *Evidence Act*, chapter 80, Laws of Kenya on matters which the court can take judicial notice of and judgments from foreign courts do not fall within the purview of the issues for consideration on judicial notice.

51. We are therefore constrained to fault the learned judges of the Court of Appeal in placing credence on the findings of the family court in English Court which largely disregarded the PRA; an agreement that could not be violated without consequence. In addition, the PRA, a binding agreement between both the appellant and the 1st respondent could only be terminated by the High Court.

iii) What is the status of the PRA?

52. The English Court (Mrs Justice Parks in Family Court Cause No XXXX) on May 11, 2017, stated as follows at paragraph 30 of her judgment:

> "I shall make a declaration as to habitual residence in terms of paras. 1, 2 and 3 of the initial declarations. I shall record that the Kenyan parental responsibility agreement reached by the parties in 2008 is no longer reflective of the child's legal or factual position and was not at the time when the mother issued her application in the Kenyan High Court for registration of that agreement on 1 September 2015, in that the child was no longer in the care of the mother."

53. Both superior courts adopted this finding on the PRA. It is curious that although the trial Judge, in his judgment, referred to how PRA's are vacated, he ended up deferring to the English Court's declaration that the PRA was no longer reflective of the child's legal or factual position.

54. The *Children Act, 2001* (No 8 of 2001) (repealed) provided in section 26 as follows:

> "26. Parental responsibility agreement, etc.
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> (1) A parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Chief Justice.
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> (2) A parental responsibility agreement may only be brought to an end by an order of the court made on application by—
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> a. any person who has parental responsibility for the child; or
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> b. the child himself with the leave of the court.
>
> 3. The court may only grant leave under subsection (2)(b) if it is satisfied that the child has sufficient understanding to make the proposed application." (emphasis ours)

55. While it is clear that there were express provisions on the procedure to follow to vacate a PRA, the PRA undoubtedly attained more force when it was adopted as an order of the

court by Mungai, J in Misc Suit No 124 of 2015 on December 17, 2015. The 1st respondent argues that the order issued by Mungai, J was invalid and unenforceable because it was done without his knowledge.

56. However, a thorough perusal of the record does not reveal this to be so. This notwithstanding, we note that the PRA was entered into voluntarily by both the appellant and the 1st respondent and neither of them has ever made any steps towards vacating it. A perusal of the record shows that the English Court alluded to the PRA and dismissed it ever so casually, without taking into account the Kenyan legal regime surrounding the PRA. Specifically, it ignored our very progressive *Constitution's* article 53 of the rights of Children, the *Children Act* and case law with regard to PRA's. Most importantly, it overlooked the fact that there was a legally binding court order on the PRA. These liberties, however, could not be taken by our superior courts.

57. We are of the view that the English Court made orders on the PRA that disregarded the sovereignty of the Kenyan legal system over its own nationals.

Since there was a binding decision of the Kenyan High Court pertaining to the parties on similar issues on which it was called to adjudicate upon, the English Court ought to have given more prominence to the PRA, the Kenyan *Constitution* which provides for the rights of children under article 53, the *Convention on the Rights of a Child* which the United Kingdom is a party to, and the *African Charter on the Rights of a Child*. It ought to have deferred to the High Court's order already in place; an order of a competent court of law. We find it quite strange that the English Court overturned a valid and legally competent PRA without hearing the parties to it. This, in our view, negates the expectation of a fair trial and is contrary to our constitutional prescriptions of the non-derogable right to a fair trial.

58. The Superior Courts ought not to have succumbed to the same temptation. They should have paid mind to section 26 of the *Children Act* (repealed). It was imperative for them to interrogate the status of the PRA seeing that Mungai, J had adopted it as an order of the court. Once adopted as an order of the court, it could not be violated without consequences. In other words, if one parent violated the agreement, then they were liable to legal proceedings. Not being vacated, we are of the view that the PRA remained a binding order of the High Court until the child attained eighteen years of age.

59. The superior courts therefore erred by accepting and relying on the English Court's decision on the PRA. The error of their finding on this issue was compounded by the fact that the *Children's Act* had specific provisions on how a PRA is vacated. Indeed, in *NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another*, HC Petition No 17 of 2014 [2019] eKLR, Njagi, J observed at paragraph 49:

49. Section 26 provides for parental responsibility agreements which agreements I find can only be vitiated like any other contract. I see nothing wrong in having parental responsibility agreements in so far as they are not in conflict with the constitution and relevant statutes.

60. We reiterate that it was improper for the superior courts to rely on the English's Court determination which made no reference to our laws, the *CRC*, and the *African Charter on the Rights and Welfare of the Child*. This is the legal regime by which the PRA ought to have been considered. At the very least, the trial court ought to have heard the parties to the PRA before invalidating it. For the avoidance of doubt, the English Court orders of August 7, 2015 does not supersede the PRA.

(iv) Whether parental rights and responsibilities could be extinguished in this case.

61. It was the appellant's contention that the rights of a child to parental care are innate and cannot be extinguished. She urged that the character and conduct of a parent are immaterial and do not extinguish parental rights unless the parent has been proven not desirous of acting in the best interest of the child. The 1st respondent on his part urged us to find that the Appellate Court assessed the evidence before it and made a finding that it would not be in the best interest of the minor to be left in the care of a parent who causes him physical and mental harm. The *Constitution* guides us on the rights of children.

62. Article 53 of the *Constitution* provides that:

> 53. Children
>
> 1) Every child has the right—
>
> a) to a name and nationality from birth;
>
> b) to free and compulsory basic education;
>
> c) to basic nutrition, shelter and health care;
>
> d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
>
> e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
>
> f) not to be detained, except as a measure of last resort, and when detained, to be held—

i for the shortest appropriate period of time; and

ii. separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child.

63. This Constitutional provision has been thoroughly elucidated by the superior courts. For instance, in *FSL v FNK*, Civil Appeal no E060 of 2021 [2022] eKLR Thande, J observed:

> " 12. In the present matter which relates to a child of the parties, the interests of the child supersede those of the parties and must at all times be upheld. In this regard, the court is guided by the provisions of the *Constitution of Kenya, 2010* and of the *Children Act* which require the court to give paramount importance to the best interests of the child. Article 53(2) of the *Constitution* provides:
>
> > " A child's best interests are of paramount importance in every matter concerning the child.
>
> The *Children Act* on the other hand provides at section 4(3) that:
>
> > " In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

64. The *Children Act* (repealed) provided for parental responsibility in section 23 as:

23. Definition of parental responsibility

(1) In this *Act*, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

65. Section 23 (c) of the repealed *Act* enumerated these rights as follows:

(c) the right to—

(i) give parental guidance in religious, moral, social, cultural and other values;

(ii) determine the name of the child;

(iii) appoint a guardian in respect of the child;

(iv) receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;

(v) arrange or restrict the emigration of the child from Kenya;

(vi) upon the death of the child, to arrange for the burial or cremation of the child.

66. The children's rights legal regime (the *Constitution*, *Children Act* (repealed), *CRC*, and the *African Charter on the Rights and Welfare of the Child*) emphasizes the centrality of the best interest of the child. The best interest of the child is determined by the circumstances of the case as they specifically relate to the child. This comprises the principles that prime the child's right to survival, protection, participation, and development above other considerations and includes the rights contemplated under article 53 (1) of the *Constitution*. As such, the focus must be on the child and what is best for him/her.

67. In addition, there is no hierarchy in the children's rights provided for under the *Constitution*. In other words, all the rights provided under article 53 are in the child's best interest. The 'best interests' concept is further strengthened by being the 'paramount' consideration. This means that the best interests of the child are to be the determining factor when making a decision on the child. It is against this aspect that parental rights ought to be balanced. This is also taking into consideration that no right should be compromised by a negative interpretation of a child's best interest.

68. In this context, the record does not provide any cogent evidence of the English Court balancing between parental rights and the best interest of the child. It is evident from the record that the 1st respondent lived in Tanzania while the child lived in York, in boarding school. The child visited the 1st respondent in Tanzania for short periods of time. The English Court (Justice Heaton) recorded that the appellant accepted that she had at least on one occasion hit her son causing him physical harm, and the child made allegations that the appellant repeatedly hit him. It was recorded that a warrant of arrest was issued for her arrest.

69. It is also on record that neither the English Court nor the parties considered it necessary to determine each of the allegations made by the child or the 1st respondent the court being satisfied that the mother had physically harmed the child. This led to the finding that the appellant was an unfit mother. However, this leaves us in the dark because we cannot tell which legal standards were applied to arrive at this conclusion particularly because the superior courts did not test this evidence and no warrant of arrest is in the record, as evidence.

70. In addition, Mrs Justice Parker in her judgment on May 11, 2017, at paragraph 19 stated:

> "he has suffered harm from the unstable relationship which he has had with his mother. I am unable to form a view precisely what happened between them to lead to the intervention of the police and social services, but I do know that the mother has given different accounts as to physical chastisement of F and I also know that his relationship with his mother has completely broken down."

She noted that the appellant objected to the minor being a ward of the court but nonetheless the English court maintained the minor as its ward. Furthermore, the English Court ordered that the child would not have any direct contact with the appellant unless agreed by the father in writing or ordered by the court. It also ordered that the child would only have indirect contact with the appellant via social media initiated by the child and not the mother and by way of letters, cards, or gifts sent to the child via her maternal aunt. These were the findings relied on wholly by our superior courts.

71. We note from the record that the appellant produced as part of her testimony two medical reports on the child which revealed that there was no indication of any form of abuse against the child. One of these is dated November 28, 2014 by a pediatrician in Kenya who had attended to the child's medical needs since the year 2013. The other is dated November 18, 2014 by a pediatrician in the United Kingdom. Both reports stated that there was no evidence of physical abuse on the child.

72. Although the English Courts did not find it necessary to determine each of the allegations made by the child, the superior courts erred by not considering and testing the evidence tendered before them by the appellant on the allegations of abuse. We are unconvinced that the appellant received a fair hearing. Nothing on the record indicates whether the appellant was heard at all on this issue. Further, nothing is indicative of whether the English or our courts considered the belt- beating discipline: excessive or otherwise. It remained unproven whether the appellant posed a continuous danger to the child.

73. We also note from the record that there is an email dated July 21, 2013 from the 1st respondent expressing gratitude to the appellant for her wonderful mothering skills in the following terms:

> "thank you for being a great mom to him and all the hard work you put is clear for all to see, he is bright, caring, responsible and a loving child and credit goes to you."

74. Accordingly, we do not find sufficient cogent evidence on record to lead to the finding that the appellant is an unfit mother liable to zero direct contact with the child. As such, the

Appellate court erred in endorsing the High Court decision which purported to extinguish the appellant's parental rights and responsibilities.

75. We cannot endorse, therefore, with a clean conscience the decisions of the superior courts which embraced the decisions of the English Courts because we are of the view that the judges did not consider the totality of the circumstances of this case in the following ways. Firstly, the English Courts declared that the child was habitually resident in England and Wales while ignoring that he was first and foremost a Kenyan national with attendant rights. In other words, he was deprived of a country of his own and of its protection and support socially and culturally. Furthermore, the minor was made a ward of an alien court when he is a Kenyan national. In adopting these findings, the Appellate Court did not consider that this was in contravention of the rights enshrined in article 53(1) (a) as outlined in earlier parts of this judgment and the *CRC*. The *CRC* provides in articles 7 & 8:

> " Article 7
>
> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
>
> Article 8
>
> 1. States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

76. We cannot help but find that the child's constitutional rights to nationality, parental care, and responsibility which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not have been infringed. This finding is also in light of the English Court's orders that the 1st respondent had care and control of the child. This court also ordered that the mother was to have no direct contact with the child. This in effect meant that the father could determine every aspect of the child's life: where he went to school, lived, or holidayed.

77. The same courts determined that child could ably articulate himself 'on the degree of integration in a social and family environment' in other words, how he saw his connections, social relationships, and support system. It is ironic because it goes without saying, that his perspective would largely be in the lens of the 1st respondent. He had been deprived of direct contact with his other parent, so even though his views and desires were heard, he could not have had a balanced assessment of the situation.

78. At this juncture, we must point out that the preamble to the *CRC* states that the family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children. Article 9 of the *Convention* further stipulates that:

> " 1. States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

79. The *Children Act* (repealed) invoked during the time of this dispute provided in section 6 (1) in mandatory terms that a child has a right to live with and to be cared for by his parents. Section 6(2) provided:

> " Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child."

80. The *Act* also provided in section 24 (1) that:

> (1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility

81. Section 24(5) on parental responsibility stated "a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child." This means parental responsibility is a mandatory ongoing obligation. Parental responsibility attaches to the right

of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for.

82. In addition, it is not in the interest of justice to deny the child access to his mother. We are cognizant of article 19 of the *African Charter on the Rights and Welfare of the Child* which stipulates that: "every child is entitled to parental care and protection and shall wherever possible reside with his or her parents."

83. It is evident from the foregoing provisions that the child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child. Ultimately, therefore, a child needs both of their parents which is their right, especially where a parent's incapacity has not been proven as we have found in this case.

84. It is a known fact that the society in which children grow up shapes who they are. Having both a mother and father involved in a child's life can provide significant social, psychological, and health benefits. In addition, the stability of having a relationship with both parents can provide security and greater opportunities for children to find their own paths to success. Accordingly, even if circumstances may warrant limited access to a parent, a court should order supervised access. This court has the constitutional obligation to ensure that the child has access to parental care and protection as enshrined in the *Constitution*.

85. The committee on the *CRC*[General comment No 14 [2013] on the right of the child to have his or her best interests taken as a primary consideration] has observed at clause 11 that 'the best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving.' Thus, the concept of the child's best interest is flexible and adaptable. It should be adapted and defined on an individual basis, according to the specific situation of the child concerned considering their personal context, situation and needs.

86. The 1st respondent contended that parental rights do not trump the best interests of the child. That is correct. However, parental rights cannot be ignored if they are in the best interests of the child. This is because the concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the children's rights recognized in the *Constitution*, the *Children Act*, the *CRC*, and the *African Charter on the Rights and Welfare of the Child*. These are all geared towards the holistic development of the child.

87. Courts, therefore, while making a decision that will impact the child are mandated to consider all circumstances affecting the child. As such, we are of the view that the following guidelines are necessary and ought to be considered when balancing a child's best interests and parental rights and responsibility:

1. The existence of a PRA between the parties.
2. The past performance of each parent.
3. Each parent's presence including his or her ability to guide the child and provide for the child's overall well-being.
4. The ascertainable wishes of a child who is capable of giving / expressing his /her opinion.
5. The financial status of each parent.
6. The individual needs of each child.
7. The quality of the available home environment.
8. Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.
9. Need to ensure that children are not placed in alternative care unnecessarily.
10. The mental health of the parents and
11. The totality of the circumstances.

88. We need to emphasize that it is never in the best interest of a child when the parents are engaged in a protracted court battle. Court battles relating to children are more often than not very selfish in nature and it is easy to overlook the psychological and mental harm done to the child in the process. In the instant matter, we note that the appellant has not had direct contact with the minor since Justice Heaton's orders of August 7, 2015. In the circumstances of this case, as already demonstrated, this is in contravention of our legal regime on the rights of the child. However, we are also alive to the fact that the child turned eighteen (18) on February 12, 2022. As such, the child is at liberty to choose whom to live with and whether or not he wants the see the appellant.

B. Orders

i. The appeal is hereby allowed.

ii. The Judgment of the Court of Appeal dated June 4, 2021 is hereby set aside.

iii. Each party shall bear its own costs.

NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & W Ouko, SCJJ

Neutral citation: [2023] KESC 17 (KLR)

Constitutional Law *- fundamental rights and freedoms - limitation of fundamental rights and freedoms - limitation of the freedom of association - whether it was unconstitutional to limit the right to associate through denial of registration of an association based on sexual orientation - whether the refusal to allow the reservations of names of a proposed non-governmental organization which included the terms "gays" and "lesbians" was unreasonable, irrational or illegitimate - whether the refusal to register an organization of persons who fell within the lesbian, gay, bisexual, transgender, queer or questioning community violated the freedom of association - Constitution, article 36; Penal Code, cap 63, sections 162, 163 and 165.*

Constitutional Law *- fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to equality and freedom from discrimination - whether the refusal to reserve a name of an intended non-governmental organization on the ground that the Penal Code criminalized gay and lesbian liaisons amounted to discrimination - Constitution, article 27(4); Penal Code, cap 63, sections 162, 163 and 165.*

Constitutional Law *- interpretation of the Constitution - interpretation of article 36 of the Constitution - where article 36 provided for the right to form, join or participate in the activities of an association of any kind - whether the right to form, join or participate in the activities of an association of any kind in article 36 included associations whose activities were contrary to the law - Constitution, article 36.*

Constitutional Law *- fundamental rights and freedoms - right to fair administrative action - what were the grounds in which an administrative decision could be challenged and struck down by courts - Constitution of Kenya, 2010, articles 23 and 47, Fair Administrative Actions Act, cap 7L, section 7(2) (a) to (o).*

Statutes *- interpretation of statutes - interpretation of section 162 of the Penal Code -where section 162 provided for unnatural offences - whether the use of the words "any person who has carnal knowledge of any person" "against the order of nature" in section 162 included female same-sex relationships as unnatural - Penal Code, cap 63, section 162.*

Statutes *- interpretation of statutes - interpretation of section 19 of the Non-Governmental OrganizationsCo-ordination Act - provision for an internal dispute resolution mechanism - whether the refusal to approve the reservation of names of a proposed non-governmental organization was subject to the dispute resolution mechanism under section 19 - Non-Governmental OrganizationsCo-ordination Act, cap 134, section 19; Non-Governmental Organizations Coordination Regulations, 1992 (cap 134B Sub Leg), regulation 8.*

Words and Phrases *- sexual orientation - definition of sexual orientation - a person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality or bisexuality - Black's Dictionary.*

Words and Phrases *- sexual orientation - definition of sexual orientation - the enduring pattern of an individual's emotional, sexual, and/or romantic attraction - Britannica Online Encyclopaedia.*

Words and Phrases *- sex - definition of sex - the sum of the peculiarities of structure and function that distinguish a male from a female organism - Black's Law Dictionary, 9th Edition.*

Words and Phrases *- sex - definition of sex - the sum of features by which members of species can be divided into two groups—male and female—that complement each other reproductively - Britannica Online Encyclopaedia.*

Brief facts

The 1st respondent applied on three separate occasions to the Non-Governmental Organizations Co-ordination Board (the appellant) for the reservation of one of the six different variations of names submitted for a proposed non-governmental organization (NGO) to address the violence and human rights abuses suffered by the lesbian, gay, bisexual, transgender, queer or questioning (LGBTQI) community in Kenya. The proposed names were, the National Gay and Lesbian Human Rights Commission, National Coalition of Gays and Lesbians in Kenya, National Gay and Lesbian Human Rights Association, Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organization.

The appellant rejected the 1st respondent's application and informed him that the proposed names and the objects of the proposed NGO were offensive to public policy and stood in conflict with sections 162, 163, and 165 of the Penal Code, cap 63, which outlawed homosexual liaisons. Aggrieved, the 1st respondent challenged the appellant's decision of rejecting his application at the High Court. The High Court found that the respondents' right of association guaranteed by article 36 of the Constitution was violated by the failure of the appellant to accord just and fair treatment of gay and lesbian persons living in Kenya seeking registration of an association of their choice.

Aggrieved, the appellant filed an appeal at the Court of Appeal. The Court of Appeal held that the appeal before it raised only two questions: whether the petition filed before the High Court was competent on account of jurisdiction based on the doctrine of exhaustion of remedies and whether, in rejecting the application for reservation of a name, the appellant breached article 36 of the Constitution. The Court of Appeal held that section 19 of the Non-Governmental OrganizationsCo-ordination Act, cap 134 (NGO Co-ordination Act) on appeals did not apply to the circumstances of the case and consequently, the High Court had the requisite jurisdiction to entertain the petition.

The majority of the Court of Appeal upheld the High Court's decision, and found, on the second question that the 1st respondent's rights were violated by the appellant's failure to register the proposed organization. Further aggrieved, the appellant filed the instant appeal.

Issues

i. Whether the refusal to register an organization of persons who fell within the lesbian, gay, bisexual, transgender, queer or questioning community violated their freedom of association.

ii. Whether it was unconstitutional to limit the right to associate through denial of registration of an association on the basis of sexual orientation?

iii. Whether refusal to reserve a name of an intended non-governmental organization on the ground that the Penal Code criminalized gay and lesbian liaisons amounted to discrimination.

iv. Whether the refusal to allow the reservations of names which included the terms "gays" and "lesbians" was unreasonable, irrational or illegitimate**?**

v. Whether the right to form, join or participate in the activities of an association of any kind in article 36 of the Constitution included associations whose activities were contrary to the law.

vi. Whether the use of the words "any person who has carnal knowledge of any person" "against the order of nature" in section 162 of the Penal Code included female same-sex relationships as unnatural.

vii. Whether the refusal to approve the reservation of names of a proposed non-governmental organization was subject to the dispute resolution mechanism under section 19 of the Non-Governmental Organizations Coordination Act on appeals.

viii. What were the grounds on which an administrative decision could be challenged and struck down by courts?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 21 - Implementation of rights and fundamental freedoms.

(*1) 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.*

(2)...

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

Article 27 (4) - Equality and freedom from discrimination

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 36 - Freedom of association

1. *Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.*
2. *A person shall not be compelled to join an association of any kind.*
3. *Any legislation that requires registration of an association of any kind shall provide that—*
   a. *registration may not be withheld or withdrawn unreasonably; and*
   b. *there shall be a right to have a fair hearing before a registration is cancelled.*

Penal Code, cap 63

Sections 162 - Unnatural offences

Any person who—

a. *has carnal knowledge of any person against the order of nature; or*
b. *has carnal knowledge of an animal; or*
c. *permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:*

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

i. *the offence was committed without the consent of the person who was carnally known; or*
ii. *the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act. [Act No. 5 of 2003, s. 32.]*

Section 163 - Attempt to commit unnatural offences

Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.

Section 165 - Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Non-Governmental OrganizationsCo-ordination Act, cap 134

Section 19 - Appeals

(1) Any organization which is aggrieved by decision of the Board made under this Part may, within sixty days from the date of the decision, appeal to the Minister.

(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.

(3) The Minister shall issue a decision on the appeal within thirty days from the date of such an appeal.

(3A) Any organization aggrieved by the decision of the Minister may, within, twenty-eight days of receiving the written decision of the Minister, appeal to the High Court against that decision and in the case of such appeal—

(a) the High Court may give such direction and orders as it deems fit; and

(b) the decision of the High Court shall be final.

(4) If the Council is satisfied that the organization has ceased to exist, its recommendation to the Board shall include suggestions of how the assets and liabilities of the organization should be distributed and the reasons thereon.

Non-Governmental Organizations Coordination Regulations, 1992 (cap 134 Sub Leg)

Regulation 8 - Approval of names

(1) An applicant for the registration of any proposed organization shall prior to such application seek from the Director approval of the name in which the organization is to be registered.

(2) The application for approval under Paragraph (1) shall be in Form 2 set out in the Schedule and accompanied by the fee specified in regulation 33.

(3) The Director shall, on receipt of an application and payment of the fee specified in regulation 33, cause a search to be made in the index of the registered Organizations kept at the documentation centre and shall notify the applicant either that—

a. *such name is approved as desirable; or*

b. *such name is not approved on the grounds that—*

   i. *it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or Organization existing under any law; or*

   ii. *such name is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable.*

(4) A name which has been approved under paragraph (3)(a) shall be entered in the register of reserved names on behalf of the applicant for a period of thirty days or such longer period, not exceeding sixty days, as the Director may allow and such period shall commence from the date of notification of such approval to the applicant.

Held

1. The appeal was filed as of right pursuant to article 163(4)(a) of the Constitution. From a perusal of the judgments of the superior courts, both courts interrogated the decisions of the Executive Director of the appellant (the Director) in view of articles 36 and 27 of the Constitution. The matter was, thus, properly before the court.
2. The matter was not about the legalization or decriminalization of LBGTQI or the morality of same-sex marriage but revolved around the question of whether refusal to register an organization of persons who fell within the LGBTQI contravened the fundamental rights and freedoms of association guaranteed in the Constitution and whether the rights to

freedom of association and freedom from discrimination of those persons seeking to be registered were infringed.

3. According to article 159(1) of the Constitution, judicial authority was derived from the people and vested in, and should be exercised by, the courts and tribunals established by or under the Constitution. In that regard, the Constitution encouraged use of alternative means of dispute resolution mechanism.

4. Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, the court needed to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

5. The administrative action concerned was the refusal to approve the 1st respondent's name. The relevant statute, the NGO Coordination Act, did not provide for a dispute resolution mechanism for the administrative action concerned. Unlike the Companies Act, the NGO Coordination Act did not anticipate that the reservation of names was an administrative action which would attract the dispute resolution mechanism provided for under section 19 of the NGO Coordination Act. In other words, there were no substantive provisions for the approval of names under the NGO Coordination Act. In addition, from the provisions of Regulation 8 of the NGO Regulations, there were no administrative mechanisms to which the 1st respondent ought to have exhausted, following the director's decision under that regulation.

6. Neither the NGO Coordination Act nor the NGO Coordination Regulations provided for any internal dispute resolution mechanism for a party aggrieved by the decision made by the director when exercising its mandate under Regulation 8 of the NGO Regulations. An Act of Parliament had to clearly provide for an internal dispute resolution mechanism before an aggrieved party could be bound by such a mechanism.

7. The petition before the High Court concerned the interpretation and application of the Constitution, a jurisdiction bestowed upon that court. The minister, therefore, did not have the jurisdiction to entertain issues such as the constitutionality of the decision taken by the Director and the appellant. Therefore, the suit before the High Court was proper. There was no internal dispute resolution mechanism under NGO Coordination Act and the NGO Coordination Regulations, 1992 to challenge the impugned decision.

8. The right to freedom of association was recognized in international and regional human rights instruments which Kenya had ratified. Article 260 of the Constitution defined a person to include a company, association, or other body of persons whether incorporated or unincorporated. A literal reading of article 36 of the Constitution was that the LGBTQI group was not excluded from the definition under article 36. Article 36(3) required that

any legislation that required registration of an association of any kind should provide that registration would not be withheld or withdrawn unreasonably. The right to form an association was an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

9. The right to freedom of association could not be limited unless as provided for under the Constitution. There was no evidence placed before the 1st appellant to demonstrate that persons who professed to be LGBTQI were criminals or that it was only them who were capable of committing the offence of unnatural acts. That was a mere assumption which was not born out of evidence when indeed it was confirmed by empirical data that even heterosexuals commit such offences more often than not most callously.

10. Not all rights were absolute, some rights were subject to limitation. In that context, article 36(3) of the Constitution contemplated that the right to freedom of association was subject to limitation. However, any limitation on any fundamental rights and freedom was subject to article 24 of the Constitution.

11. Although sections 162, 163, and 165 of the Penal Code prohibited any person from committing acts that went against the order of nature, those sections did not distinguish between heterosexual or homosexual offenders. The sections did not limit the perpetrators of such acts to persons who were LGBTQI; indeed, the words, any person, connoted a potential offender under those sections who could very well be heterosexual, homosexual, intersex or otherwise.

12. Sections 162, 163, and 165 of the Penal Code did not, pursuant to the provisions of article 24 of the Constitution, express the intention to limit LGBTQI's right to freedom of association. Likewise, the sections did not specify the nature and extent of the limitation of the freedom of association, if any. The 1st respondent intended to register an organization to champion the rights of LGBTIQI, and that did not correlate whatsoever with the offences articulated under sections 162, 163 and 165.

13. The appellant's interference to the 1st respondent's right to freedom of association did not pursue any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals and the protection of the rights and freedom of others. Therefore, the appellant's limitation of the right to freedom of association was not proportionate to the aim sought.

14. Article 21(3) of the Constitution imposed an obligation on all State organs and all public officers to address the needs of vulnerable groups within society including members of minorities and marginalized communities. Given that the right to freedom of association was a human right, vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms, that right was inherent in everyone irrespective of whether the views they were seeking to promote were popular or not.

15. It would be unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants. Therefore, the appellant's decision was unreasonable and unjustified. LGBTQI had a right to freedom of association which included the right to form an association of any kind. All persons, whether heterosexual, lesbian, gay, intersex or otherwise, would be subject to sanctions if they contravened existing laws, including sections 162, 163 and 165 of the Penal Code. By refusing to register the proposed NGO, the persons were convicted before they contravened the law. Such action was retrogressive. The appellant violated the 1st respondent's right to freedom of association under article 36 of the Constitution.
16. The use of the word "sex" under article 27(4) of the Constitution did not connote the act of sex *per se* but referred to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further, the word "including" under the same article was not exhaustive, but only illustrative and would also comprise freedom from discrimination based on a person's sexual orientation. Therefore, an interpretation of non-discrimination which excluded people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.
17. To allow discrimination based on sexual orientation would be counter to the constitutional principles. Therefore, the appellant's action of refusing to reserve the name of the 1st respondent's intended NGO on the ground that sections 162, 163 and 165 of the Penal Code criminalized gay and lesbian liaisons was discriminatory in view of section 27(4) of the Constitution. The 1st respondent's right not to be discriminated directly or indirectly based on their sexual orientation was violated by the appellant.

Dissenting opinion

Per Mohammed K Ibrahim, SCJ (dissenting)

1. Where there was an alternative dispute resolution mechanism established by legislation, the courts had to exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion. That was further firmly rooted in article 159 of the Constitution which required the courts to promote alternative dispute resolution mechanisms.
2. The moment a storm began to brew, courts should not be the first port of call but rather the final resort. That was not to say that where there was evident abuse of discretion by bodies, when there was arbitrary behaviour, malice, caprice and disregard for the principles of natural justice, the courts could sit back. The courts had a duty to intervene where the exhaustion requirement would not serve the values enshrined in the Constitution or law.
3. The NGO Coordination Act did not contemplate the reservation of a name to be one of the decisions that were appealable under section 19 of the NGO Coordination Act. There were no substantive provisions for the approval of names under the NGO Coordination Act, rather the name reservation process was governed by regulation 8 of the NGO Coordination Regulations, 1992. That was unlike the Companies Act, No 17 of 2015 which had the entire

Part V containing sections 48 to 68 dedicated to regulating the choice of names and the reservation process for companies. Section 19 of the NGO Coordination Act was intended to deal with substantive decisions of refusal or cancellation of registration.

4. The appellant was not dealing with the registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. The contested decision to refuse to reserve the name was made solely administratively and in accordance with the NGO Regulations rather than the NGO Coordination Act. It therefore did not attract the dispute resolution mechanism provided for under section 19 of the NGO Coordination Act.

5. Before an aggrieved party could be bound by such a system, a statute had to expressly provide for an internal dispute settlement procedure. In the instant suit, there was no clear mechanism of appeal or remedy within the *NGO Coordination Act* concerning the reservation of a name or names of a proposed NGO. Further, the case raised issues of constitutional interpretation and application, therefore, the administrative forum did not have jurisdiction to hear the parties. Thus, the High Court could not shut its door to the appellants for failure to exhaust an internal remedy that did not apply to their circumstances.

6. Article 36 of the Constitution guaranteed every Kenyan the right to freedom of association, which included the right to form, join or participate in the activities of an association of any kind. Freedom of association, the right for people to gather and freely express their ideas on anything, was essential for a pluralist and open democratic society.

7. The right to associate was used for a wide range of purposes beyond politics, including those related to trade unions to advocate for labour rights, civil societies to champion various causes in society, culture, amusement, athletics, social causes and humanitarian aid. Conversely, the State had a responsibility to refrain from interfering with the establishment of associations, and there had to be systems that enabled citizens to join associations without official interference to help them achieve different goals.

8. The freedom of association was in line with international and regional human rights instruments which Kenya has ratified. However, under article 24 of the Constitution, limitation of rights and fundamental freedoms was permissible upon certain strict conditions. The conditions were that; a right or fundamental freedom in the bill of rights should only be limited by a law and to the extent only that the limitation was reasonable and justifiable in an open and democratic society. Such limitation had to be based on human dignity, equality and freedom. The only rights not subject to any limitation were those found in article 25 of the Constitution and included freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.

9. The moral foundations of the society served as the basis for Kenya's laws found in the Constitution and the various statutes enacted by Parliament. The laws had to be observed and respected. One such law was the NGO Coordination Act which was enacted

with the key objective of regulating the registration and co-ordination of all national and international non-governmental organizations operating in Kenya. Regulation 8(3)(b)(ii) of the NGO Co-ordination Regulations gave the Director the discretion to refuse to approve the reservation of a name of an organization where such a name was in the opinion of the Director repugnant to or inconsistent with any law or was otherwise undesirable.

10. Sections 162 and 165 of the Penal Code criminalised male homosexual relationships while section 163 of the Penal Code prescribed a penalty of imprisonment for seven years. Due to the usage of the phrase "having carnal knowledge of any person," which was "against the order of nature," section 162's interpretation allowed for the inference that female same-sex relationships were also unnatural. That meant that those clauses could be used to prosecute both men and women who were in same-sex relationships.

11. The constitutionality of sections 162(a)(c) and 165 of the Penal Code was challenged in *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (amicus curiae)*, HC petition 150 & 234 of 2016 (consolidated) (2019) eKLR. The court in that matter found the impugned sections not to be unconstitutional. The matter was currently on appeal and the Court of Appeal was yet to render itself on the same. The implication of which was that sections 162, 163 and 165 of the Penal Code remained valid edicts of the law.

12. Due to the continued existence and validity of sections 162, 163 and 165 of the Penal Code, the court failed to see how the appellant could have reserved a name or allowed the formation of an association with the very terms that imply or whose declared purposes were in support of actions that were against the law or expressly banned by it.

13. The right to freedom of association as enshrined by article 36 of the Constitution included the right to form, join or participate in the activities of an association of any kind. Although the wording "of any kind" in article 36 could seem wide-ranging and open-ended, the drafters of the Constitution and indeed the people of Kenya who ratified the Constitution did not intend for the formation of groups whose activities or objectives were against the law or the Constitution to be included.

14. As long as, sections 162, 163 and 165 of the Penal Code remained valid laws, then the actions of the appellant in refusing to allow the reservations of names which included the terms “gays” and “lesbians”, could not be considered unreasonable, irrational or illegitimate.

15. Since the avenue of the courts decriminalizing was pending before the court at the 1st respondent’s instigation, a second alternative would be to rally the people of Kenya to pursue Parliament to amend the laws to repeal sections 162, 163 and 165 of the Penal Code. Other jurisdictions either through legislation or constitutional revisions had amended their laws to remove similar provisions including the United Kingdom in 2013, Scotland in 2014, Northern Ireland in 2019, Canada in 1969, and Australia in 1994 all amended their laws to remove similar provisions. Some countries such as South Africa in 2006 and Australia in 2017 went further to legalize same-sex marriages.

16. Society's social opinions and concerns were continually changing. If the people of Kenya desired to have those laws removed from statute, then legislators in their capacity as the voice of the people could enact, amend, and repeal those laws. However, until such time, sections 162, 163 and 165 of the Penal Code remained in Kenya's statute books as law.
17. Article 27(4) of the Constitution provided that the State should not discriminate directly or indirectly against any person on grounds including sex. The Constitution did not include sexual orientation as one of the seventeen grounds. In science, sexual orientation was often divided into the three components of attraction, behaviour and self-identification. There were myriad ways to describe sexual orientation, but the most common included: heterosexual, being attracted to the opposite gender; homosexual, being attracted to the same gender; and bisexual, being attracted to more than one gender.
18. Looking at the history of the constitutional-making process that lasted over ten years, the process was in all aspects consultative with Kenyans voting in a referendum twice, leading to the promulgation of the Constitution. The inclusion of sex as one of the grounds in article 27(4) of the Constitution was not contentious and was clear that the framers of the Constitution intended to achieve gender equality and equality for all on all fronts in society.
19. The original views of Kenyans captured in the final report of the Constitution of Kenya Review Commission (CKRC report) found final expression in article 45(2) of the Constitution which provided that every adult had the right to marry a person of the opposite sex, based on the free consent of the parties. The CKRC report had to be read in the context that it reflected the intentions and recommendations of the framers of the Constitution, informed by the views of Kenyans. But it had to also be read in the context of the fact that it was prepared roughly eighteen (18) years ago. Perhaps the views of Kenyans had since evolved. But that could not be determined and considered in the instant judgment. It could only be the subject of a referendum.
20. From the thoughts, comments and recommendations in the CKRC report, the inclusion of sexual orientation in the Bill of Rights was always in contention. Therefore, it was problematic to read sexual orientation as one of the grounds to be included in article 27(4) of the Constitution. In other jurisdictions, where the right against discrimination was meant to include sexual orientation, it had been expressly stated as such in either the statutes or the national constitutions of those countries.
21. The appellant in rejecting the names proposed did so on grounds that they were inconsistent with the law. The appellant's rejection of the names proposed by the 1st respondent did not amount to discrimination on the basis of sex or sexual orientation as it was firmly within the law.
22. The court would have allowed the appeal and set aside the decision of the Court of Appeal

Per W Ouko, SCJ (dissenting)

23. The court had jurisdiction and was properly seized of the appeal. The petition filed before the High Court was competent to the extent that, in the circumstances of the case the 1st

respondent was not bound to exhaust internal dispute resolution mechanisms provided for under section 19 of the Non-Governmental Organizations Co-Ordination Act, as the decision under challenge did not qualify as one of the decisions to be appealed to the minister.

24. The issue before the court was not about the decriminalization of LGBTQI, or the constitutionality of sections 162, 163 and 165 of the Penal Code. The controversy had nothing to do with morality or same sex marriage, family units and all the fancy arguments around the difference between lesbian, gay and bisexual persons (LGB), and transgender and intersex persons (TI). Apart from the secondary question relating to the doctrine of exhaustion, argued pursuant to section 19 of the NGO Coordination Act, the central issue in the appeal was about the reservation of a name and whether the appellant's decision in rejecting the names proposed was lawful, reasonable, proportionate and procedurally fair.

25. Gay and lesbian were not defined in Kenya's laws. But they were widely used today. Lesbians, bisexuals, gays or homosexuals were generally known as persons who were sexually, emotionally and romantically attracted to people of the same sex. Those were matters of personal sexual orientation, which according to Yogyakarta Principles connoted a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

26. Regulation 8 of the NGO Coordination Regulations essentially dealt with the approval of names of proposed organizations. Before an application for registration was made, the Director could approve the proposed name if it was desirable; or reject it, if it was identical to an existing name and was likely to bring confusion; or if such name, was in the opinion of the Director, repugnant to or inconsistent with any law or is otherwise undesirable.

27. The law governing the exhaustion of administrative remedies was codified in section 9 of the Fair Administrative Action Act, which demanded that the courts should not review an administrative action or decision unless the internal mechanisms for appeal or review and all remedies available under any other written law were first exhausted. The courts could, however, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considered such exemption to be in the interest of justice.

28. From a long line of decisions spanning the spectrum of the three superior courts, the law was firmly settled that where there existed an alternative method of dispute resolution established by legislation, the courts had to exercise restraint in exercising their jurisdiction and give deference to such dispute resolution bodies. That doctrine was applicable before the promulgation of the Constitution of Kenya, 2010 and remained relevant under it. It accorded with article 159 of the Constitution which encouraged alternative means of dispute resolution.

29. The impugned decision was made at the stage of a request to the Director for reservation of a name and not registration. Only decisions made by the appellant under Part III of the NGO Coordination Act were appealable to the minister by dint of section 19 of the NGO Coordination Act. Those were decisions that related to the refusal to register an organization, the cancellation of a certificate issued to an organization, among others.
30. A dispute arising from the reservation of a name was not one of the decisions envisaged to attract internal dispute resolution mechanism provided for under section 19 of the NGO Coordination Act. Reservation of name was a step toward the registration of an organization, but it did not constitute registration. The 1st respondent was not required to exhaust the internal dispute resolution mechanism under section 19.
31. Article 36 of the Constitution acknowledged by that there could be good reasons for withholding registration, hence the qualifying term, unreasonably. The right, was for that reason not absolute, but subject to the limitations of article 24 of the Constitution.
32. A feature of article 36 of the Constitution was its emphasis that every person had the right to freedom of association, which included right to form, join or participate in the activities of an association of any kind. Though the phrase "association of any kind" appeared wide enough to include nearly any association in any form or character, from a holistic reading of the Constitution, an association of "any kind" intended by the framers and Kenyans would not include associations whose activities were inconsistent with the Constitution or contrary to the law. There could not be, for instance a right to freedom of association to form, join or participate in the activities of an association whose expressed objective would offend members of a particular community, religious, ethnic or racial group or whose name was obscene, offensive, hateful, derogatory or defamatory; or to adopt names of a proscribed group.
33. The NGO Coordination Act, as the title implied, was one of the statutes enacted by Parliament to make provision for the registration of voluntary grouping of individuals or associations, not operated for commercial purposes but for the benefit of the public at large and for the promotion of social welfare. Under section 14 of the NGO Coordination Act, the appellant could refuse to register any association if the association did not meet certain specified conditions. Although the court was unable to trace on record the letter dated March 25, 2013 which conveyed the decision of the appellant to the 1st respondent, the court was nonetheless satisfied with the full tenor and effect given to it by both the High Court and the Court of Appeal. The effect of the letter was that, so long as the words lesbian and gay remained part of the proposed name, the 1st respondent's application stood rejected.
34. The words "expeditious, efficient, lawful, reasonable and procedurally fair" were replicated in section 4(1) of the Fair Administrative Action Act, signifying a system that, apart from incorporating those attributes, set out standards to be observed by administrators and administrative bodies in their decision-making processes. The Fair Administrative Action Act, was enacted in 2015 pursuant to clause (3) of article 47 of the Constitution, to give

effect to the right to a fair administrative action. It was against articles 24, 36 and 47 of the Constitution, the Fair Administrative Action Act, section 14 of the NGO Coordination Act and regulation 8 of the NGO Coordination Regulation that the appellant's decision to reject the names proposed by the 1st respondent had to be measured.

35. Public authorities or bodies, like the appellant, were generally conferred by the parent statute with powers and duties in relation to their particular areas of competence. It was for that reason, as a general rule, that courts of law would normally be slow to interfere with the exercise of those authorities' administrative discretion on substantive grounds. As a necessary corollary to that, public bodies had to inevitably only act within the powers conferred to them by law.

36. In terms of article 47(1) of the Constitution and on various provisions of the Fair Administrative Action Act, the courts could not escape from asking whether a public body in a similar situation, on the material before it, could have reached the same decision as that impugned. As a result, an administrative decision could be challenged and the court could strike down an administrative decision on its illegality, irrationality, procedural impropriety, violation of fundamental human rights, or for lack of proportionality or for being unreasonable. Those inherent supervisory powers were reposed in the High Court by article 23 of the Constitution.

37. The right to just administrative action was a constitutional imperative, or what could be called the constitutionalisation of administrative justice. By entrenching the standard of reasonableness, expedition, efficiency, lawfulness, and procedural fairness as the correct measure of judicial scrutiny of administrative decisions, article 47 of the Constitution revolutionised the general administrative law in Kenya. Section 7(2)(a) to (o) of the Fair Administrative Actions Act, for the first time specified what the court, in reviewing an administrative action or decision had to look at.

38. Section 7(2)(a) to (o) of the Fair Administrative Actions Act, marked a breakaway from the common law test and principles for review of public bodies' decisions in Kenya. The standard of measurement established by the Constitution and the law left no doubt that a contest of administrative action involved, as a minimum the application of the Constitution. Compared to the common law standard of reasonableness, the constitutional standard simply turned on whether there was unreasonableness, procedural unfairness, illegality, delay or inefficiency in the decision-making process or in the decision itself. Section 7(2)(a) to (o), following upon the constitutional parameters detailed some of the factors to guide the court in reviewing administrative action or decision.

39. According to article 36 of the Constitution, an application for registration of an association of any kind could not be withheld or withdrawn unreasonably. Except for the rights listed under article 25 of the Constitution, all the other rights or fundamental freedoms in the Bill of Rights could be limited by law to the extent that the limitation was reasonable and justifiable (article 24 of the Constitution).

40. From section 14 of the NGO Coordination Act and regulation 8(3)(b)(ii) of the NGO Coordination Regulations, the appellant had administrative discretion to grant or deny an application for reservation of name or registration of a name of a proposed association. It could reject an application if it was satisfied that the proposed activities or procedures of the association were not in the national interest, were repugnant to or inconsistent with any law or were otherwise undesirable, among other considerations. The exercise of that discretion, like all discretionary powers was circumscribed by principles of justice, reasonableness and good faith. The decision-maker had to only consider relevant factors, and the decision should not be made arbitrarily or capriciously(section 7(2)(a) to (o) of the Fair Administrative Actions Act).
41. As long as the decision to reject the proposed names was made in good faith, without consideration of extraneous matters and according to law, the requirement of article 36 of the Constitution was satisfied; that registration could only be withheld or withdrawn on reasonable grounds. The appellant explained those grounds primarily to be the prevailing penal system that outlawed acts that could be associated with the proposed names.
42. The Penal Code, like some of the laws in Kenya, was transplanted and adapted to the exigencies of the British colonial administration during the colonial period. Some of those laws had been retained in Kenya's statute books. The relevance of some of those laws remained controversial and debatable. Of the laws in the statute books were Chapter XV of the Penal Code (Offences Against Morality) or Chapter XVI, section 171 creating the offence of bigamy.
43. Both sections 162 and 165 of the Penal Code criminalised male homosexual relationships. It was a matter of interpretation that the use of the words, "any person who has carnal knowledge of any person" "against the order of nature" in section 162 could be construed to include female same-sex relationships as unnatural. In contrast section 377 of the Indian Penal Code, the equivalent of Kenya's section 162, made explicit provision that the unnatural offence was committed by having carnal intercourse against the order of nature with any man, woman or animal. "Any person" in Kenya's Penal Code, by parity of reasoning would similarly extend to woman.
44. Given the prevailing penal regime of law that criminalized same-sex relationships in Kenya, the appellant's decision met the constitutional and legal threshold of reasonableness, rationality, proportionality and procedural fairness. In the face of sections 162, 163 and 165 of the Penal Code, it was unfathomable how the appellant would have been expected to proceed to reserve a name or register an association whose proposed name or whose expressed objects were in furtherance of activities that were contrary to or inconsistent with the law.
45. The only obstacle between the proposed NGO and its registration was the two words, gay and lesbian. The 1st respondent was resolute that the words were the identifying mark of the proposed NGO and could not be abandoned. In the discharge of its statutory functions, the appellant was not bound to accept willy-nilly the name(s) suggested by the 1st respondent.

The Constitution and the law extended to the appellant some latitude of discretion in considering an application for reservation or registration of a name. The same law bound the appellant to reject any application for reservation of a name of any proposed organization for specific reasons.

46. To avoid stigmatisation, discrimination, State-sponsored violence or being caught up by the law, applicants in some jurisdictions had been able to achieve the same objectives to serve LGBTQI persons and to register organizations in harsher legal environments by pursuing registration using more neutral names and language about their aims and objectives. Some of the groups had simply adopted a rainbow name, an LGBTQI pride flag, without the mention of any of the words in the acronym LGBTQI that could be perceived to be offensive. But a more pragmatic approach towards opening up the door for registration of the group would be to introduce legislative reforms, including amendment to the Penal Code and repeal of sections 162, 163 and 165 to decriminalise acts contemplated by those provisions based on the will and desire of the people of Kenya. That was the course adopted by many countries around the world.

47. Social attitudes and concerns were constantly evolving. Lawmakers, as representatives of the people created, modified and repealed laws to achieve particular behavioural outcomes, often in an effort to respond to perceived changes in the society. The decision to repeal or amend those laws to accommodate LGBTQI community in Kenya was one that could only be made by the people from whom all sovereign power flowed or by their elected representatives and only after the involvement of the people.

48. A front or strategy to address discrimination against LGBTQI persons had been through judicial pronouncements. Courts in other jurisdictions had, through their decisions decriminalised discriminatory laws against LGBTIQ people. Through judicial pronouncements, LGBTQI persons could receive some reprieve.

49. The limitations imposed by section 14 of the NGO Coordination Act and the NGO Coordination Regulations on the registration of an association met the requirements under articles 24 and 36 of the Constitution. By those provisions, the appellant was permitted to refuse the reservation or registration of an association upon being satisfied of certain strictures set out in law and which were reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

50. The appellant did not violate the respondents' right of association. The appellant, as a public body, cognizant of the law, aware of its mandate and guided by relevant considerations, properly and judiciously exercised its discretion.

51. The words "on any ground, including..." in article 27(4) of the Constitution meant that the grounds on that list were merely illustrative rather than exhaustive and could include several other protected characteristics not listed. Indeed, article 259(4)(b) of the Constitution declared that in the Constitution, unless the context otherwise required; the word "includes" meant "includes, but was not limited to.

52. Though the language of article 27 of the Constitution was plain, the basis rule of constitutional interpretation was that the Constitution had to be given a holistic interpretation. Holistic interpretation had been described as interpreting the Constitution in context. It was contextual analysis of a constitutional provision, reading it alongside and against other provisions, to maintain a rational explication of what the Constitution had to be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.
53. There was a clear distinction between 'sex' and 'sexual orientation'. Sexual orientation referred to each person's capacity for emotional, affectional and sexual attraction to, and intimate sexual relations with individuals of a different gender or the same gender or more than one gender.
54. The word sex was used three times in the Constitution; in the article 27, in article 42(2) on the right to marry a person of the opposite sex and article 53(1)(f)(ii) on the detention in custody of a child, in conditions that took account of the child's sex. In the context of those articles, sex was used in reference to a person's sexual anatomy based on one's sex chromosomes- (male/female). The discrimination that was expressly prohibited by article 27 was on account of sex and not sexual orientation.
55. There was nothing whatsoever in article 27(4) of the Constitution or on a reading of the Constitution as a whole which suggested that the framers of the Constitution were addressing their minds in any way whatever to problems of discrimination on grounds of sexual orientation. Had that been the intention, nothing could have been easier than to state so as had been done in some of the constitutions, statutes and international instruments. The intention was to prohibit discrimination based on the consideration whether a person was male or female.
56. The Constitution had to be read in the social context in which it was adopted. It was recorded that part of Kenya's history that attempted at constitution-making and the process that finally realized it was consultative. Throughout that course, a lot of information and data were gathered and documented. The information in whatever form constituted extra textual source which when read in historical context of Kenya provided essential background that aided in the interpretation of the Constitution.
57. The principle of the universality of human rights had not been in contestation, but the inclusion of sexual orientation in the set of human rights had. In other words, human rights were inherent and held simply because of being a human. All human beings, including LGBTQI persons, were entitled to the full enjoyment of all the rights under Chapter Four of the Constitution, not because of their sexual preferences as LGBTQI but as human beings. Just as the rights enjoyed by heterosexuals were not based on their sexual orientation but by virtue of common humanity. In jurisdictions where sexual orientation was intended to be part of the right against discrimination, it had been explicitly so provided either in the constitutions of those nations or in the statutes.

58. There was a clear distinction between sex and sexual orientation. In article 27(4) of the Constitution, the phrase sexual orientation was deliberately omitted by the framers because they only intended to guarantee the right against discrimination on the ground of a female or male gender. Section 5 of the Employment Act, prohibited discrimination in employment based on a limited list of grounds including sex but like the Constitution, it did not include sexual orientation in that list. On the international and regional plane, the main human rights and fundamental freedoms instruments, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and African Charter on the Human and People's Rights (ACHPR) all of which had been ratified by Kenya, did not make reference to sexual orientation.
59. From the court's research, only a few countries had included discrimination on the grounds of sexual orientation in their constitution. Those that had, including México, Portugal, Sweden, United Kingdom, Fiji and New Zealand, had done so expressly. The appellant's rejection of the names proposed by the 1st respondent did not amount to discrimination on the basis of sex or sexual orientation.
60. The court would have allowed the appeal and set aside the decision of the Court of Appeal.

Appeal dismissed.

Orders

1st respondent to have the costs of the appeal.

Citations

Cases

Kenya

1. *Dry Associates Ltd v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd* Petition 328 of 2011; [2012] eKLR - (Explained)
2. *EG & 7 others v Attorney General; DKM & 9 others (interested parties); Katiba Institute & another (amicus curiae)* Petition 150 & 234 of 2016; [2019] eKLR (Consolidated) - (Applied)
3. *EG v Non- Governmental Organisations Co-ordination Board, Attorney General, AMI, DK & Kenya Christian Professionals Forum* Petition 440 of 2013; [2015] KEHC 5425 (KLR); [2015] eKLR - (Mentioned)
4. *Fleur Investments Limited v Commissioner of Domestic Taxes & Kenya Revenue Authority* Civil Appeal 158 of 2017; [2018] KECA 341 (KLR); [2018] eKLR - (Explained)
5. *Fleur Investments Ltd v Commissioner of Domestic Taxes & another* Judicial Review Application 152 of 2019; [2018] eKLR - (Applied)
6. *In the Matter of the Kenya National Commission on Human Rights* Reference 1 of 2012; [2014] eKLR; [2014] 2 KLR 356 - (Mentioned)
7. *Miano, Anthony & others v Attorney General & others* Petition E343 of 2020; [2021] eKLR - (Explained)

8. *Mumba, Albert Chaurembo & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] KESC 83 (KLR; [2019] eKLR - (Explained)
9. *Munialo, Jack Mukhongo & 12 others v Attorney General & 2 others* Petition 182 of 2017; [2017] eKLR - (Explained)
10. *Muruli, Marble v Wyclife Ambesta Oparanya & 3 others* Petition 11 of 2014; [2016] KESC 14 (KLR); [2016] eKLR - (Applied)
11. *Mutanga Tea & Coffee Company Ltd v Shikara Ltd & another* Civil Appeal 54 of 2014; [2015] KECA 469 (KLR); [2015] eKLR - (Mentioned)
12. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Applied)
13. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR); [2013] 2 KLR 142 - (Applied)
14. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Mentioned)
15. *Republic v National Environmental Management Authority* Civil Appeal 84 of 2010; [2011] eKLR - (Explained)
16. *Shollei v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Explained)
17. *Speaker of National Assembly v Njenga Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] eKLR; [2008] 1 KLR 425 - (Mentioned)
18. *United Millers Ltd v Kenya Bureau of Standards & 5 others* Petition (Application) 4 of 2021; [2021] KESC 72 (KLR); [2021] eKLR - (Followed)
19. *Vania Investments Pool Ltd v Capital Markets Authority & others* Civil Appeal 92 of 2014; [2014] KECA 452 (KLR); [2014] eKLR - (Mentioned)

South Africa

S v Makwanyane and another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 - (Explained)

Botswana

1. *Attorney General of Botswana v Thuto Rammoge & 19 others* Civil Appeal No 128 of 2014 - (Explained)
2. *Kanane v State* [2003] 2 BLR 67 (CA) - (Applied)
3. *Letsweletse Motshidiemang v Attorney General* High Court Civil Case No MAHGB-000591- 16 - (Explained)

United Kingdom

1. *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 - (Applied)
2. *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 - (Explained)
3. *Morelle v Wakeling* [1955] 2 QB 3379 - (Mentioned)
4. *R (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473 - (Explained)
5. *Regina v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 - (Explained)

India

1. ***Navtej Singh Johar v Union of India*** AIR 2018 SC 4321 - (Explained)
2. ***Suresh Kumar Koushal v Naz Foundation*** AIR 2014 SC 563 - (Mentioned)

United States

Gay Alliance of Students v Mathews 544 F 2d 162 (4th Cir 1976) - (Explained)

Canada

R v Oakes [1986] 1 SCR 103 - (Applied)

Regional Court

1. *People v Siyah Pembe Üçgen Izmir Association ("Black Pink Triangle")* Izmir Court of First Instance No 6 - (Explained)
2. *Salgueiro da Silva Mouta v Portugal* Application no. 33290/96 - (Applied)
3. *Sidiropoulos & others v Greece* (57/1997/841/1047) - (Explained)
4. *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) - (Explained)
5. *Zhdanov & others v Rusia* Application No 12200/08, 35949/11 and 58282/12 - (Explained)

Texts

1. Cameron, E., (1993), *Sexual Orientation and the Constitution: A Test Case for Human Rights* South African Lagal Journal, 110, p 450
2. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
3. Gelpe, MR., (Ed) (1985), *Exhaustion of Administrative Remedies: The Lesson from Environmental Cases* 53 George Washington Law Review 1: Faculty Scholarship Paper 81
4. Heymann, JH., et al (Eds) (2016), *Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions* New York: Yale Journal of Law & Feminism pp149-69
5. Kangu, JM., (Ed) (2015), *Constitutional Law of Kenya on Devolution* Nairobi : Strathmore University Press p 346
6. McHenry, RD., (Ed) (2001), *Britannica Online Encyclopaedia* Encyclopædia Britannica, Inc
7. Ontario Human Rights Commission (), *The Glossary of Human Rights Terms*
8. (2006), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*

Statutes

Kenya

1. Companies Act (cap 486) sections 48; 49; 50; 51; 52; 53; 54; 55; 56; 57; 58; 59; 60; 61; 62; 63; 64; 65; 66; 67;68 - (Interpreted)
2. Constitution of Kenya articles 11(1)(2); 19(2); 20(2); 24(1)(5)(a); 27(4); 28; 31(3); 36; 163(4); Chapter 4 - (Interpreted)
3. Constitution of Kenya Review Act (Spent) (cap 3A) sections 29, 30 - (Interpreted)
4. Employment Act (cap 226) section 5 - (Interpreted)
5. Fair Administrative Action Act (cap 7L) sections 4(1); 7(2)(a)-7(2)(o); 9 - (Interpreted)
6. Law Reform Act (cap 26) In general - (Cited)
7. Non-Governmental Organizations Co-Ordination Act (cap134) section 19 - (Interpreted)
8. Non-Governmental Organizations Co-ordination Regulations, 1992 (cap 134) regulation 8(3)(b)(ii); part II - (Interpreted)
9. Penal Code (cap 63) sections 162(a)(c); 163, 165, 171; Chapter XV; XVI; - (Interpreted)
10. Supreme Court Act (cap 9B) section 15 - (Interpreted)

South Africa

1. Civil Union Act, 2006 (Act No 17 of 2006) In general - (Cited)
2. Constitution of the Republic of South Africa, 1996 section 9(3) - (Interpreted)

Botswana

1. Penal Code (cap 08:01) sections 164, 167 - (Interpreted)
2. Societies Act (Chapter 18:01) In general - (Cited)

United Kingdom

1. Buggery Act, 1533 (Repealed) In general - (Cited)
2. Equality Act, 2010 (cap 15) section 12 - (Interpreted)
3. Marriage (Same-Sex Couples) Act, 2013 (cap 30) In general - (Cited)
4. Marriage and Civil Partnership (Scotland) Act, 2014 (2014 asp 5) In general - (Cited)
5. Northern Ireland (Executive Formation etc) Act, 2019 (cap 22) In general - (Cited)

India

Indian Penal Code, 1860 (Act No 45 of 1860) section 377 - (Interpreted)

Canada

Canadian Human Rights Act (R.S.C., 1985, c. H-6) In general - (Cited)

Australia

1. Human Rights (Sexual Conduct) Act, 1994 In general - (Cited)
2. Marriage Amendment (Definition and Religious Freedoms) Act (No 129, 2017) In general - (Cited)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 articles 2, 10(1)

2. European Convention on Human Rights, 1950 article 14
3. International Covenant on Civil and Political Rights (ICCPR), 1966 articles 2, 22(1); clause 3, 4; paragraph 1
4. Universal Declaration of Human Rights (UDHR), 1948 article 2

Advocates

Mr. Charles Kanjama and *Ms. Rachael Wambui* for the petitioner
Mrs. Ligunya for the 1st respondent
Ms. Omuom for the 2nd respondent
Mr. Harrison Kinyanjui for the 5th respondent

February 24, 2023, the Court delivered the following Judgment:

A. Background

1. The petition of appeal before court is dated May 6, 2019 and lodged on even date. The appeal challenges the Judgment of the Court of Appeal (Waki, Nambuye, Koome, Makhandia and Musinga, JJA) at Nairobi in Civil Appeal No 145 of 2015 delivered on March 22, 2019, which dismissed the appeal in the High Court decision *EG v Non-Governmental Organisations Co-ordination Board & 4 others*, petition No 440 of 2013. The Court of Appeal (by a majority of 3:2) affirmed the decision of the High Court that had declared that the Non-Governmental Organizations Coordination Board (NGO co-ordination board) had contravened the provisions of article 36 of the *Constitution* in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.

2. This matter can be traced to a letter from the NGO co-ordination board dated March 25, 2015 refusing to reserve any of the 1st respondent's proposed names to register a non-governmental organization (NGO) seeking to champion the rights of (lesbian, gay, bisexual, transgender, queer or questioning (LGBTIQ) persons in Kenya. The 1st respondent sought to reserve for registration of an NGO in any of the names: Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; Gay and Lesbian Human Rights Organization; Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective.

3. However, the appellant's executive director declined to approve any of the proposed names on the grounds that sections 162, 163 and 165 of the *Penal Code* criminalizes gay and lesbian liaisons. The 1st respondent's efforts to request for a review of the decision from the NGO coordination board bore no fruit.

4. Aggrieved by the appellant's decision, the 1st respondent filed High Court petition No 440 of 2013 alleging that the appellant's refusal to register the intended NGO not only contravened the provisions of articles 20(2), 31(3), 27(4), 28 and 36 of the *Constitution*, but also those of the *Non-Governmental Organizations Co-ordination Act* (the NGO Coordination Act).

5. The trial court (Lenaola, J (as he then was), Ngugi, J (as she then was), and Odunga, J (as he then was) delineated two main issues and several other collateral issues for determination. The primary issues for determination were:

   i. whether LGBTIQ have a right to form associations in accordance with the law; and

   ii. if the answer is in the affirmative, whether the decision of the board not to allow the registration of the proposed NGO because of the choice of name is a violation of the rights of the 1st respondent under articles 36 and 27 of the *Constitution*.

6. On April 24, 2015, the court rendered its determination. Before tackling the main issues, the court addressed itself on the issue of whether there was failure by the 1st respondent to exhaust any internal remedies before approaching the court. In this regard, the trial court observed that in rejecting the names, the appellant was not dealing with registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. Therefore, the court held that the refusal to reserve the proposed names was not "a decision" contemplated under section 19 of the *NGO Coordination Act* under which an appeal to the Minister lies. The trial court also found that the impugned decision was purely administrative and was made pursuant to the *NGO Regulations*, and not the *NGO Coordination Act*. To this end, the court concluded that there was no statutory prescribed internal remedy that was available to the 1st respondent, and that the court could not close its doors on him for failure to exhaust an internal remedy that did not apply to his circumstance.

7. Further, the trial court held that the state is restricted from determining which convictions and moral judgments one can hold, and that as per the *Constitution*, the right to freedom of association is not selective, but is guaranteed to, and applies to everyone. The learned judges also, observed that it did not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups. Moreover, the court observed that if only people with views that are popular were allowed to associate with others, then the room within which to have a rich dialogue and disagree with the government and others in society would be thereby unreasonably limited.

8. The trial court observed that it was apparent that the appellant took issue with both the name, and the objects and purposes, of the 1st respondent's proposed NGO because it deemed the name to be furthering an illegality. Therefore, the court concluded that whatever

mode the Board wished to place in rejecting the name sought to be used by the 1st respondent, its effect was to reject the 1st respondent's application to register an association to advocate for the rights of LGBTIQ. Ultimately, the court found that the appellant's action constituted an infringement of the 1st respondent's right to freedom of association.

9. On the issue of whether the limitation of the 1st respondent's right to freedom of association was justifiable in a free and democratic society, the trial court recognized that the right to freedom of association is not absolute and can be limited. However, such limitation must be in accordance with article 24 of the *Constitution*. Accordingly, the court faulted the appellant's reliance on sections 162 and 163 of the *Penal Code* to justify its decision, as those sections do not criminalize homosexuality or the state of being homosexual; the law only refers to certain sexual acts which are "against the order of nature." Likewise, the learned judges observed that the fact that the state does not prosecute people who confess to being lesbians and homosexuals in this country, is a clear manifestation that such sexual orientation is not criminalized. To that end, the court found that the *Penal Code* does not criminalize the right to freedom of association of people based on their sexual orientation nor does it contain any provision that limits the freedom of association of persons based on their sexual orientation. The court concluded therefore that the appellant's reliance on the provisions of the *Penal Code* to limit the 1st respondent's freedom of association was untenable.

10. With regard to the right to non-discrimination, the trial court noted that both the board and the High Court are constitutionally mandated when applying the *Constitution* to give effect to the non-discrimination provisions in article 27. Further, it observed that an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.

11. Finally, the trial court found the petition had merit and declared the words 'every person' in article 36 of the *Constitution* to include all persons living within the Republic of Kenya despite their sexual orientation. The court further declared that the appellant had contravened the provisions of article 36 of the *Constitution* and, that the 1st respondent was entitled to exercise his constitutionally guaranteed right to freedom of association. Consequently, the High Court issued an order of mandamus directing the board to strictly comply with its constitutional duty under article 27 and 36 of the *Constitution*, and the relevant provisions of the *NGO Co-ordination Act*.

12. Dissatisfied with the judgment of the High Court, the appellant lodged an appeal at the Court of Appeal in Nairobi, Civil Appeal No 145 of 2015, challenging the whole judgement and decree of the High Court. The appellant raised eleven grounds stating that the learned judges erred in law and in fact:

i. By identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or any sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behavioral traits which the society has a right and duty to regulate for the sake of the common good;

ii. When they held that the refusal to register the 1st respondent's proposed NGO was not a decision contemplated under section 19 of the *NGO Act* for which an appeal lies to the minister;

iii. In failing to recognize the limits of the right to freedom of association and the fact that the right is enjoyed by persons and not based on any attribute they may determine for themselves;

iv. In finding that the right to freedom of association extended to the proposed NGO of the 1st respondent;

v. By adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country;

vi. By disregarding the religious preference in the *Constitution* and the preambular influence that must be applied in interpreting and applying the various constitutional provisions in issue;

vii. By failing to uphold the provisions of the *Penal Code* that outlaw homosexual behavior, as well as any aiding, abetting, counselling, procuring and other related and inchoate crimes;

viii. By effectively reading into the *Constitution*'s non-discrimination clause the ground of sexual orientation;

ix. By misunderstanding and misapplying the limitation clause in article 24 of the *Constitution*;

x. By rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration or proposed applications for associations of persons; and

xi. By granting the declarations sought and the order of *mandamus* in the decree appealed against.

13. Having considered the issues for determination, the Court of Appeal on March 22, 2019, by a majority of 3-2, dismissed the appeal, affirming the judgment of the High Court. The issues for determination delineated by the court were whether the 1st respondent had an obligation to exhaust the remedies available under the *NGO Coordination Act* or whether

the 1st respondent's petition before the High Court was premature; whether in rejecting the reservation of the name, the director of the appellant violated article 36 on the 1st respondent's right to freedom of association and from discrimination and equality under articles 36 and 27 of the *Constitution* respectively, and whether the right under article 36 is a limited right pursuant to article 24.

14. On the issue of the exhaustion of internal remedies, the majority (Waki, Koome and Makhandia JJA) agreed with the reasoning of the High Court. In that regard, the learned judges observed that the *NGO Coordination Act* and *Regulations* therein had not provided for an internal appeal mechanism for applicants to follow when a name is refused for the reservation to register an NGO. Therefore, the court found that requiring the 1st respondent to exhaust internal remedies would have been an exercise in futility given that there was none. The court further agreed with the trial court that courts are the ultimate bastion and custodians of the *Constitution* and that appellant's decision not only transcended a mere administrative act, but also touched on matters of constitutional interpretation.

15. On the other hand, the minority (Nambuye and Musinga JA) in finding that the petition before the High Court was premature, observed that the genesis of the 1st respondent's petition was purely an administrative action executed by the director on behalf of the appellant, declining registration of his NGO with no constitutional underpinnings at that point in time. Therefore, the procedures set out in section 19 of the *NGO Coordination Act* ought to have been invoked and exhausted before seeking the court's intervention.

16. With regards to the violation of the right to freedom of association and limitation thereof, the majority (Waki, Koome and Makhandia JJA) found that the director of the appellant was in breach of article 36 of the *Constitution*. The learned judges noted that there was no contestation from any side that there are people in this country who answer to any of the descriptions in the acronym LBGTIQ; these are 'persons,' and are therefore protected under article 36 of the *Constitution*. The court observed that just like everyone else, they have a right to freedom of association which includes the right to form an association of any kind. They further held that the LBGTIQ, just like other citizens, are subject to the law including sections 162, 163 and 165 of the *Penal code*, and would be subject to sanctions if they were to contravene such law. The court concluded that by refusing to register the NGO, the 1st respondent was convicted before contravening any law, and that such action was retrogressive. The Court of Appeal, by majority, also found that the only limitation to the right of freedom of association as provided under article 36 of the *Constitution* is that the activities of the association must be in accordance with the law. If they are not, then the proposed NGO would not be protected by the *Constitution* and the law would take its cause. They further observed that it was arbitrary to speculate and categorize LGBTIQ, as persons who have the propensity to destroy society by contravening the provisions of the

Constitution or the *Penal Code*, or as a group bent on ruining the institution of marriage or culture.

17. On the other hand, the minority (Nambuye and Musinga JJA) held that the director of the appellant's action of rejecting the proposed names did not discriminate against the LGBTIQ. They observed that the right to freedom of association as guaranteed under article 36 of the *Constitution* was not absolute, and subject to the limitation in terms of article 24(1) of the *Constitution*. Further, the learned judges found that article 27 (4) prohibits discrimination on the basis of a person's sex (gender) and not sexual orientation. They observed that the law, as it currently stands, does not permit homosexual and lesbian sexual practices, and the freedom of association of gays and lesbians in Kenya may lawfully be limited by rejecting registration of a proposed NGO, if the country's laws do not permit their sexual practices.

18. Dissatisfied with the Court of Appeal's decision, the appellant filed an appeal before us presumably under article 163(4) (a) of the *Constitution*. The appellant seeks the following orders from the court:

    a. The appeal be allowed with costs.

    b. The judgment and decree of the Court of Appeal given on March 22, 2019 disallowing the appeal be reversed and set aside.

    c. An order do issue affirming the right and duty of the appellant to refuse registration to any association intended to be established contrary to public the interest, or public policy, or to advance an agenda or directly or indirectly promoting conduct that is impugned under the laws of this country, including the advancement of any homosexual agenda.

19. The appellant contends that the Court of Appeal through its majority decision erred in law in dismissing the appellant's appeal against the decision of the High Court on the following grounds:

    a. That the learned judges erred by failing to recognize that the actions of the executive director under the *NGO Regulations* were made under the delegated authority of the board whose decision was subject to appeal to the minister.

    b. That the learned judges erred in law in failing to recognize the limits of the right to freedom of association as provided for under article 36 of the *Constitution* of and the fact that the freedom is enjoyed by persons and not based on any attribute, they may determine for themselves.

c. That the learned judges erred in law in conflating the freedom of association under article 36 of the *Constitution* with-

   a. An absolute right to associate any desired label or name.

   b. An unfettered right to pursue any particular activity, objective or policy.

d. That the learned judges erred in law in finding that the freedom of association provided for under article 36 of the *Constitution* extended to the 1st respondent's proposed NGO.

e. That the learned judges erred in law by disregarding the religious preference in the *Constitution* and its preamble, which influence should be applied in interpreting and applying the various constitutional provisions.

f. That the learned judges erred in law by effectively reading into the *Constitution* non-discrimination clause, article 27 the ground of sexual orientation.

g. That the learned judges erred in law by finding that morals and public policy have no legitimate role in the appellants determination on the acceptance of the registration of the proposed NGOs, contrary to articles 24(5)(a), 36(3),19(2) ,11(1) & (2) of the *Constitution* and sections 162, 163 and 165 of the *Penal Code*.

h. That the learned judges erred in law by disallowing the appeal before it.

B. Parties' Submissions

The appellant

20. The appellant in its submissions filed on August 8, 2019, and supplementary submissions filed on September 20, 2019, argued that article 36 is not an absolute right and is subject to limitation under article 24 of the *Constitution*. The appellant urged that individual rights should be interpreted with due regard to the public interest and the rights of the larger Kenyan community. Further that, in the *Constitution*, only persons of the opposite sex can contract marriage, and that our *Constitution's* non-discriminatory clause is different from that of the *South African Constitution*. In that context, it was submitted that whereas, the *South African Constitution* expressly enlists sexual orientation as a ground for non-discrimination, our *Constitution* does not.

21. It was the appellant's case that its refusal to register the 1st respondent's NGO with any of the proposed names that is, 'National Gay and Lesbian Human Rights Commission, National Coalition of Gays and Lesbians in Kenya and National Gay and Human Rights Association,' was a reasonable refusal within the meaning of article 36 of the *Constitution*.

22. Further, the appellant submitted that article 159(2) (c) read alongside article 165 of the *Constitution* affirms that the High Court's unlimited jurisdiction should be interpreted in a way that accommodates alternative dispute resolution mechanisms. The appellant buttressed this argument by citing the decisions in *Mutanga Tea & Coffee Company Ltd v Shiakara Limited & Another* [2015] eKLR and *Vania Investments Pool Limited v Capital Markets Authority & others* [2014] eKLR.

23. The appellant also argued that the registration of the intended NGO would undermine sections 162, 163 and 165 of the *Penal Code*, and therefore, refusal of such registration was a reasonable limitation of the right to freedom of association under article 36 of the *Constitution*.

24. It concluded by submitting that the right to freedom of association under article 36(3) of the *Constitution*, allows the legitimate regulatory authority to restrict the use of certain names from the identity of an association that seeks registration on account of public interest and policy.

1st Respondent

25. In response to the appeal, the 1st respondent submitted that the appellant has raised many diversionary issues which obscure the true nature and scope of the dispute before the court. It was argued that the delegated authority of the executive director and availability of an appeal to the minister, has little or nothing to do with interpretation or application of the *Constitution* and therefore the Supreme Court does not have jurisdiction to entertain the appeal.

26. The 1st respondent argued that the rights and fundamental freedoms set out in the *Constitution* are inherent on all persons including LGBTIQ persons on account of their humanity and inherent dignity. Therefore, the provisions of the *Constitution* relating to religion do not and cannot constitute a reasonable or valid ground for refusing to reserve names for an NGO whose objectives is toprotect and promote the humanity, dignity and rights and fundamental freedoms of LGBTIQ persons or other groups of persons.

27. In addition, the 1st respondent submitted that the appellant had in any event conceded at the High Court that the *Constitution* protects individuals against all forms of discrimination including that of sexual orientation, and in doing so therefore it was clear that the *Constitution* expressly prohibits discrimination on any ground including the list under article 27(4) which is merely illustrative and not exhaustive.

2nd Respondent

28. In support of the appeal, the 2nd respondent, the Attorney General (AG) submitted that the *NGO Coordination Act* provides for a dispute resolution mechanism under section 19 which provides that an appeal against the decision of the board lies with the minister. It was therefore argued that the High Court assumed jurisdiction that it did not have over the matter.

29. Further it was urged that the High Court dealt with a matter which it ought not to have dealt resulting to a per incuriam decision. The AG reinforced this argument with the decisions in *Marble Muruli v Wyclife Ambesta Oparanya & 3 others*, Supreme Court petition No 11 of 2014, [2016] eKLR and *Morelle v Wakeling* [1955] 2 QB 3379.

30. It was the AG's case that the superior courts failed to appreciate the proper context under which the appellant's reason for rejecting the names submitted by the 1st respondent fell and that the right to freedom of association as envisaged in the *Constitution* is not absolute, and is subject to limitation under article 24 of the *Constitution*.

Amicus curiae

31. The *amicus curiae* (Katiba Institute) urged that the denial of registration did not meet the requirements of article 24 of the *Constitution*, and that article 24(3) the *Constitution* places the onus on the person seeking to justify a limitation to demonstrate grounds justifying the limitation of a right or fundamental freedom; and that the grounds must be premised on human dignity, equality, and freedom. In that regard, the *amicus curiae* urged this court to establish whether this onus has been met by the appellant.

C. Issues for Determination

32. Having considered the respective parties' pleadings and submissions in the appeal before us the following issues emerge for determination:

    i. Whether the 1st respondent was required to exhaust internal remedies under the *NGO Coordination Act*,

    ii. Whether the decision of the executive directive of the NGO Coordination Board violated article 36 of the *Constitution*, and;

    iii. Whether the decision of the NGO Coordination Board was discriminatory and contravened article 27 of the *Constitution*.

D. Analysis and Determination

33. With regard to this court's jurisdiction to entertain the appeal before us, we find that it is filed as of right pursuant to article 163(4)(a) of the *Constitution*. We have perused the judgments of the superior courts and noted that both courts interrogated the decisions of the executive director of the NGO Coordination Board in view of article 36 and 27 of the *Constitution*. We have also considered article 163(4)(a) of the *Constitution*, section 15 of the *Supreme Court Act*, and the guiding principles set by this court in the case of *Lawrence Nduttu & 6000 other v Kenya Breweries Ltd & another*, SC Pet No 3 of 2012, and it is our finding that this matter is properly before us.

34. Before determining the issues listed above, we find it necessary to emphasize that the matter before us is not about the legalization or decriminalization of LBGTIQ, or the morality of same-sex marriage but revolves around the question of whether refusal to register an organization of persons who fall within the LGBTIQ contravened the fundamental rights and freedoms of association guaranteed in the *Constitution* and whether the rights to freedom of association and freedom from discrimination of those persons seeking to be registered were infringed upon.

35. Having so clarified, we now proceed to deal with the issues for determination as follows;

(i) Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the *NGO Coordination Act*?

36. The appellant supported by the 2nd and 5th respondents argued that there exists an internal dispute resolution mechanism under the *NGO Coordination Act* and the*NGO Organizations Regulations, 1992*. Therefore, they urged that the 1st respondent ought to have exhausted the internal dispute resolution mechanism before filing a petition in court. Citing section 19 of the *NGO Act*, it was submitted that the rejection of the name by the NGO Coordination Board should have resulted in an appeal to the minister under section 19 (3) of the *Act*. In that context, they maintained that the petition before the High Court was premature. They urged the court to affirm the dissenting decision of Musinga, JA, who observed that name reservation and application for registration of an NGO cannot be separated.

37. On his part, the 1st respondent supported by the *amicus curiae* argued that the appellant, having refused to reserve the names brought before it by the 1st respondent, directed that the matter be heard in a court of law. The 1st respondent's counsel also submitted that the matter was at the early stages of reservation of names and not the registration of the NGO, and that reservation falls under regulation 8 of the *NGO Co-ordination Regulations, 1992*

and not section 19 of the *NGO Act* as proposed. Therefore, they urged that there was no remedy available to the 1st respondent under regulation 8.

38. According to article 159 (1) of the *Constitution*, judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the *Constitution*. In that regard, the *Constitution* encourages use of alternative means of dispute resolution mechanism.

39. According to Gelpe, Marcia R, "*Exhaustion of Administrative Remedies: The Lesson from Environmental Cases*" (1985). Faculty Scholarship. Paper 81, exhaustion of administrative remedies aids in protecting administrative autonomy, preserving the separation of powers, gaining judicial economy, avoiding administrative inefficiency, and permitting courts to benefit from an administrative body's determination of facts and exercise of discretion.

40. The doctrine of exhaustion of administrative remedies was settled by this court in the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* SC petition No 3 of 2016; [2019] eKLR. This court stated as follows at paragraph 118:

> "..... Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi- judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute".

41. In the persuasive case of *R v National Environmental Management Authority*, CA No 84 of 2010; [2011] eKLR the Court of Appeal observed as follows:

> "The principle running through these cases is where there was an alternative remedy and especially <u>where parliament had provided a statutory appeal procedure</u>, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, <u>it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."</u>. [Emphasis added]

42. We are also persuaded by the High Court's reasoning in *Anthony Miano & others v Attorney General & others*, HC petition No E343 of 2020; [2021] eKLR where the court made

reference to the doctrine of exhaustion (by citing a 5-judge bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 (2020) eKLR which had elaborately dealt with the doctrine of exhaustion.) The court stated at paragraph 35:

> "…….What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, the regulatory scheme involved, the nature of the interests involved – including the level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies…. [Emphasis added.

43. From the foregoing decisions, this court is invited to interrogate whether an internal dispute resolution mechanism was available to the 1st respondent, and the suitability of the internal appellate mechanism to determine the issue. In this context, while the appellant urged that there existed an internal dispute resolution mechanism stipulated under section 19 of the *NGO Coordination Act*, the 1st respondent submitted to the contrary. He also submitted that the executive director advised that the matters raised were constitutional in nature therefore, beyond his ambit.

44. Section 19 of the *NGO Coordination Act* provides as follows:

> "19.
>
> 1. Any organization which is aggrieved by the decision of the board made under this part may, within sixty days from the date of the decision, appeal to the minister.
>
> 2. On request from the minister, the council shall provide written comments on any matter over which an appeal has been submitted to the minister under this section.
>
> 3. The minister shall issue a decision on the appeal within thirty days from the date of such an appeal.
>
> 3A. Any organization aggrieved by the decision of the minister may, within, twenty-eight days of receiving the written decision of the minister, appeal to the High Court against that decision and in the case of such appeal—

a. The High Court may give such direction and orders as it deems fit; and

b. The decision of the High Court shall be final."

45. Concerning reservation of names, part II of the *NGO Coordination Regulations, 1992* regulation 8 provides as follows:

> " 1. An applicant for the registration of any proposed organization shall prior to such application seek from the director approval of the name in which the organization is to be registered.
>
> 2. The application for approval under paragraph (1) shall be in form 2 set out in the schedule and accompanied by the fee specified in regulation 33.
>
> 3. The director shall, on receipt of an application and payment of the fee specified in regulation 33, cause a search to be made in the index of the registered organizations kept at the documentation centre and shall notify the applicant either that—
>
> a. such name is approved as desirable; or
>
> b. such name is not approved on the grounds that—
>
> i. it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or organization existing under any law; or
>
> ii. such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable.
>
> 4. A name which has been approved under paragraph (3)(a) shall be entered in the register of reserved names on behalf of the applicant for a period of thirty days or such longer period, not exceeding sixty days, as the director may allow, and such period shall commence from the date of notification of such approval to the applicant."

46. In the instant case, the administrative action concerned was the "refusal to approve the 1st respondent's name." So then, does the relevant statute, that is the *NGO Coordination Act*,

provide for a dispute resolution mechanism for the administrative action concerned? The answer is in the negative. Unlike the *Companies Act*, the *NGO Coordination Act* does not anticipate that the reservation of names is an administrative action which will attract the dispute resolution mechanism provided for under section 19. In other words, there are no substantive provisions on approval of names under the *NGO Coordination Act*. In addition, from the provisions of regulation 8, it is obvious to us that there are no administrative mechanisms to which the 1st respondent ought to have exhausted, following the director's decision under the said regulation.

47. We therefore agree with the position taken by the two superior courts that neither the *NGO Coordination Act* nor the *NGO Regulations* provide for any internal dispute resolution mechanism for a party aggrieved by the decision made by the director when exercising its mandate under regulation 8. We also find it necessary to emphasize that an Act of parliament must clearly provide for an internal dispute resolution mechanism before an aggrieved party can be bound by such a mechanism.

48. The above finding, notwithstanding, we note that the petition before the trial court concerned interpretation and application of the *Constitution*, a jurisdiction bestowed upon that court. The "minister" therefore, did not have the jurisdiction to entertain issues such as the constitutionality of the decision taken by the director and the NGO Coordination Board. Therefore, it is our finding that the suit before the High Court was proper. In conclusion, we affirm the decision of the Court of Appeal that there was no internal dispute resolution mechanism under *NGO Coordination Act* and the *NGO Coordination Regulations, 1992* to challenge the impugned decision.

(ii) Whether the decision of the executive directive of the NGO Coordination Board violated article 36 of the *Constitution*.

49. The core issue for determination between the parties herein is whether the decision of the executive director of the NGO Coordination Board violated article 36 of the *Constitution*. In this regard, the appellant argued that in refusing to reserve the names for the proposed NGO, it had formed the opinion that the names and the objects offended public policy as their registration would stand in conflict with sections 162, 163 and 165 of the *Penal Code* which provisions outlaw homosexual liaisons. Furthermore, the appellant faulted the two superior courts for failing to appreciate the proper context under which the appellant's reason for rejecting the names proposed by the 1st respondent fell. It was argued that the superior courts disregarded majority interests, the moral principle that is enshrined in the *Constitution*.

50. In opposition, the 1st respondent argued that article 36 of the *Constitution* expressly provides for the registration of an association of any kind, and that the only group limitations on the

freedom of association envisioned by the *Constitution* are restricted to persons serving in the Kenya Defence Forces or the National Police Service in accordance with article 24 (5) (b) of the *Constitution*. It was also submitted that if the drafters of the *Constitution* intended to restrict the freedom of association of LGBTIQ persons or any other group of persons, they would have expressly included that group in article 24(5) of the *Constitution*.

51. Article 36 of the *Constitution* states that:

> " 1. Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
>
> 2. A person shall not be compelled to join an association of any kind.
>
> 3. Any legislation that requires registration of an association of any kind shall provide that—
>
> a. registration may not be withheld or withdrawn unreasonably.
>
> b. there shall be a right to have a fair hearing before a registration is cancelled"

52. This court notes that the right to freedom of association is also recognized in international and regional human rights instruments which Kenya has ratified. The right to freedom of association is provided for under article 22 (1) of the *International Covenant on Civil and Political Rights* (ICCPR). It states:

> " Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"

53. Similarly, article 1(1) of the *African Charter on Human and Peoples Rights* provides *inter alia*:

> " Every individual shall have the right to free association provides he abides by the law"

54. Furthermore, article 260 of the *Constitution* defines a "person" to include a company, association, or other body of persons whether incorporated or unincorporated. The question we have asked ourselves is whether in the instant case, the person(s) referred to in the above provisions also include LGBTQ? Our literal reading of article 36 of the *Constitution* is that the LGBTQ group is not excluded from the definition under article 36. Sub-article (3) requires that any legislation that requires registration of an association of any kind shall

provide that registration may not be withheld or withdrawn unreasonably. The right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

55. The right to freedom of association cannot be limited unless as provided for under the *Constitution*. In that regard, article 24 (1) provides as follows:

> " A right or fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--
>
> a. the nature of the right or fundamental freedom;
>
> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation;
>
> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose".

56. The parameters of legislative limitation with regard to the right to associate has engaged the minds of judges in other jurisdictions, in both international and domestic courts. In the case of *Sidiropoulos and Others v Greece* (57/1997/841/1047), the European Court of Human Rights held that:

> " The court points out that the right to form an association is an inherent part of the right set forth in article 11, even if that article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly, states have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the convention and subject to review by the convention institutions".

57. Furthermore, the Supreme Court of Canada in the case In *R v Oakes* [1986] 1 SCR 103 developed principles for consideration when determining whether a limitation of a right is justifiable, namely; a) there has to be a pressing and substantial objective for the law or government's action; b) the means chosen to achieve the objective must be proportional to the burden on the rights of the claimant; c) the objective must be rationally connected to the limit on the charter right; d) the limitation must minimally impair the charter right; and d) there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

58. According to the Siracusa principles on the limitation and derogation provision in the *International Covenant on Civil and Political Rights*, clause 3 and 4 in the general interpretative principles relating to the justification of limitations section, provides that "all limitations shall be interpreted strictly and in favour of the right at issue and in the light and context concerned." The burden of justifying a limitation upon a right guaranteed under ICCPR lies with the state.

59. In *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1, Chaskalson, observed in his lead opinion at paras 103 & 104:

> " The criteria prescribed by section 33(1) for any limitation of the rights contained in section 11(2) are that the limitation must be justifiable in an open and democratic society based on the freedom of equality, it must be both reasonable and necessary and it must not negate the essential content of the right... The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be

necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

60. In the present case, the appellant submitted that it declined to approve any of the names as proposed by the 1st respondent on the ground that sections 162, 163 and 165 of the *Penal Code* criminalize gay and lesbian liaisons as the same goes against the order of nature. So, is the right to freedom of association absolute under article 25? Can it be limited? Did the impugned legislation, the *Penal Code*, provide for the limitation of the right to freedom of association of LGBTQ? Was the limitation of the 1st respondent's right necessary in a democratic society? Was the limitation proportionate to the aim sought? Moreover, there was no evidence placed before the 1st appellant to demonstrate that persons who profess to be LGBTQ are criminals or that it is only they who are capable of committing the offence of "unnatural acts". This was a mere assumption which was not born out of evidence when indeed it is confirmed by empirical data that even heterosexuals commit such offences more often than not most callously.

61. This court takes cognizance that not all rights are absolute, and that some rights are subject to limitation. In that context, article 36 (3) of the *Constitution* contemplates that the right to freedom of association is subject to limitation. However, any limitation on any fundamental rights and freedom is subject to article 24 of the *Constitution*.

62. Sections 162, 163 and 165 of the *Penal Code* upon which the director's decision was premised on provides as follows:

> "(162) Any person who—
>
> a. has carnal knowledge of any person against the order of nature; or
>
> b. has carnal knowledge of an animal; or
>
> c. permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:
>
> Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—
>
> i. the offence was committed without the consent of the person who was carnally known; or
>
> ii. the offence was committed with that person's consent, but the consent was obtained by force or by means of threats

> or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act
>
> (163) Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.
>
> (165) Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years."

63. Although sections 162, 163, and 165 prohibits any person from committing acts that go against the order of nature, we observe that the said sections do not distinguish between heterosexual or homosexual offenders. The sections do not limit the perpetrators of such acts to persons who are LGBTQ; indeed, the words, "any person", connote a potential offender under those sections who may very well be heterosexual, homosexual, intersex or otherwise.

64. We have interrogated the above sections of the *Penal Code*, and it is our finding that they do not, pursuant to the provisions of article 24 of the *Constitution*, express the intention to limit LGBTQ's right to freedom of association. Likewise, the sections do not specify the nature and extent of the limitation of the freedom of association, if any. The 1st respondent's intention was to register an organization to champion for the rights of LGBTIQ, and this has no correlation whatsoever with the offences articulated under sections 162, 163 and 165 of the *Penal Code*.

65. We find the appellant's interference to the 1st respondent's right to freedom of association did not pursue any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals and the protection of the rights and freedom of others. Therefore, it is our considered view that the appellant's limitation of the right to freedom of association was not proportionate to the aim sought.

66. We also have looked at case law relating to the freedom of association and registration of LGBTIQ organizations and have taken note of the jurisprudential standards that have been applied elsewhere. In the case of *Gay Alliance of Students v Mathews*, United States Court of Appeal [4th Cir 1976) the court held that the university's refusal to register the alliance hindered its efforts to recruit the new members and denied to the alliance the enjoyment of

the university's services, which other registered student organizations was afforded, thereby violating their freedom of association.

67. Furthermore, the European Court of Human Rights in *Zhdanov and Others v Rusia* (Application No 12200/08, 35949/11 and 58282/12 found that the Russian courts' decisions refusing registration had interfered with the freedom of association of the applicant organisations and their founders or presidents, the individual applicants. The court was not convinced that refusing to register the organisations had pursued the legitimate aims of protecting morals, national security and public safety, and the rights and freedoms of others. The only legitimate aim put forward by the authorities for the interference, which the court assumed to be relevant in the circumstances, was the prevention of hatred and enmity, which could lead to disorder. In particular, the authorities believed that the majority of Russians disapproved of homosexuality and that therefore the applicants could become the victims of aggression.

68. In the *People v Siyah Pembe Üçgen Izmir Association ("Black Pink Triangle")*, Izmir Court of First Instance No 6, Turkey, the court observed that it was not possible to characterize as immoral the fact that someone had a particular involuntary sexual orientation or the use of words such as lesbian, gay, bisexual, travesty or transsexual nor was being gay, lesbian, travesty or transsexual prohibited under national law, therefore the use of such terms in Black Pink Triangle's statute could not be considered immoral or contrary to law. The court also reasoned that, to characterize an association's aims as immoral, it had to be shown that those aims were against strictly determined morals that are accepted by the whole society. The general aim of the Black Pink Triangle was to strengthen solidarity among LGBTIQ persons, cultivate a freer environment in society and end discrimination against LBGT individuals. In declining to dissolve the association and affirming that lesbian, gay, bisexual, travesty and transsexual individuals have the same rights as everyone else to form an association, the court noted that Turkish laws did not prevent LGBT persons from forming an association.

69. Closer home, within the African continent, the Court of Appeal of Botswana in case of the *Attorney General of Botswana v Thuto Rammoge and 19 others*, Civil Appeal No 128 of 2014 grappled with similar questions as those before this Court. The case concerned the constitutionality of the refusal by Botswana's Department of Civil and National Registration to register a civil society group, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) which had sought to register as a society under *Botswana's Societies Act*. The refusal to register LEGABIBO was on the basis that same-sex conduct was at the time criminalized by sections 164 and 167 of the *Penal Code of Botswana*. The court held that the right to freedom of assembly and association protected the rights of lesbians, gays, bisexuals and their supporters to register a society to promote the rights of the members of the grouping and to lobby for legal reform. Significantly, the court noted that even

though *Botswana's Penal Code* then prohibited same-sex sexual acts, that did not extend to preventing gay and lesbian individuals from associating with one another.

70. We point out at this juncture that the *Constitution* requires state organs, state officers, public officers to uphold national values and principles of governance such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized. In addition, the *Constitution*, in article 21 (1) 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. Moreover, article 21(3) imposes an obligation on all state organs and all public officers to address the needs of vulnerable groups within society including members of minorities and marginalised communities. Given that the right to freedom of association is a human right, vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms, we hold that this right is inherent in everyone irrespective of whether the views they are seeking to promote are popular or not.

71. We are persuaded from aforementioned constitutional provisions, legal principles and case law, that it would be unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants. Therefore, we are of the view that the appellant's decision was unreasonable and unjustified.

72. As such, we agree with the reasoning of the High Court that just like everyone else, LGBTIQ have a right to freedom of association which includes the right to form an association of any kind. It should be noted however that all persons, whether heterosexual, lesbian, gay, intersex or otherwise, will be subject to sanctions if they contravene existing laws, including sections 162, 163 and 165 of the *Penal Code*. By refusing to register the NGO, the persons were convicted before they contravened the law. Such action is retrogressive. We, therefore, affirm the decision of the Court of Appeal that the appellant violated the 1st respondent's right to freedom of association under article 36 of the *Constitution*.

iii. Whether the decision of the NGO Coordination Board was discriminatory against the 1st respondent and violated article 27(4) of the *Constitution*?

73. The appellant argued that sexual orientation is not among the prohibited grounds contemplated under article 27 (4) of the *Constitution*. Further, it faulted the majority decision of the Court of Appeal which affirmed the High Court decision which interpreted the term 'including' under article 27(4) of the *Constitution* to give room for including sexual

orientation in the non- discrimination clause. Article 27(4) of the *Constitution* provides as follows:

> "(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

74. Article 2, paragraph 1, of the *International Covenant on Civil and Political Rights (ICCPR)* obligates each state party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Article 26 of the ICCPR not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

75. Regionally, article 2 of the *African Charter on Human and People's Rights* provides that every person shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status.

76. Further, according to the *Ontario Human Rights Commission, the Glossary of Human Rights Terms*, sexual orientation is defined as the direction of one's sexual interest or attraction. It is a personal characteristic that forms part of who one is. It covers the range of human sexuality from lesbian and gay, to bisexual and heterosexual. The *UK Equality Act 2010*, at section 12 defines sexual orientation to mean a person's orientation towards persons of the same sex, persons of the opposite sex, or persons of either sex. In relation to the protected characteristic of sexual orientation, a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; or a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation.

77. Other than the UK *Equality Act*, most international legal instruments do not expressly provide for the right not to be discriminated on the basis of one's sexual orientation. However, the grounds enumerated in the said instruments, including article 27(4) of the Kenyan *Constitution*, are not exhaustive. In that regard, the European Court of Human Rights in the case of *Salgueiro da Silva Mouta v Portugal*, judgment of December 21, 1999, Reports 1999-IX, p 327, para 28 ruled that a person's sexual orientation is a concept which

is undoubtedly covered under article 14 of the *European Charter on Human Rights*. In that regard, article 14 of the *European Charter on Human Rights* provides for enjoyment of the rights set forth in this the convention without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

78. In *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), the Human Rights Committee observed that; ''in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation''.

79. Guided by the foregoing legal instruments, comparative analysis, and caselaw, it is our opinion that the use of the word "sex" under article 27(4) does not connote the act of sex per se but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further we find that the word "including" under the same article is not exhaustive, but only illustrative and would also comprise "freedom from discrimination based on a person's sexual orientation." We, therefore, agree with the finding of the High Court to wit, an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles.'' Therefore, the appellant's action of refusing to reserve the name of the 1st respondent's intended NGO on the ground that "sections 162, 163 and 165 of the *Penal Code* criminalizes gay and lesbian liaisons" was discriminatory in view of section 27(4) of the *Constitution*. Consequently, we find that the 1st respondent's right not to be discriminated directly or indirectly based on their sexual orientation was violated by the appellant.

80. From the above analysis and finding, it is our finding that this appeal fails and is for dismissal.

81. As regards costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Pet No 4 of 2014; [2014] eKLR, this court held that it has discretion to award costs to ensure that the ends of justice are met, and that costs shall follow the event. Therefore, the 1st respondent shall have the costs of the appeal.

Dissenting Opinion of Justice Mohammed K. Ibrahim

82. I have had the advantage of reading in draft the majority judgment in this appeal and the dissenting opinion of my brother, Justice William Ouko. I am unable to agree with the majority in certain aspects hence this dissent.

83. The factual background and the summary of the submissions advanced by the parties in this appeal have comprehensively been set out in the majority judgment. I will therefore not

rehash them in this dissent save in limited aspects for purposes of clarity of any point I will be making.

84. From the petition of appeal and the parties' submissions, three major issues arise for determination in this appeal. They are: whether the 1st respondent was required to exhaust internal remedies under the *NGO Coordination Act*; whether the decision of the executive directive of the NGO Coordination Board violated article 36 of the *Constitution*; and whether the decision of the NGO Coordination Board was discriminatory and contravened article 27 of the *Constitution*.

85. I too find it necessary to render a disclaimer that despite the moral and religious concerns, the issue that was before the court did not concern the legalization or decriminalization of LGBTQI or morality regarding same-sex marriage, families, or any discussions of the differences between lesbian, gay, and bisexual, transgender, and intersex people. The core issues concern the registration of an organization and whether the freedom of association and freedom from discrimination were infringed upon.

i. Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the *NGO Coordination Act*

86. On this issue, I agree with the majority decision. In this country, it is now firmly established law that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion. This court in its previous decisions has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies. In the case of Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others SC Petition No 3 of 2016; [2019] eKLR we underscored the need for the relevant person, bodies, tribunals and any other quasi-judicial authorities and organs to be given the first opportunity to deal with disputes as provided for in the relevant parent statute. In the case of *United Millers Limited v. Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others*, SC petition (application) No 4 of 2021; [2021] eKLR we were emphatic that the courts must exercise restraint in exercising their jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

87. This is further firmly rooted in article 159 of the *Constitution* which requires the courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial

consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.

88. That is not to say that where there is evident abuse of discretion by such bodies, when there is arbitrary behaviour, malice, caprice, and disregard for the principles of natural justice, the courts can sit back. As held by the Court of Appeal in *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the courts have a duty to intervene where the exhaustion requirement would not serve the values enshrined in the *Constitution* or law.

89. That said, in the present case, I agree with the majority that the *NGO Coordination Act* does not contemplate the reservation of a name to be one of the decisions that are appealable under section 19 of the *NGO Coordination Act*. There are no substantive provisions for the approval of names under the *NGO Coordination Act*, rather the name reservation process is governed by regulation 8 of the *NGO Coordination Regulations, 1992*. This is unlike the *Companies Act*, No 17 of 2015 which has the entire part v containing sections 48 to 68 dedicated to regulating the choice of names and the reservation process for companies. It is evident that section 19 of the *NGO Coordination Act* is intended to deal with substantive decisions of refusal or cancellation of registration.

90. The appellant was not dealing with the registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. The contested decision to refuse to reserve the name was made solely administratively and in accordance with the *NGO Regulations* rather than the *NGO Coordination Act*. It therefore did not attract the dispute resolution mechanism provided for under section 19.

91. I further concur with the majority that before an aggrieved party may be bound by such a system, a statute must expressly and provide for an internal dispute settlement procedure. In the present suit, there was no clear mechanism of appeal or remedy within the *NGO Coordination Act* concerning the reservation of a name or names of a proposed NGO. Further to this I agree with the majority that the case raises issues of constitutional interpretation and application, therefore, the administrative forum did not have jurisdiction to hear the parties. With that, the High Court could therefore not shut its door to the appellants for failure to exhaust an internal remedy that did not apply to their circumstances.

ii. Whether the decision of the executive directive of the NGO Coordination Board violated article 36 of the *Constitution*

92. On this issue, I find myself in disagreement with the majority. In the current instance, the appellant claimed that it refused to approve any of the names suggested by the first respondent because sections 162, 163, and 165 of the *Penal Code* penalize homosexual and lesbian relationships since they are incompatible with the natural order of things.

93. Article 36 of the *Constitution* guarantees every Kenyan the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. It is imperative to stress the significance of this provision. It is widely acknowledged that freedom of association, the right for people to gather and freely express their ideas on anything, is essential for a pluralist and open democratic society. Looking back during the post-independence era the 1980s and 1990s saw the political space expand with the reintroduction of political pluralism and the end of the one- party regime. Trade unions and university student associations must be mentioned alongside political parties as they were also at the forefront of the struggle for political freedom, workers' rights and student concerns. Many of the freedoms and rights Kenyans enjoy today were a result of the agitation and activities of the various associations formed.

94. The right to associate is used for a wide range of purposes beyond politics, including those related to trade unions to advocate for labour rights, civil societies to champion various causes in society, culture, amusement, athletics, social causes and humanitarian aid. Conversely, the state has a responsibility to refrain from interfering with the establishment of associations, and there must be systems that enable citizens to join associations without official interference to help them achieve different goals.

95. The freedom of association is in line with international and regional human rights instruments which Kenya has ratified such as article 22 (1) of the *International Covenant on Civil and Political Rights (ICCPR)* and article 10 (1) of the *African Charter on Human and Peoples Rights*.

96. However, under article 24 of the *Constitution*, limitation of rights and fundamental freedoms is permissible upon certain strict conditions. The conditions are that; first a right or fundamental freedom in the bill of rights should only be limited by a law and second, to the extent only that the limitation is reasonable and justifiable in an open and democratic society. Such limitation must be based on human dignity, equality and freedom. In the case of *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) [2022] KESC 5 (KLR), this court endorsed the views of EC Mwita J in *Jack Mukhongo Munialo & 12 others*

v Attorney General & 2 others, HC Petition No 182 of 2017; [2017] eKLR, when he observed as follows pertaining the limitation of rights under article 24:

> "Even where the right or fundamental freedom has been limited by law, the yardstick for determining reasonableness and justifiability of the limitation is whether such limitation is acceptable in an open and democratic society.
>
> [70]. The court in considering the limitation under article 24(1), must bear in mind that there is no superior right and take into consideration factors such as the nature of the right to be limited, the importance and purpose of the limitation, the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others. This calls for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights."

97. The only rights not subject to any limitation are those found in article 25 of the *Constitution* and include freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of habeas corpus.

98. Democratic societies are governed by laws. Kenya is no different. The moral foundations of our society serve as the basis for our laws found in the *Constitution* and the various statutes enacted by parliament. The laws must be observed and respected.

99. One such law is the *Non-Governmental Organizations Co-ordination Act,* 1990 which was enacted with the key objective of regulating the registration and co-ordination of all national and international non-governmental organizations operating in Kenya. Relevant to the dispute before court is regulation 8 (3)(b)(ii) of the *Non-Governmental Organizations Co-ordination Regulations,* 1992 which gives the director the discretion to refuse to approve reservation of a name of an organization where

> "such a name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable."

100. The appellant submitted that it declined to approve any of the names as proposed by the 1st respondent on the ground that sections 162, 163 and 165 of the *Penal Code* criminalize gay and lesbian liaisons as the same goes against the order of nature.

101. The *Penal Code* is another statute that proscribes behaviour and actions that are considered criminal in Kenya. Section 162 sets out categories of "unnatural offences", defined as

> " carnal knowledge against the order of nature".

This phrase has previously been referred to as anal sexual activity. Under section 162(c), heterosexual couples having anal intercourse may also be subject to this rule, despite the fact that it does not specifically and exclusively address homosexuality. Section 163 prescribes a penalty of imprisonment for seven years for attempts to commit any of the offences specified in section 162. Section 165, on the other hand, is concerned with "gross indecent practices between males", committed either in private or in public. Although the term "indecency" is not defined in the provision, it is required that the conduct be sexual, between men and obscene or indecent depending on the situation.

102. As explained by my brother, Justice Ouko, sections 162 and 165 criminalise male homosexual relationships while section 163 prescribes a penalty of imprisonment for seven years. I find myself in agreement with his sentiments when he states that due to the usage of the phrase "having carnal knowledge of any person," which is "against the order of nature," section 162's interpretation allows for the inference that female same-sex relationships are also "unnatural." This means that these clauses can be used to prosecute both men and women who are in same-sex relationships.

103. I am keenly aware that the constitutionality of sections 162(a) (c) and 165 of the *Penal Code* was challenged in *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (amicus curiae)*, HC petition 150 & 234 of 2016 (consolidated) (2019) eKLR. The court in that matter found the impugned sections not to be unconstitutional. The matter is currently on appeal and the Court of Appeal is yet to render itself on the same.

104. The implication of which is that sections 162, 163 and 165 of the *Penal Code* remain valid edicts of the law.

105. Due to the continued existence and validity of sections 162, 163 and 165 of the *Penal Code*, I fail to see how the appellant could have reserved a name or allowed the formation of an association with the very terms that imply or whose declared purposes are in support of actions that are against the law or expressly banned by it.

106. The right to freedom of association as enshrined by article 36 includes the right to form, join or participate in the activities of an association of any kind. Although the wording "of any kind" might seem wide-ranging and open-ended, it is my considered view that the drafters of the *Constitution* and indeed the people of Kenya who ratified the *Constitution* did not

intend for the formation of groups whose activities or objectives were against the law or the *Constitution* to be included.

107. As long as, sections 162, 163 and 165 of the *Penal Code* remain valid laws, then the actions of the appellant in refusing to allow the reservations of names which include the terms "gays" and "lesbians", cannot be considered unreasonable, irrational or illegitimate.

108. I must commend Justice Ouko for going a step further to propose alternatives that the 1st respondent could pursue in order to secure registration or an organization with his choice of names. Since the avenue of the courts decriminalizing is pending before court at the 1st respondent's instigation, a second alternative would be to rally the people of Kenya to pursue parliament to amend the laws to repeal sections 162, 163 and 165 of the *Penal Code*. I can do no more than repeat that other jurisdictions either through legislation or constitutional revisions have amended their laws to remove similar provisions including the United Kingdom in 2013, Scotland in 2014, Northern Ireland in 2019, Canada in 1969, and Australia in 1994 all amended their laws to remove similar provisions. Some countries such as South Africa in 2006 and Australia in 2017 went further to legalize same-sex marriages.

109. Society's social opinions and concerns are continually changing. If the people of Kenya desire to have these laws removed from statute, then legislators in their capacity as the voice of the people can enact, amend, and repeal these laws. However, until such time, sections 162, 163 and 165 remain in our statutes books as law.

iii. Whether the decision of the NGO Coordination Board was discriminatory against the 1st respondent and violated article 27(4) of the *Constitution*

110. On this issue, the appellant argued that sexual orientation is not among the prohibited grounds contemplated under article 27 (4) of the *Constitution*.

111. Article 27(4) of the *Constitution* provides that the state shall not discriminate directly or indirectly against any person on grounds including sex. The *Constitution* does not include sexual orientation as one of the seventeen grounds.

112. The majority have taken the view that use of the word "including" in article 27 is not exhaustive but rather only illustrative leaving room to add to the list of grounds. Ouko SCJ on the hand is of the view that the framers of the *constitution* did not intend to include discrimination on grounds of sexual orientation and had it been, then nothing would have been easier than to state so.

113. Sex in the *Black's Law Dictionary*, 9th edition is defined as

> " the sum of the peculiarities of structure and function that distinguish a male from a female organism".

The *Britannica Online Encyclopaedia* defines sex as "the sum of features by which members of species can be divided into two groups—male and female—that complement each other reproductively."

114. The *Black's Dictionary* defines sexual orientation as

> " a person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality or bisexuality."

While the *Britannica Online Encyclopaedia* defines it as

> " the enduring pattern of an individual's emotional, sexual, and/or romantic attraction. In science, sexual orientation is often divided into the three components of attraction, behaviour, and self-identification. There are myriad ways to describe sexual orientation, but the most common include: heterosexual, being attracted to the opposite gender; homosexual, being attracted to the same gender; and bisexual, being attracted to more than one gender."

115. Looking at the history of our constitutional making process that lasted over ten years, the process was in all aspects consultative with Kenyans voting in a referendum twice, leading to the promulgation of the *2010 Constitution*. I find persuasion in John Mutakha Kangu's book *Constitutional Law of Kenya on Devolution,* 2015 where he underscores the importance of preparatory materials in constitutional interpretation when read together with the historical context of the country, as they provide useful background material that defines where the Kenyans were coming from and where they wanted to go. One of the key preparatory materials is the final report of the Constitution of Kenya Review Commission, 2005 (the CKRC report) which captured the views and recommendations of Kenyans.

116. Chapter 4 of the CKRC report on the goals and objective of the review, on page 47 the commission noted that among the critical objectives were the need to achieve equal rights for all and gender equity being "the equal treatment of men and women, especially on opportunities to participate in public affairs, commerce and social life, including the family." The commission was keen to note that women were victims of family and customary laws that sometimes discriminated against them in their rights to inheritance, custody of children, commercial law and practices especially concerning loans and even hindered their participation in politics or commerce.

117. From this, the inclusion of sex as one of the grounds in article 27(4) is not contentious and is clear that the intention of the framers of the *Constitution* was to achieve gender equality and equality for all on all fronts in society.

118. On the other hand, the issue of same-sex marriages and homosexuality arose in several instances and is mentioned in the CKRC report at several stages. On page 100, at the tail end of chapter 8, the commission, from the views and profiles of Kenyan communities, recommended that in family and marriage, same-sex unions should be outlawed. On page 381, the steering committee consensus building group, which was tasked with building consensus on contentious issues, after numerous meetings and deliberations, on the character of marriage, endorsed the recommendation of the technical working group "B" that the draft constitution should clarify the definition of marriage to prohibit same-sex marriages. The consensus initiative accordingly recommended that marriage could take place only between persons of the opposite sex.

> " (c) The character of marriage
>
> The draft constitution protects the right to marry and found a family. Some delegates feared that this provision may permit homosexual marriages since the draft constitution did not specify that marriage can only take place between persons of the opposite sex. The group endorsed the recommendation of the technical working group 'b' on citizenship and bill of rights that the draft should clarify the definition of marriage to prohibit same sex marriages.
>
> The consensus initiative accordingly recommended that marriage could take place only between persons of opposite sex.
>
> The technical working committee on citizenship and bill of rights adopted this recommendation."

119. On page 400, during the general debate, the delegates, one of the issues that elicited controversy was the bill of rights. It is reported as follows:

> " The issues of controversy on the bill of rights were whether all the provisions in the bill of rights should apply to all persons without exception, and the exact circumstances under which any of these rights may be qualified.
>
> In addition, a number of delegates were concerned that the draft bill of 2002 contained no clear definition of a number of concepts including -

> when life begins, in the context of scientific, religious pro-life and pro-choice approaches to the issue of abortion;the right to life;family and marriage;same sex marriages as opposed to "woman to woman" marriages under customary practices;youth;older members of society;persons with disability.
>
> It was felt that these definitions should take into account the African culture and context, and further clarity on these and similar concepts could eliminate controversy on an otherwise acceptable bill of rights."

120. On pages 436 and 437, the technical working committee "b" from their deliberations recommended that same-sex marriages and homosexuality should be prohibited.

121. The committee of experts established in 2009, embarked on a constitutional review process under the *Review Act, 2008* building on the work of the Constitutional Review Commission of Kenya (CKRC). It was tasked with identifying and preparing a report on contentious and non-contentious issues, inviting representations from all interested persons on the issues and then preparing a harmonized draft constitution. As required by sections 29 and 30 of the *Review Act, 2008* the committee of experts took into consideration the views of the people of Kenya as presented to the *Constitution* of Kenya Review Commission, captured in the CKRC report as well as the CKRC drafts; the CKRC draft of September 2001; the draft that came out of the National Constitutional Conference termed the Bomas Draft of 2004; and the referendum draft termed the proposed new constitution of 2005. Notably, the committee of experts in their final report made no mention of the issues in contest herein.

122. The original views of Kenyans captured in the CKRC report found final expression in article 45(2) of the *Constitution* which provides that

> " every adult has the right to marry a person of the opposite sex, based on the free consent of the parties."

123. The CKRC report must be read in the context that it reflects the intentions and recommendations of the framers of the *Constitution*, informed by the views of Kenyans. But it must also be read in the context of the fact that it was prepared roughly eighteen (18) years ago. Perhaps the views of Kenyans have since evolved. But this cannot be determined and considered in this judgement. It can only be the subject of a referendum.

124. However, what is evident is, with these thoughts, comments and recommendations in the CKRC report, the inclusion of sexual orientation in the bill of rights was always in contention. It is therefore my considered view that it is problematic to read sexual orientation as one of the grounds to be included in article 27(4).

125. In some places where the right against discrimination was meant to include sexual orientation, it has been expressly stated as such in either the statutes or the national constitutions of those countries. These countries include South Africa, Angola, Mozambique as well as México, Portugal, Sweden, the United Kingdom, Canada Fiji and New Zealand.

126. In any case, the appellant in rejecting the names proposed did so on grounds that they were inconsistent with the law. I arrive at the conclusion that the appellant's rejection of the names proposed by the 1st respondent did not amount to discrimination on the basis of sex or sexual orientation as it was firmly within the law.

127. I would have for these reasons allowed the appeal and set aside the decision of the Court of Appeal. However, as these views are in the minority, the decision of the court is that of the majority.

Dissenting Opinion of W. Ouko, SCJ

128. I have had the advantage of reading the majority decision in this appeal. I agree with the factual background, the summary of the submissions advanced by the parties and the three issues for consideration and determination as framed. I do not therefore intend to recapitulate them here in detail. I am also in agreement with the majority decision on two aspects: first, that this court has jurisdiction and is properly seized of the appeal; and secondly, in respect of the first issue, that the petition filed before the High Court was competent to the extent that, in the circumstances of the case the 1st respondent was not bound to exhaust internal dispute resolution mechanisms provided for under section 19 of the *Non-Governmental Organizations Co-Ordination Act*, as the decision under challenge did not qualify as one of the decisions to be appealed to the minister.

129. I am however, with profound respect, not in agreement with the reasoning, conclusions reached and final orders made by the majority on the remaining two issues. But I am entirely in agreement with the views expressed by my brother Ibrahim, SCJ in his separate dissenting opinion.

130. The following are the reasons for the path I have chosen to follow.

A. Introduction

131. At the heart of this dispute is the alleged violation of constitutional rights and fundamental freedoms of the 1st, 3rd and 4th respondents; the 1st respondent being an advocate of the High Court and an activist for equality of lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) persons in Kenya; the 3rd respondent is a transgender woman, while the 4th

respondent is a father of an intersex child. The 5th respondent was described in the High Court judgment as a forum for christian professionals that believes that the registration of the proposed association would advance a cause against public policy by "legalising" criminality, namely homosexuality. The appellant, on the other hand is a body corporate established under the provisions of the *Non- Governmental Organisations Co-ordination Act*, (NGO Act) with the mandate of facilitating and co-ordinating the work of all national and international non- governmental organizations operating in Kenya. By the very nature of its mandate, it also maintains a register of all such organizations.

132. The 1st respondent was aggrieved by the appellant's refusal to "register a proposed" non-governmental organization (NGO) under different variations of proposed names listed below in the succeeding paragraphs. While the 3rd and 4th respondents opposed the proposed NGO's registration and expressed concern that the registration would muddle up issues relating to lesbian, gay, bisexual (LGB) persons with those of transgender and intersex (TI) persons, yet there is a clear distinction between these two groups of persons.

133. Apparently, the explanation given by the appellant to the 1st respondent for its decision not to reserve any of the proposed names was its discomfort with the use of the terms "gay" and "lesbian" in the names. The appellant was, in fact, according to sworn affidavits, ready and prepared to reserve any of the names so long as the two words were omitted from the proposed names. The 1st respondent, for his part was not prepared to abandon those words. It is this stalemate that prompted the 1st respondent to petition the High Court alleging violations of their constitutional rights.

134. What's in a name? asked William Shakespeare through one of his characters in Romeo and Juliet, to signify the fact that a name may be a convenient concept for identification but the essence behind it is the distinctive and fundamental nature of identity. An organization will be identified by its unique name and other attributes. To the 1st respondent, therefore the words "gay" and "lesbian" were the unique marks of identification of the proposed organization, without which its objectives, characteristics, affiliations, and social roles would be completely lost.

135. In the High Court petition, the 1st respondent sought, *inter alia* a judicial interpretation on whether the words 'every person' in article 36 of the *Constitution* includes all persons living within the Republic of Kenya despite their sexual orientation; a declaration that the appellant contravened articles 36 of the *Constitution* in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice; a declaration that the 1st respondent is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association like any other Kenyan; and a declaration that the appellant's failure to comply with article 36 infringed on the "right

of marginalised and minority groups in the Republic of Kenya" to which the 1st respondent and other gay and lesbian persons belong.

136. The *Universal Declaration of Human Rights* (UDHR) affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights; and that everyone is entitled to all the rights and freedoms set forth in the instrument, without distinction of any kind, including distinction based on sex. A similar provision is made in the *International Covenant on Civil and Political Rights (ICCPR)*. Both instruments recognize and restate the right to freedom of association with others, for the protection of specific interests; and that no restrictions may be placed on the exercise of this right "other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others." [my emphasis].

137. The *African Charter on Human and Peoples' Rights (ACHPR)* similarly provides in article 10 that every individual shall have the right to free association "provided that he abides by the law". I shall return to these provisions as well as those in the *Constitution* of Kenya later in this judgment.

B. Background

138. In April 2012, the 1st respondent applied on three separate occasions to the appellant for the reservation of one of the six different variations of names submitted for a proposed NGO to address the violence and human rights abuses suffered by the LGBTIQ community in Kenya. The proposed names were, National Gay and Lesbian Human Rights Commission, National Coalition of Gays and Lesbians in Kenya, National Gay and Lesbian Human Rights Association, Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organization. The only response he received from the appellant was that the names were "unacceptable". Frustrated by the reply, the 1st respondent instructed an advocate to re-apply. It was at this point that the appellant gave a comprehensive explanation why it could not reserve the proposed names or register the association as proposed.

139. According to the appellant, the proposed names and the objects of the proposed NGO were offensive to public policy and stood in conflict with sections 162, 163 and 165 of the *Penal Code*, which outlaw homosexual liaisons. With that, the appellant technically rejected the 1st respondent's application.

C. Litigation History

140. The litigation journey from the High Court through to this court is comprehensively encapsulated in the majority judgment, save to reiterate briefly that the High Court (Lenaola, Ngugi, and Odunga, JJ. - as they then were) in determining the substantive question of violations of the respondents' constitutional rights, found that indeed the respondents' right of association guaranteed by article 36 of the *Constitution* were violated by the failure of the appellant to accord just and fair treatment of gay and lesbian persons living in Kenya seeking registration of an association of their choice.

141. The Court of Appeal, (Waki, Nambuye, Koome (as she then was), Makhandia and Musinga JJ. A), were unanimous that the appeal before them raised only two questions: whether the petition filed before the High Court was competent on account of jurisdiction based on the doctrine of exhaustion of remedies and secondly whether, in rejecting the application for reservation of a name, the appellant breached article 36 of the *Constitution*. They too were in agreement that section 19 of the *NGO Act* did not apply to the circumstances of the case. Consequently, the High Court had the requisite jurisdiction to entertain the petition.

142. But in a split decision of 3:2 the majority (Waki, Koome (as she then was) and Makhandia, JJ.A, upholding the High Court, found, on the second question that the 1st respondent's rights were violated by the appellant's failure to register the proposed organization, Nambuye and Musinga, JJA dissenting.

143. Before the Supreme Court, the following grounds have been identified for determination; whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the *NGO Coordination Act* and whether the respondents' rights under articles 27(4) and 36 of the *Constitution* were violated.

D. Issues for Determination

144. This appeal seeks answers to the following 3 issues:

i. Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the *NGO Coordination Act*,

ii. Whether the decision of the appellant not to reserve the names of the proposed organization violated article 36 of the *Constitution*, and

iii. Whether the decision of the appellant was discriminatory of the respondents and therefore violated article 27(4) of the *Constitution*

E. Analysis and Determination Jurisdiction of The Supreme Court

145. I reiterate that I am in agreement with the majority that this appeal meets the principles for the proper invocation of our jurisdiction under article 163(4)(a) and as enunciated by the court in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Pet No 3 of 2012; [2012] eKLR, among other decisions of the court.

146. It is apposite too at this stage to clarify that the issue before us is not about the decriminalization of LGBTIQ, or the constitutionality of sections 162, 163 and 165 of the Penal Code. It is also true that the controversy has nothing to do with morality or same sex marriage, family units and all the fancy arguments around the difference between lesbian, gay and bisexual persons (LGB), and transgender and intersex persons (TI). Indeed those in the second category (TI) have expressed serious objection to their inclusion in the quest to register an NGO on behalf of all LGBTIQ persons. According to them, to be classified as LGBTIQ may lead to a misconception that they are gay and lesbian. I reiterate that these arguments do not concern us in this appeal.

147. Apart from the secondary question relating to the doctrine of exhaustion, argued pursuant to section 19 of the *NGO Act*, the central issue in this appeal is about the reservation of a name and whether the appellant's decision in rejecting the names proposed was lawful, reasonable, proportionate and procedurally fair. This question is to be resolved by the interpretation of articles 27 and 36 of the *Constitution* which were specifically invoked.

148. What were the offending names proposed? Initially, in April 2012, the 1st respondent proposed for reservation the following sets of names, Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy, and Gay and Lesbian Human Rights Organization. After the appellant advised him that the names were unacceptable and should be revised, the 1st respondent forwarded more names in March, 2013, Gay and Lesbian Human Rights Commission, Gay and Lesbian Human Rights Council and Gay and Lesbians Human Rights Collective. The common denominator in all the suggested names is gay and lesbian. These terms are not defined in our laws. But they are, no doubt widely used today. Lesbians, bisexuals, gays or homosexuals are generally known as persons who are sexually, emotionally and romantically attracted to people of their same sex. These are clearly matters of personal sexual orientation, which according to *Yogyakarta Principles* connote;

> "... a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

149. It is important to explain that *Yogyakarta Principles* were promulgated as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. Though not binding, these principles have inspired several judicial decisions across the world and shaped policy recommendations in this field.

150. Prof Edwin Cameron in *Sexual Orientation and the Constitution: A Test Case for Human Rights*, (1993) 110 SALJ 450, authored this definition of sexual orientation:

> "Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex."

151. I have explained these terms because of their importance in the determination of the question framed in the second ground. It has been part of the respondents' argument that the words 'every person' in article 36 of the *Constitution* includes all persons living within the Republic of Kenya irrespective of their "sexual orientation". To the first issue,

i. Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the *NGO Coordination Act*

152. This ground is based on regulation 8 of the *Non-Governmental Organizations Coordination Regulations, 1992* (NGO Regulations) which essentially deals with the "approval of names" of proposed organizations. Prior to an application for registration being made, the director may approve the proposed name if it is desirable; or reject it, if it is identical to an existing name and is likely to bring confusion; or if such name, is in the opinion of the director, repugnant to or inconsistent with any law or is otherwise undesirable.

153. This process is strictly-speaking a reservation of name task similar to section 48 of the *Companies Act* (reservation of a company name). It has been the appellant's argument from the High Court to this court, that once the 1st respondent was notified that the proposed names were undesirable, the next course of action, instead of proceeding to the High Court, would have been to invoke section 19 of the *NGO Act*, under which,

> "19.
>
> 1. Any organization which is aggrieved by decision of the board made under this part may, within sixty days from the date of the decision, appeal to the minister.

2. On request from the minister, the council shall provide written comments on any matter over which an appeal has been submitted to the minister under this section.

3. The minister shall issue a decision on the appeal within thirty days from the date of such an appeal.

(3A) Any organization aggrieved by the decision of the minister may, within, twenty-eight days of receiving the written decision of the minister, appeal to the High Court against that decision and in the case of such appeal—

a. the High Court may give such direction and orders as it deems fit; and

b. the decision of the High Court shall be final". [my emphasis].

154. The 1st respondent and all the parties opposed to the appeal have argued that the decision not to reserve the names was made by the director and not the board (the appellant). That being the case, the decision in question did not qualify to be taken through the appellate process envisaged under section 19 aforesaid. Both the High Court and the majority in the Court of Appeal agreed.

155. The doctrine requiring exhaustion of internal administrative remedies is an innovative way of correcting, reviewing or appealing administrative decisions using the very administration itself. This gives the administrative body a chance to correct its own errors, if any. In addition, it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

156. Presently, the law governing exhaustion of administrative remedies is codified in section 9 of the *Fair Administrative Action Act*, which demands that the courts shall not review an administrative action or decision unless the internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The courts may, however, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

157. From a long line of decisions spanning the spectrum of the three superior courts, the law is now firmly settled in this country that where there exists an alternative method of dispute resolution established by legislation, the courts must exercise restraint in exercising their jurisdiction and give deference to such dispute resolution bodies. It is equally common factor that this doctrine was applicable before the promulgation of the *Constitution* of Kenya in 2010 and remains relevant under it today. It accords with article 159 of the *Constitution* which encourages alternative means of dispute resolution. See *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)*, High Court constitutional petition Nos 159 of 2018 & 201 of 2019; [2020] eKLR; and *Speaker of National Assembly v Njenga Karume* [2008] 1KLR 425, in a long line of many others.

158. This court has in the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others*, SC petition No 3 of 2016; [2019] eKLR, reviewed several past decisions on this subject, and essentially agreed with the *ratio decidendi* developed in those cases over the years. See also similar pronouncement on this doctrine by this court in *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others*, SC petition (application) No 4 of 2021; [2021] eKLR.

159. By the provisions of section 9(4) aforesaid, the courts may, in exceptional circumstances and on application, exempt a party from the obligation of exhausting any remedy if the court considers such exemption to be in the interest of justice. In *Fleur Investments Limited v Commissioner of Domestic Taxes & another*, Civil Appeal No 158 of 2017; [2018] eKLR, the Court of Appeal found in the passage below that there were exceptional circumstances to exempt the appellant from exhausting internal dispute resolution channels of the respondent;

> " ... Whereas courts of law are enjoined to defer to specialised tribunals and other alternative dispute resolution statutory bodies created by parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly".

160. The question to which I now must turn after setting out the foregoing principles, is whether the petition filed in the High Court by the 1st respondent was incompetent for failure to comply with the provisions of section 19 aforesaid.

161. It is common factor that the impugned decision was made at the stage of a request to the director for reservation of a name and not registration. Only decisions made by the board under part III of the Act are appealable to the minister by dint of section 19. Those are decisions that relate to refusal to register an organization, cancellation of a certificate issued to an organization, among others.

162. For the foregoing reasons, I, like the majority and Ibrahim, SCJ come to the same conclusion that a dispute arising from the reservation of a name is not one of the decisions envisaged to attract internal dispute resolution mechanism provided for under section 19. Reservation of name is a step toward the registration of an organization, but it does not constitute registration. The answer to this issue is in the negative; that the 1st respondent was not required to exhaust the internal dispute resolution mechanism under section 19 of the *NGO Coordination Act*.

ii. Whether the decision to reject the names for the proposed organization violated the right to freedom of association under article 36 of the *Constitution*

163. According to the 1st respondent, the rights and fundamental freedoms set out in the *Constitution* are inherent in all persons, including LGBTIQ persons; that in declining to register the proposed NGO, the appellant violated the respondents' rights and freedom of association contrary to article 36; and that the denial also amounted to discrimination on the basis of sexual orientation contrary to article 27 of the *Constitution*.

164. As this ground deals with the right to freedom of association, article 36 reads as follows;

> " 36.
>
> 1. Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
>
> 2. A person shall not be compelled to join an association of any kind.
>
> 3. Any legislation that requires registration of an association of any kind shall provide that
>
> a. registration may not be withheld or withdrawn unreasonably; and
>
> b. there shall be a right to have a fair hearing before a registration is cancelled."

165. It is in this article that the right to freedom of association to form, join or participate in the activities of an association of any kind is guaranteed. The article anticipates the enactment of legislation to regulate registration of associations to realize those rights. That legislation which is to provide for, among other things, registration of associations is to ensure that registration of an association is not withheld or withdrawn unreasonably.

166. Of immediate relevance to the question before us, is the acknowledgment by article 36 that there may be good reasons for withholding registration, hence the qualifying term, unreasonably. The right, is for this reason not absolute, but subject to the limitations of article 24.

167. The second feature of this article is its emphasis that "every person" has the right to freedom of association, which includes right to form, join or participate in the activities of an "association of any kind". Though the phrase "association of any kind" appears wide enough to include nearly any association in any form or character, from my own holistic reading of the *Constitution*, I do not think an association of "any kind" intended by the framers and Kenyans would include associations whose activities are inconsistent with the *Constitution* or contrary to the law, or as I have explained elsewhere in this judgment, there cannot be, for instance a right to freedom of association to form, join or participate in the activities of an association whose expressed objective would offend members of a particular community, religious, ethnic or racial group or whose name is obscene, offensive, hateful, derogatory or defamatory; or to adopt names of a proscribed group.

168. The *NGO Act*, as the title implies, is one of the statutes enacted by parliament to make provision for the registration of voluntary grouping of individuals or associations, not operated for commercial purposes but for the benefit of the public at large and for the promotion of social welfare. See section 2 of the *Act*.

169. Under section 14 of the *Act*, the appellant may refuse to register any association if the association does not meet certain specified conditions.

170. Although I am unable to trace on record the letter dated March 25, 2013 which conveyed the decision of the appellant to the 1st respondent, I am nonetheless satisfied with the full tenor and effect given to it by both the High Court and the Court of Appeal, according to which, the reasons proffered for the rejection of the proposed names were that section 162 of the *Penal Code* "criminalises gay or lesbian liaisons"; that under regulation 8(3)(b) of the *Non- Governmental Organizations Coordination Regulations*, the director can reject a name if it is "inconsistent with any law or is otherwise undesirable".

171. It is my understanding, as it was that of the two superior courts below, that the effect of the said letter of March 25, 2013 was that, so long as the words lesbian and gay remained part of the proposed name, the 1st respondent's application stood rejected.

172. At the heart of this ground is the question whether by deciding in the manner it did, the appellant contravened the provisions of articles 36 of the *Constitution*, violating the respondents' right to freedom of association as set out previously. Reading and interpreting the *Constitution* in the manner it demands in article 159, a related question may also be asked; did appellant exercise its administrative discretion contrary to article 47 (1) of the *Constitution* thereby violating the rights and fundamental freedoms of the respondents? Article 47(1) decrees that;

> " Every person has the right to administrative action that is <u>expeditious, efficient, lawful, reasonable and procedurally fair</u>". [my emphasis].

173. It will shortly become apparent why I have highlighted the words expeditious, efficient, lawful, reasonable and procedurally fair. Suffice, however, at this point to state that these words are replicated in section 4(1) of the *Fair Administrative Action Act*, signifying a system that, apart from incorporating these attributes, sets out standards to be observed by administrators and administrative bodies in their decision-making processes.

174. The *Fair Administrative Action Act*, was enacted in 2015 pursuant to clause (3) of article 47, to give effect to the right to a fair administrative action. It is against articles 24, 36 and 47 of the *Constitution*, the *Fair Administrative Action Act*, section 14 of the *NGO Act* and regulation 8 that the appellant's decision to reject the names proposed by the 1st respondent must be measured.

175. Public authorities or bodies, like the appellant, are generally conferred by the parent statute with powers and duties in relation to their particular areas of competence. It is for that reason, as a general rule, that courts of law will normally be slow to interfere with the exercise of those authorities' administrative discretion on substantive grounds. As a necessary corollary to this, public bodies must inevitably only act within the powers conferred to them by law. In terms of article 47(1) of the *Constitution* and on various provisions of the *Fair Administrative Action Act*, the courts cannot escape from asking whether a public body in a similar situation, on the material before it, could have reached the same decision as that impugned. As a result, an administrative decision may be challenged and the court may strike down an administrative decision on its illegality, irrationality, procedural impropriety, violation of fundamental human rights, or for lack of proportionality or for being unreasonable. These inherent supervisory powers are reposed in the High Court by article 23 of the *Constitution*.

176. The right to just administrative action is today a constitutional imperative, or what may be called the constitutionalisation of administrative justice. By entrenching the standard of reasonableness, expedition, efficiency, lawfulness, and procedural fairness as the correct measure of judicial scrutiny of administrative decision, article 47 of the *Constitution* has revolutionised the general administrative law in Kenya. Section 7(2)(a) to (o) of the *Fair Administrative Actions Act*, for the first time specifies what the court, in reviewing an administrative action or decision must look at. Again because of its relevance and importance to the issue under review, I reproduce below the part material to that review.

> "(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–
>
> a. the person who made the decision–
>
> i. was not authorized to do so by the empowering provision;
>
> ii. acted in excess of jurisdiction or power conferred under any written law;
>
> ....
>
> b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> c. the action or decision was procedurally unfair;
>
> d. the action or decision was materially influenced by an error of law;
>
> e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
>
> f. the administrator failed to take into account relevant considerations;
>
> g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
>
> h. the administrative action or decision was made in bad faith;

i. the administrative action or decision is not rationally connected to–

   i. the purpose for which it was taken;

   ii. the purpose of the empowering provision;

   iii. the information before the administrator; or

   iv. the reasons given for it by the administrator;

j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k. the administrative action or decision is unreasonable;

l. the administrative action or decision is not proportionate to the interests or rights affected;

m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n. the administrative action or decision is unfair; or

o. the administrative action or decision is taken or made in abuse of power". [my emphasis].

177. These provisions mark a breakaway from the common law test and principles for review of public bodies' decisions in Kenya. At common law, the test was laid down in the celebrated English case of *Associated Provincial Picture Houses v Wednesbury Corporation*, [1948] 1 KB 223, from which the Wednesbury principle of unreasonableness originated. It was said in that case that a public authority acts unreasonably when a decision it makes is "so absurd that no sensible person could ever dream that it lay within the powers of the authority"; the Wednesbury unreasonableness. Over time, the test of what constitutes reasonableness in English administrative law has become blurred and too sophisticated. It is struggling to survive and judges in that jurisdiction have criticised the Wednesbury test. Lord Cooke of

Thorndon spared no punches in the following speech in the House of Lords case of *Regina v Secretary of State for The Home Department, Ex Parte Daly* [2001] UKHL 26.

> "And I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd".

178. In April 2003 in *R (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence*, [2003] EWCA Civ 473, the Court of Appeal wondered what justification there was for retaining the Wednesbury test. But declined "to perform its burial rites".

179. While the burial rites have been postponed in England, in Kenya the departure from the common law approach has been accepted and acknowledged by the High Court in *Dry Associates Limited v Capital Markets Authority and another interested party Crown Berger (K) Ltd*, petition 328 of 2011; [2012] eKLR, when it said that;

> "article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* but is to be measured against the standard established by the *Constitution*."

180. The standard of measurement established by the *Constitution* and the law outlined in the preceding paragraphs leaves no doubt that a contest of administrative action today involves, as a minimum the application of the *Constitution*. Compared to the common law standard of reasonableness, today's constitutional standard simply turns on whether there was unreasonableness, procedural unfairness, illegality, delay or inefficiency in the decision-making process or in the decision itself. Section 7(2)(a) to (o) of the *Fair Administrative Actions Act*, following upon these constitutional parameters detail some of the factors to guide the court in reviewing administrative action or decision.

181. I reiterate that the question to be answered under this ground is, whether the appellant's decision to reject the proposed names was unreasonable, irrational, unlawful or disproportionate.

182. According to article 36, application for registration of an association of any kind "may not be withheld or withdrawn unreasonably". Except for the rights listed under article 25, all the other rights or fundamental freedoms in the bill of rights can be limited by law to the extent that the limitation is reasonable and justifiable. See article 24 of the *Constitution*.

183. Section 14 of the *NGO Act*, on the other hand vests in the appellant the power to "refuse the registration" of a proposed association if—

> "a. it is satisfied that its proposed activities or procedures are not in the national interest; or
>
> b. it is satisfied that the applicant has given false information on the requirements of subsection (3) of section 10; or
>
> c. it is satisfied, on the recommendation of the council, that the applicant should not be registered". [my emphasis].

184. Under regulation 8(3)(b)(ii) of the *NGOs Regulations*;

> "(1) An applicant for the registration of any proposed organization shall prior to such application seek from the director approval of the name in which the organization is to be registered.
>
> (2) .....
>
> (3) The director shall, on receipt of an application and payment of the fee specified in regulation 33, cause a search to be made in the index of the registered organizations kept at the documentation centre and shall notify the applicant either that—
>
> a. such name is approved as desirable; or
>
> b. such name is not approved on the grounds that—
>
> i. it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or organization existing under any law; or
>
> ii. such name is in the opinion of the director repugnant toor inconsistent with any law or is otherwise undesirable".

[my emphasis].

185. From these provisions I entertain no doubt myself that the appellant had administrative discretion to grant or deny an application for reservation of name or registration of a name of a proposed association. It could reject an application if it was satisfied that the proposed activities or procedures of the association were not in the national interest, were repugnant to or inconsistent with any law or were otherwise undesirable, among other considerations.

186. The exercise of this discretion, like all discretionary powers, is circumscribed by principles of justice, reasonableness and good faith. The decision-maker must only consider relevant factors, and the decision must not be made arbitrarily or capriciously. See section 7(2)(a) to (o) set out above. Lord Denning's statement below in the case of *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, is an apt summary of the manner in which administrative discretion must be exercised:

> " The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless, the decision will be set aside."

187. As long as the decision to reject the proposed names was made in good faith, without consideration of extraneous matters and according to law, the requirement of article 36 was satisfied; that registration may only be withheld or withdrawn on reasonable grounds. The appellant explained those grounds primarily to be the prevailing penal system that outlaws acts that may be associated with the proposed names.

188. Talking of Kenya's penal system, it is interesting to note that the present *Penal Code*, like some of the laws in this country, was transplanted and adapted to the exigencies of the British colonial administration during the colonial period. Some of those laws have been retained in our statute books to this day. The relevance of some of these laws remains controversial and debatable. Of the laws still in the statute books are chapter XV of the *Penal Code (Offences Against Morality)* or chapter XVI, section 171 creating the offence of bigamy. For our purpose, sections 162, 163 and 165 of chapter XV are relevant. Section 162 relates to unnatural offences and state as follows:

> " 162. Any person who—
>
> a. has carnal knowledge of <u>any person against the order of nature</u>; or

b. has carnal knowledge of an animal; or

c. permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:

provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty- one years if—

i. the offence was committed without the consent of the person who was carnally known; or

ii. the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

163. Attempt to commit unnatural offences

Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years. [my emphasis].

189. On the other hand, section 165 deals specifically with gross indecent practices between males. It criminalises;

> " Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years." [my emphasis].

190. Both sections 162 and 165 criminalise male homosexual relationships. It is a matter of interpretation that the use of the words, "any person who has carnal knowledge of any person" "against the order of nature" in section 162 may be construed to include female same-sex relationships as "unnatural". In contrast section 377 of the *Indian Penal Code*, the equivalent of our section 162, makes explicit provision that the unnatural offence is committed by having "carnal intercourse against the order of nature with any man, woman or animal". "Any person" in our code, by parity of reasoning would similarly extend to woman.

191. In view of the prevailing penal regime of law that criminalizes same-sex relationships in Kenya, I hold the view that the appellant's decision met the constitutional and legal threshold of reasonableness, rationality, proportionality and procedural fairness. In the face of sections 162, 163 and 165 of the *Penal Code*, it is unfathomable how the appellant would have been expected to proceed to reserve a name or register an association whose proposed name or whose expressed objects are in furtherance of activities that are contrary to or inconsistent with the law.

192. Lindon Otieno, in his affidavit to which reference has been made, acknowledged that indeed the 1st respondent had the right and freedom to register the proposed organization; that gays and lesbians are human beings and are entitled to all other rights enjoyed by every other human being, save for those rights that are limited under article 24 of the *Constitution* and those activities or objects that are repugnant and contrary to the existing laws; that though the appellant was committed and willing to observe and respect the 1st respondent's freedom of association under article 36 of the *Constitution*, the latter was not ready to review the name and objectives of the proposed organization so as not to offend the provisions of the law.

193. I have earlier on in this opinion observed the uniqueness of a name. In this case the only obstacle between the proposed organization and its registration were the two words, gay and lesbian. The 1st respondent was resolute that the words were the identifying mark of the proposed organization and could not be abandoned.

194. In the discharge of its statutory functions, was the appellant bound to accept willy-nilly the name(s) suggested by the 1st respondent? No. It is not a robot. The *Constitution* and the law extend to the appellant some latitude of discretion in considering an application for reservation or registration of a name. The same law binds the appellant to reject any application for reservation of a name of any proposed organization for specific reasons.

195. To avoid stigmatisation, discrimination, state sponsored violence or being caught up by the law, applicants in some jurisdictions have been able to achieve the same objectives to serve LGBTIQ persons and to register organizations in harsher legal environments by pursuing registration using more neutral names and language about their aims and objectives. Some of the groups have simply adopted a rainbow name, an LGBTIQ pride flag, without the mention of any of the words in the acronym LGBTIQ that may be perceived to be offensive. In the United Kingdom, for instance, the African Rainbow Family (ARF), was registered as a grassroots charity that support lesbian, gay, bisexual, transgender, queer and intersex (LGBTIQ) people of African heritage and the wider black, asian, minority ethnic groups.

196. But a more pragmatic approach towards opening up the door for registration of the group would be to introduce legislative reforms, including amendment to the *Penal Code* and repeal of sections 162, 163 and 165 to decriminalise acts contemplated by these provisions

based on the will and desire of the people of Kenya. This is the course adopted by many countries around the world, as I have been able to establish.

197. In the United Kingdom, *the Buggery Act of 1533* has been over the years replaced by the *Marriage (Same-Sex Couples) Act, 2013*, the *Scottish Marriage and Civil Partnership (Scotland) Act, 2014* and the *Northern Irish Northern Ireland (Executive Formation etc) Act, 2019*.

198. Closer home, South Africa's post-apartheid Constitution outlaws discrimination based on sexual orientation. South Africa has also legalised same-sex marriage. Section 9(3) of the *South African Constitution*, unlike our article 27 makes express provision against unfair discrimination on the ground of "sexual orientation" in addition to discrimination on the ground of "sex". *The Civil Union Act* of South Africa came into force on November 30, 2006, to provide for both same-sex and opposite-sex couples to contract unions, and allows couples to choose to call their union either a marriage or a civil partnership.

199. Until 1969, same-sex sexual activities between consenting adults were considered crimes punishable by imprisonment in Canada. That year, the Canadian parliament passed an omnibus law decriminalising private sexual acts between two consenting adults.

200. In addition, in 1996, the *Canadian Human Rights Act* was amended to specifically include sexual orientation as one of the prohibited grounds of discrimination. The effect of this was to declare that gay, lesbian and bisexuals were entitled to equal opportunities with other individuals in the society.

201. In Australia the *Human Rights (Sexual Conduct) Act 1994* decriminalised homosexual activity. Several years later same-sex marriage was legalized in 2017 by the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act*.

202. Based on these developments in those jurisdictions, it is fair to say that social attitudes and concerns are constantly evolving. Lawmakers, as representatives of the people create, modify, and repeal laws to achieve particular behavioural outcomes, often in an effort to respond to perceived changes in the society. But it is emphasized that the decision to repeal or amend these laws to accommodate LGBTIQ community in Kenya is one that can only be made by the people from whom all sovereign power flows or by their elected representatives and again only after the involvement of the people.

203. The third front or strategy to address discrimination against LGBTIQ persons has been through judicial pronouncements. Courts in other jurisdictions have, through their decisions decriminalised discriminatory laws against LGBTIQ people. Before 2018 in India the courts were categorical that so long as section 377 of the *Indian Penal Code* was not repealed, any carnal intercourse against the order of nature with any man, woman or animal,

would be a criminal offence punishable with imprisonment for life. An attempt to strike down section 377 as being discriminatory against LGBTIQ persons was brought through a petition, *Suresh Kumar Koushal v Naz Foundation*, civil appeal No 10972 of 2013. In the first place, the High Court accepted the arguments that consensual same-sex sexual relations done in private between adults should be decriminalised, holding that the existing criminalisation was in contravention of the constitutional rights to life and personal liberty, equality before the law and against non-discrimination. Two justices of the Supreme Court did not agree and in overturning the judgment found that section 377 IPC did not violate the *Constitution*.

204. Five years after this decision, in 2018 the Supreme Court of India had a change of heart and in unprecedented landmark decision, it decriminalised all consensual sex among adults in the case of *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321. It held that section 377 was violative of the *Constitution*. It, however, clarified that section 377 would continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality. To that extent it can be said that the judgment did not have the effect of repealing the entire section 377. Its significance is that, for the first time in India that judgment decriminalised consensual sex among adults.

205. In 2019 the High Court in Botswana, in the case of *Letsweletse Motshidiemang v Attorney General*, High Court Civil Case No MAHGB- 000591- 16 declared sections 164(a), 164(c) and 165 of the *Penal Code* to be unconstitutional and proclaimed that "sodomy laws therefore deserve archival mummification, or better still, a museum peg, shelf or cabinet for archival display." This decision was upheld by the Court of Appeal and with that, both male and female same-sex relationships were decriminalised overturning the 2003 decision in *Kanane v The State*, [2003] 2 BLR 67 (CA) where it had been decided that the time had not come to decriminalise homosexual practices even between consenting adult males in private.

206. I have set out these developments in those foreign countries only to illustrate the fact that through judicial pronouncements LGBTIQ persons can receive some reprieve.

207. I have endeavoured to steer clear, just like the two courts below, of the constitutionality of sections 162, 163 and 165 of the *Penal Code*. All the five justices of appeal in their separate judgments drew attention to the fact that that question was pending determination in the High Court at the time they rendered their judgments. Exactly two months later on May 24, 2019 that decision was indeed delivered. In it, three judges of the High Court (Aburili, Mwita & Mativo, JJ. - as he then was) unanimously declared that:

> " 406. In conclusion, therefore, having considered the arguments on both sides, the precedents cited, the *Constitution* and the law, we are not satisfied that the petitioners' attack on the constitutional validity of

> sections 162 and 165 of the *Penal Code* is sustainable. We find that the impugned sections are not unconstitutional. Accordingly, the consolidated petitions have no merit. We hereby decline the reliefs sought and dismiss the consolidated petitions". [my emphasis]

208. I am aware that this decision has been challenged in the Court of Appeal in Civil Appeal No 536 of 2019, from where the most likely terminus is this court. Therefore, the less said about it, the safer.

209. Therefore, in answer to the question posed under this ground, I am satisfied that the limitations imposed by section 14 of the *NGO Act*, and the *NGO Regulations* on the registration of an association meets the requirements under articles 24 and 36 of the *Constitution*. By those provisions, the appellant is permitted to refuse the reservation or registration of an association upon being satisfied of certain strictures set out in law and which, in my view, are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

210. It is important as I conclude this ground to restate that, in considering whether an administrative decision is constitutional or lawful where parliament has conferred the discretion on a particular decision maker, the court will respect the fact that the discretion remains the decision maker's; and it is not for the court to itself exercise that discretion in the decision maker's stead. The practical effect of this approach is that, where the court finds that the decision was unconstitutional or unlawful on any of the grounds explained earlier, the court can only quash it or declare it a nullity.

211. It is for all the reasons I have given, that I come to the conclusion that the appellant did not violate the respondents' right of association. The appellant, as public body, cognizant of the law, aware of its mandate and guided by relevant considerations, properly and judiciously exercised its discretion.

iii. Whether the decision of the appellant violated article 27(4) of the *Constitution* for being discriminatory against the 1st respondent

212. The next and final substantive issue for determination is whether, by rejecting the proposed names, the appellant discriminated against the 1st respondent and LGBTIQ persons collectively based on their sexual orientation contrary to article 27(4) of the *Constitution*.

Article 27 (4) states that:

> " The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or

> social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth." [my emphasis]

213. I have emphasised the words any person, any ground and sex. Before the High Court the 1st respondent's argument was hinged on these words; that all persons living within the Republic of Kenya, despite their sexual orientation are protected against all forms of discrimination; and that the appellant contravened article 27 in failing to accord just and fair treatment to gay and lesbian persons seeking registration of an association of their choice. Although the article specifically makes reference to sex, the respondents argued that the list in clause 4 of article 27 is not closed and must be taken, from the use of the word "including" to encompass sexual orientation. Both the High Court and the Court of Appeal were in agreement that the prohibition extends to discrimination based on sexual orientation.

214. It is correct, with respect to state, like the respondents asserted before us and confirmed by the two courts, that the words

> " on any ground, including ..."

mean that the grounds on this list are merely illustrative rather than exhaustive and could include several other protected characteristics not listed. The appellant too concedes that that is the correct interpretation. Indeed, article 259 (4) (b) of the *Constitution* declares that:

> " 4. In this Constitution, unless the context otherwise requires;
>
> b. the word "includes" means "includes, but is not limited to." [my emphasis].

215. Though the language of article 27 is plain, we bear in mind the basis rule of constitutional interpretation, that the *Constitution* must be given a holistic interpretation. Holistic interpretation has been described as;

> " ...interpreting the *Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances."

See *In the Matter of the Kenya National Commission on Human Rights*, advisory opinion reference No 1 of 2012; [2014] eKLR.

216. Earlier in this opinion I made reference to *Yogyakarta Principles* and Prof Edwin Cameron's Definition of Sexual Orientation in the Treatise, *The Constitution: A Test Case for Human*

Rights, (*supra*). From the definitions proffered, there is clear distinction between 'sex' and 'sexual orientation'. To restate; sexual orientation is understood to refer to each person's capacity for emotional affectional and sexual attraction to, and intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.

217. The word sex, on the other hand is used three times in the *Constitution*; in the above article, in article 42(2) on the right to marry a person of the opposite sex and article 53(1)(f)(ii) on the detention in custody of a child, in conditions that take account of the child's sex. In the context of these articles, sex is used in reference to a person's sexual anatomy based on one's sex chromosomes- (male/female). The discrimination that is expressly prohibited by article 27 is on account of "sex" and not "sexual orientation".

218. Did the framers intend sexual orientation to be read into the list of seventeen grounds against discrimination in article 27(4)? I find nothing whatsoever in the article or on my reading of the *Constitution* as a whole which suggests that the framers were addressing their minds in any way whatever to problems of discrimination on grounds of sexual orientation. Had that been the intention, nothing could have been easier than to state so as has been done in some of the constitutions, statutes and international instruments I have alluded to. The intention was to prohibit discrimination based on consideration whether a person is a male or female.

219. The *Constitution* has to be read in the social context in which it was adopted. It is recorded part of our history that attempts at constitution-making and the process that finally realized it was consultative. Throughout this course, a lot of information and data were gathered and documented. The information in whatever form constitutes extra textual source which when read in historical context of the country provides essential background that aids in the interpretation of the *Constitution*. The committee of experts (CoE) assumed its mandate to embark on a constitutional review process building on the work of the Constitutional Review Commission of Kenya (CKRC). As a matter of fact, among the reference materials that the CoE reviewed was the CKRC report. In the final report of the *Constitution of Kenya Review Commission* (2005) at page 381 the technical working committee on citizenship and bill of rights adopted this recommendation regarding the character of marriage:

> " (c) The character of marriage
>
> The draft constitution protects the right to marry and found a family. Some delegates feared that this provision may permit homosexual marriages since the draft constitution did not specify that marriage can only take place between persons of the opposite sex. The group endorsed the recommendation of the technical working group 'b' on citizenship and bill of rights that the draft should clarify the definition of marriage to prohibit same sex

> marriages. The consensus initiative accordingly recommended that marriage could take place only between persons of opposite sex."

220. The principle of the universality of human rights has not been in contestation, but the inclusion of sexual orientation in the set of human rights has. In other words, human rights are inherent and held simply because of being a human. All human beings, including LGBTIQ persons, are entitled to the full enjoyment of all the rights under chapter four of the *Constitution*, not by reason of their sexual preferences as LGBTIQ but as human beings. Just as the rights enjoyed by heterosexuals are not based on their sexual orientation but by virtue of common humanity.

221. In jurisdictions where sexual orientation was intended to be part of the right against discrimination, it has been explicitly so provided either in the constitutions of those nations or in the statutes. The *South African Constitution* from which so much was borrowed in the making of our Constitution, sexual orientation is expressly provided for, along with "sex" under the freedom from discrimination. Section 9(3) of that *Constitution* reads;

> " The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." [my emphasis]

222. In Angola, a new *Penal Code*, which replaced their 1886 *Code*, came into effect in January 2021 and has decriminalised same-sex conduct. It has a non- discrimination provision that includes 'sexual orientation' as a protected ground.

223. In 2015, Mozambique which is regarded as one of the most tolerant countries in Africa towards gays and lesbians repealed colonial-era clause from its Penal Code which outlawed same-sex relationships as "vices against nature". Mozambique Labour Law, (law nr. 23/2007) provides for "non- discrimination on grounds of sexual orientation, race or HIV/AIDS status", in addition to granting to "all employees, whether nationals or foreigners, without distinction based on sex, sexual orientation, the right to receive a wage and to enjoy equal benefits for equal work".

224. What emerges from this analysis is that there is a clear distinction between sex and sexual orientation. I believe that in article 27(4) the phrase sexual orientation was deliberately omitted by the framers because they only intended to guarantee the right against discrimination on the ground of a female or male gender.

225. To augment this conclusion, section 5 of the *Employment Act*, prohibits discrimination in employment based on a limited list of grounds including sex but like the *Constitution*, does not include sexual orientation in that list.

226. On the international and regional plane, the main human rights and fundamental freedoms instruments, the (UDHR), the *International Covenant on Civil and Political Rights (ICCPR)* and *African Charter on the Human and People's Rights (ACHPR)* all of which have been ratified by Kenya, do not make reference to sexual orientation.

227. Article 2 of *UDHR* reads as follows;

> " everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". [my emphasis]

228. There are similar provisions in the ICCPR as well as in the ACHPR. In all the three instruments, the word sex (highlighted) is used to connote male or female, and not sexual orientation. The instruments also recognize that there may be limitations on the exercise of some of those rights as may be prescribed by law in a democratic society and in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Importantly, they emphasize that the enjoyment of rights must be within and in conformity with the existing law.

229. From my own research, only a few countries have included discrimination on the grounds of sexual orientation in their constitution. Those that have, including México, Portugal, Sweden, United Kingdom, Fiji and New Zealand, have done so expressly. See Raub, Amy, Adèle Cassola, Isabel Latz, and Jody Heymann. *"Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions."* Yale Journal of Law & Feminism 18.149 (2016): 149-69.

230. For the very same reasons I have given on issue (ii) above, and in view of the clear language of article 27 (4) of the *Constitution*, I come to the conclusion on issue (iii) that the appellant's rejection of the names proposed by the 1st respondent did not amount to discrimination on the basis of sex or sexual orientation.

231. In the result and for the reasons stated, I find merit in this appeal and would have allowed it, and set aside the decision of the Court of Appeal. But as these views are in the minority, the decision of the court shall be that of the majority.

E. Court's Determination and Orders

233. Consequently, we find that the appeal is not merited. We make the following orders:

1. The appeal dated May 6, 2019 and lodged on the same date is hereby dismissed.

2. The 1st respondent shall have the costs thereof.

234. It is so ordered.

Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Petition 15 of 2020) [2023] KESC 14 (KLR) (17 February 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 14 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine appeals from the Court of Appeal raising questions of constitutional interpretation – where the appeal arose from interlocutory applications - what was the distinction between an appeal emanating from an interlocutory ruling and an appeal from a conservatory order -whether the Supreme Court had the jurisdiction to determine appeals emanating from the Court of Appeal that arose from conservatory orders – whether the Supreme Court had the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal - Constitution of Kenya, 2010 article 165(3)(b); Court of Appeal Rules rule 5(2)(b).*

Civil Practice and Procedure *– contempt of court – nature of application - whether applications for contempt of court were to be determined on a priority basis like preliminary objections - whether the Court of Appeal erred in its refusal to decide a pending application on contempt of court - Supreme Court Act, 2011, section 21(1)(a).*

Civil Practice and Procedure *- interlocutory applications - application to maintain status quo - what principles should courts apply when determining the status quo in interlocutory applications.*

Brief facts

The instant matter emanated from commercial agreements between the appellant and the 1st and 2nd respondents concerning the distribution of the 1st respondent's products. The 1st respondent sought to repossess the distribution territories of Baba Dogo, Dandora 1 and II, and Kariobangi North that had been previously granted to the 1st appellant in the year 2000 and declined to refund goodwill paid by the appellant, on the ground that the amounts were non-refundable. The 1st respondent further appointed other distributors to that distribution territory. In reaction to the 1st respondent's measures, the appellant chose to pursue the constitutional path by instituting the petition before the High Court. The appellant alleged that following the coming into force of the Competition Act in 2011, the relationship between it and the 1st, 2nd, 4th, and 5th respondents (the Diageo respondents) was re-ordered as it was no longer permissible for the appellant as an independent distributor to commit exclusively to serve them. The appellant therefore moved to challenge not just the contract but more so the conduct of the Diageo respondents which the appellant stated, stifled the appellant's enjoyment of the benefits of the new legal environment as protected by the Constitution that had just come in place.

Secondly, in the year 2012, distributors came together and registered a new association by the name of Beverage Distributors of Kenya (BDK). This was to bring together beverage distributors from across the country to address matters of common interest in the beverage industry. According to the appellant, the Diageo respondents violently resisted engaging BDK and insisted on dealing with BDK members individually. The appellant pleaded that that was a clear effort to prevent the

appellant from benefitting from the gains resulting from the adoption of a common strategy. As a result, the appellant alleged that that was a term of a contract that was contrary to the values enshrined in the Constitution.

The issue at the High Court was whether the court had jurisdiction to determine the matter considering the arbitration clause in the contract. The High Court ruled that it had jurisdiction considering that the petition raised constitutional issues and considering that there were third parties enjoined in the suit who were not privy to the suit. The High Court also issued conservatory orders. The Court of Appeal, on the other hand, held that the High Court did not have jurisdiction and overturned the High Court's decision, and also granted relief in favour of the respondent and adverse to the appellant, while at the same time denying the High Court jurisdiction over the dispute between the parties.

Aggrieved, the appellant filed the instant suit; among the grievances by the appellant on the decision of the Court of Appeal was the court's failure to determine the pending applications. On the application by 1st and 2nd respondents for stay pending appeal under rule 5(2)(b) of the Court of Appeal Rules, the Court of Appeal had directed that parties maintain the status *quo*. Then there were three other applications. The first was an application by the appellant to cite the 1st and 2nd respondents for contempt of court of the status *quo* orders. The second application was by the 1st respondent to adduce additional evidence, while the third one was for the joinder of the Chartered Institute of Arbitrators. None of the three applications was ever heard nor determined in the eventual judgment.

Issues

i. Whether the instant appeal raised a question of constitutional interpretation or application to warrant determination at the Supreme Court.
ii. What was the distinction between an appeal emanating from an interlocutory ruling such as a decision emanating from an application under rule 5(2)(b) of the Court of Appeal Rules and an appeal from a conservatory order?
iii. Whether the Supreme Court had the jurisdiction to determine appeals emanating from the Court of Appeal that arose from conservatory orders.
iv. Whether article 163(4) of the Constitution conferred upon the Supreme Court the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule (5)(2)(b) of the Court of Appeal rules of 2010.
v. Whether applications for contempt of court were to be determined on a priority basis like preliminary objections.
vi. Whether the Court of Appeal erred in its refusal to decide a pending application on contempt of court
vii. What principles should courts apply in determining the status *quo* in interlocutory applications?

Held

1. The jurisdiction of the court stemmed from the Constitution itself, and also from Statute. While it was for the litigant to choose which jurisdiction to invoke, once that decision was made, they had to meet the set threshold. The appellant invoked article 163(4)(a) of the Constitution; however, the issue of certification under article 163(4)(b) did not arise. The litigant coming before the Supreme Court had the duty of categorizing his or her case, to beckon the specific constitutional opening under which the matter fell. The court could not exercise concurrent jurisdiction simultaneously.
2. In order to evaluate the jurisdictional standing of the Supreme Court, the test was whether the appeal raised a question of constitutional interpretation or application and whether such a constitutional issue had been canvassed in the superior courts below leading to the appeal before the Supreme Court.
3. The High Court's jurisdiction was challenged on account that the dispute was of a commercial and not constitutional nature. Despite it being a ruling on the grant of conservatory orders, the test was whether any interpretation or application of the Constitution could be readily identified from the pleadings and the court decision.
4. The last test was the rationale for the Court of Appeal's decision and its resultant effect on the infringement of rights. That included a challenge on the preferred forum as directed by the Court of Appeal in the use of a private arbitrator to determine the arising constitutional question and the attendant recourse by third parties in that particular forum as well as the principles for grant of conservatory relief. The test was satisfied.
5. The Supreme Court would not ordinarily entertain an appeal from a ruling emanating from the Court of Appeal's exercise of its discretion since the substantive appeal at the Court of Appeal would still be pending. For a party to be granted leave to appeal to the Supreme Court, there had to be a clear demonstration that such a question of law, whether explicit or implicit, had arisen in the lower tiers of courts, and had been the subject- matter of judicial determination. The Supreme Court had not been conceived as just another layer in the appellate court structure. Not all decisions of the Court of Appeal were subject to appeal before the Supreme Court. The discretionary pronouncements appurtenant to the appellate court's mandate fell outside the set of questions appealable to the Supreme Court. Such discretionary decisions, which originated directly from the appellate court, were by no means the occasion to turn the instant court into a first appellate court, as that would stand in conflict with the terms of the Constitution.
6. Unlike the High Court which had express supervisory jurisdiction over the subordinate courts, the Supreme Court did not enjoy similar powers over other superior courts. That was notwithstanding the apex nature that the court was placed under the Constitution and the decisions being binding under the doctrine of *stare decisis*.
7. Conservatory orders bore a more decided public law connotation: for those were 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, were not, unlike interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, were not to be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. Conservatory orders were not ordinary civil law remedies but were remedies provided for under the Constitution. Article 23 (3) of the Constitution empowered the court to, *inter alia*, grant conservatory orders. In the course of issuing the ruling, the court made certain pronouncements touching on the interpretation and application of the Constitution, which had found their way to the Supreme Court.

8. The dispute was prosecuted through litigation and the surrounding issues determine whether indeed it qualified to be considered as a constitutional question or not. It was readily determinable for some of them and almost improbable to distinguish constitutional and other underlying issues in others. It was best left to the court on a case-to-case basis upon critically evaluating the facts, evidence and arguments before it. There would be a level of factual contestations that would inform the court's determination even at an interim stage to determine whether or not the court should exercise its discretion in favour of the applicant seeking conservatory orders.

9. The Supreme Court had the requisite jurisdiction to hear and dispose of the instant matter and none of the preliminary objections was merited and consequently, all of them were dismissed. The court could only uphold objections that claimed that the matter did not involve interpretation of the Constitution once the superior courts below had conclusively expressed themselves on the merits, the parties being entitled to and having taken up the appellate mechanisms. Both objections were unmerited and were dismissed.

10. Every litigant before the court was entitled to a decision. The Court of Appeal erred by not making any determination on the application for contempt, both when the same was live before it and in the judgment that disposed of the matter with finality.

11. Whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of the court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates would necessitate that this court should assume jurisdiction and interrogate those alleged wrongs. The Supreme Court was clothed with inherent powers which it may invoke, if circumstances so demanded, to do justice. The Constitution from which the court derived their legitimacy decrees that courts had to do justice to all.

12. Contempt proceedings were a matter of public interest more so where allegations were made that one party was misusing the same to get at another without due process. Contempt

proceedings may lead to imprisonment and therefore, where allegations of breach of the right to a fair hearing were raised, the court ought to lend an ear to the complaining party.

13. The appeal was premature as the Court of Appeal was yet to determine the dispute with finality. It was not for the court to direct how the appellate court would have dealt with the matters before it. That was a matter properly before that court which court knew or ought to have known how to deal with all issues placed before it for determination.

14. Just like a preliminary objection, issues of contempt of court were to be prioritized and determined *in limine* as soon as it arose. The authority of the courts over a matter is an ongoing process that should be safeguarded during and after the court process. The effect of taking court processes and in particular court orders lightly even in the face of the court was that it was likely to encourage descend into anarchy and loss of confidence in the court process.

15. It was an unfortunate misdirection that the appellate court, in the wake of such a contempt of court application, deliberately ignored the same and shelved it as a side show. Such an omission did not find any place for explanation in the judgment. The Court of Appeal erred in its refusal to decide on the pending applications either in a ruling or indeed in the judgment.

16. Notwithstanding the underlying commercial transaction between the parties, there was no basis for the Court of Appeal to resolve the dispute based on contracts which were neither the subject matter of the appellant's case nor the High Court ruling. In making the orders, the Court of Appeal completely changed the landscape of the dispute. First, it deprived the appellant of its recourse since the distribution territories subject to the dispute were no longer available to the appellant but were instead granted to third parties. Secondly, the third parties were not privy to or expected to be bound by the said commercial agreement and third, the decision inversely created obligations and rights of the parties, with the interim relief resulting to a finality of the rights of the parties.

17. In granting the conservatory orders, the High Court retained control over the dispute as it was seized of the case and all parties were before it without any recourse to arbitration. In total contrast, the Court of Appeal, in overturning the conservatory orders and issuing further interim relief while referring the matter to the arbitrator, thereby divested itself of control over the case as the parties were deprived the liberty to proceed with the litigation. No further recourse by the parties on the interim orders was available to them before the High Court as it was equally bound by the decision of the Court of Appeal. The Court of Appeal had on its part ceded its potential intervention in the matter to the arbitrator.

18. The jurisdiction of the arbitrator was limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. Breaches, violations and infringements of the Constitution did not fall within the jurisdiction of arbitrators and such breaches could not be the basis of setting aside arbitral awards.

19. There were parties in the instant matter who were not privy to the commercial transactions upon which arbitration would accrue. For instance, while the dispute was initially between the appellant and the 1st and 2nd respondents, other parties had since been added to the suit through the pleadings filed. The 3rd respondent was purported to have taken over distribution of the 1st and 2nd respondents' products within the appellant's distribution area; the 4th respondent was the holding company controlling the operations of the 1st and 2nd respondents; the 5th respondent is the 1st, 2nd, and 4th respondents' controlling entity of these entities and their operations; the 6th and 7th respondents were distributors of the 1st and 2nd respondents.
20. The mandate of an arbitrator largely proceeded on the basis of the agreement by parties, and was mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcended the commercial dispute, well into the constitutional sphere, every person was free to access courts.
21. There was no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law could not turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that bound parties to their agreements. That in itself did not mean that any person who set out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights had to succeed, as cases were determined on their merits.
22. The Court of Appeal, by overturning the ruling by the High Court, fell into error in more than one respect. That was by failing to appreciate and uphold that the dispute before the court related to breach of constitutional rights. In issuing the relief countermanding that made by the High Court and by referring the matter to the arbitrator, and making a full and final determination on matters still pending before the High Court, the Court of Appeal further erred. The Supreme Court corrected those errors by overturning the Court of Appeal decision in its entirety. Arbitration had to remain an option open to any party within their understanding of their contract. There was no bar to any of them invoking any arbitral clause to assert their rights under the said contract. The filing of proceedings under the Constitution could not *per se* be a bar.
23. The substantive petition before the High Court was yet to be determined since the year 2016 when the appellant first approached the court. As the dispute was still live at the High Court, it was only proper that the High Court be allowed to proceed to hear the matter on its merits.
24. The Court of Appeal erred in not making any determination on the applications pending before it. The applications could be disposed of in two ways; the first option was for the court to assume jurisdiction and deal with the applications on merit within the judgment. The other option was to remit the applications back to the Court of Appeal which was seized of them for disposal.
25. The Court of Appeal already having rendered itself in its judgment, as pertains to the instant matter, the court was *functus officio*. The Court of Appeal was aware of the pending

applications, yet did not find a place to decide on the same in its final decision. There was no entry window upon which that court could entertain any matter, considering that the nature of the pending applications required that they be handled in the course of the proceedings, prior to the final judgment.

26. The second option of seizing the jurisdiction was permitted under section 21(1)(a) of the Supreme Court Act, cap 9B, which provided that on appeal in proceedings heard in any court or tribunal, the Supreme Court could make any order, or grant any relief, that could have been made or granted by that court or tribunal. Moreover, no purpose would be served by reopening the entire judgment of the Court of Appeal on the limited but crucial issues of contempt of court proceedings, application for joinder of a party and application for adducing more evidence in view of the instant court's finding on the fate of the Court of Appeal judgment. The inherent jurisdiction of the Supreme Court point to the need to exercise such jurisdiction to remedy any apparent wrongs arising from the decision of the Court of Appeal. Article 159(2)(b) of the Constitution implored the courts to ensure that in exercising judicial authority, they were guided by the principle that justice should not be delayed. The instant matter having started in 2016, needed to have closure as quickly as possible, including the disposal of the applications that were undetermined by the Court of Appeal.

27. The contempt proceedings arose out of the Court of Appeal's orders on an application made for stay pending appeal under rule 5(2)(b) of the Court of Appeal Rules. Such an application had to be most expeditiously dealt with as soon as it arose. The approach taken by the Court of Appeal was to subordinate the application to the main hearing as parties were instead directed to engage their energies towards the substantive appeal.

28. It was desirous that the status *quo* be ascertained as it was only upon such ascertainment that it would be possible to discern whether any contempt occurred as urged or not.

29. Courts should be careful when issuing conservatory and other interim relief to parties. While it was well intended to preserve the substratum of the case by way of status *quo* orders, sight should never be lost of the fact that parties appearing before courts for such urgent relief were always at the height of their contest. If indeed the courts had to use the term status *quo*, it was only practical that the same be accompanied by the descriptive particulars of the exact position that the court seeks to preserve. That would avoid situations like the instant case where each party was left to its own perception as to what the court meant. That ultimately eroded the very essence of court intervention and subjected the court to undesirable controversy regarding compliance with the said order.

30. An order to maintain the status *quo* could mean anything, everything and nothing. Unless it was clearly spelt out in precise and unambiguous terms what the status at a particular point in time was, it was a recipe for frustration and embarrassment for the court to simply order, without more, that the status *quo* be maintained. Such vague and imprecise orders served only to embolden individuals so-minded to do that which was intended to be prohibited or

injuncted secure that they could escape because status quo was never spelt out clearly. The Court of Appeal status *quo* fit in the foregoing crucible of unclarity.

31. The order of the court made on August 11, 2016 appreciated the existence of certain facts that the parties were not in agreement as to what the prevailing position was and that the parties were still trading, as they had done over a period of time.

32. Status *quo* could only mean the position as obtaining at the High Court. The proceedings before the Court of Appeal only ensued as a result of the decision by the High Court made on June 29, 2016. The application was grounded on the position that had been argued before the High Court calling for referral of the matter to arbitration pursuant to clause 15. 2 of the agreement dated June 3, 2016. No evidence had been presented to demonstrate that it was brought to the Court of Appeal's attention that the situation had changed either at the time of filing the application or at the time the order of August 11, 2016 was made by the Court of Appeal. It was the very basis of the High Court proceedings that the respondents sought to refer the matter to the arbitrator under the situation that was prevailing at the time, the merits of which were still pending before the High Court. The reason the respondents moved to the Court of Appeal under rule 5(2)(b) of the Court of Appeal Rules was to prevent the execution and implementation of the decision of the High Court.

33. The issues raised were to be resolved in the substance of the appeal and that no direct orders sought were granted as to affect the orders of the High Court in place as at August 11, 2016. It was for that reason that the appeal was fast tracked for determination. The position then obtaining was as in the High Court orders of June 29, 2016, preserving the dealings of the parties as at February 2, 2006.

34. The rationale by the High Court in basing its decision as at February 2, 2006 was that the appellant had paid goodwill to the 1st respondent in the sum of Kshs 27,300,000/= on that day which must had accrued some rights over a distribution route. The High Court had initially granted ex parte orders on June 14, 2016 which the 1st and 2nd respondents on the one hand and the 3rd respondents on the other hand had unsuccessfully tried to vary. That could only mean that the appellant, by the conservatory orders issued had its routes stated in the petition and the application for conservatory orders being Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satelitte, Dagoretti, UDV A, UDV B, and UDV C, protected.

35. The Supreme Court could not, by the instant judgment, conclusively determine the merits of the case by the appellants that was otherwise pending before the trial court. However the court could deduce and establish from the declaration by the superior courts below that there existed continuing business arrangement with the 1st and 2nd respondents as at February 2, 2006 which the High Court preserved. The status *quo* orders by the Court of Appeal did not vary this position by the High Court and that explained why the appellant moved the Court of Appeal for contempt proceedings against the 1st and 2nd respondents.

36. It was ingenious for the respondents to turnaround and raise expiry of contract that was never the subject of the court proceedings and determination. Even if that were to be the case, it was absurd that the 1st, 4th and 5th respondents would on one hand invoke the expiry of the contract to justify noncompliance with the court orders while at the same time relying on the same 'expired' contract to refer the matter to the arbitrator. One could not simultaneously simply approbate and reprobate. Moreover, the order of the Court of Appeal affirmed that as at August 11, 2016, when the contract relied upon by the respondents had ostensibly expired, the parties were still trading. That was the trading arrangement that both superior courts below preserved during the pendency of the hearing.
37. There was breach of the status *quo* orders. That was manifest in the 1st and 2nd respondents' attempt to terminate the contract with the respondent or otherwise interfere with the said routes as revealed in the position on record taken by the said respondents. The routes allocated under the two-month agreement were: Hurlingham, Industrial Area, Kenyatta, Langata, Nairobi West, South B and Upper Hill. In the letter dated August 5, 2016 the 1st and 2nd respondents' advocates requested for evidence from the appellant of distribution routes as at February 2, 2006 was mischievous in view of their long-standing partnership. That by extension amounted to contempt of court on the part of the 1st and 2nd respondents and prompted the applications to court by the appellant. Such contempt was not to go unpunished.
38. The Supreme Court had under section 28(4) of the Supreme Court Act the same powers and authority as those of the High Court to punish for contempt of court. The Supreme Court could also, under section 22 of the Supreme Court Act, remit proceedings that began in a court or tribunal to any court that had jurisdiction to deal with the matter. The dispute was live before the High Court. The application for contempt was promptly filed by the appellant both at the High Court and at the Court of Appeal once the appellant noticed that the respondents had altered the obtaining status.
39. The High Court was directed to, on the basis of the finding on contempt, issue suitable punishment for contempt of court on priority basis as it dealt with the petition pending before it on its merits. There was a pending application before the High Court for contempt arising out of the status *quo*. The respondents could only appear at that point before the High Court to purge the contempt before they could be allowed audience before the court.
40. The orders of June 29, 2016 made by the High Court were fully restored to enable the court resume the hearing on merit of the amended petition pending before it. The High Court was also to proceed to assess the suitable punishment arising out of the contempt application dated August 23, 2016 by the appellant pending before it.

Appeal allowed.

Orders

i. *The appeal dated August 20, 2020 was allowed.*

ii. *The judgment and orders of the Court of Appeal in Civil Appeal No 163 of 2016 delivered on the July 10, 2020 were set aside in entirety;*
The High Court orders of June 29, 2016 were reinstated and the Court was to consider the consequences of any disobedience of those orders.
iii. *The matter was remitted to the High Court for disposal of the Amended Petition dated June 20, 2016 pending before the High Court on priority basis; considering the age of this matter;*
iv. *Costs in the Court of Appeal and in the Supreme Court were awarded to the appellant as against the 1st and 2nd respondents.*

Citations

Cases

Kenya

1. *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others* Petition 22 of 2014; [2015] eKLR - (Followed)
2. *Bia Tosha Distributors Limited v Kenya Breweries Limited, UDV (Kenya) Limited, East African Breweries Limited & Diageo PLC* Petition 249 of 2016; [2016] KEHC 4484 (KLR) - (Followed)
3. *Bia Tosha Limited v Kenya Breweries Ltd & 6 others* Application 10 of 2017; [2018] eKLR - (Followed)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petitions 14, 14 A, 14 B & 14C of 2014; [2014] eKLR (Consolidated) - (Mentioned)
5. *Erad Suppliers & another v National Cereals & another* Civil Suit 639 of 2009; [2012] KEHC 4372 (KLR) - (Followed)
6. *Geoffrey M. Asanyo, Makana Motors, Multiple Sales Promoters Limited & Wakam Enterprises Company Limited v Attorney General* Petition 21 of 2015; [2018] KESC 10 (KLR) - (Followed)
7. *Githiga, Stephen Maina & 5 others v Kiru Tea Factory Company Ltd* Application 12 of 2019; [2020] KESC 22 (KLR) - (Followed)
8. *Gwer, Samson & 5 others v Kenya Medical Research Institute & 3 others* Petition No 12 of 2019; [2020] eKLR - (Followed)
9. *Imanyara & 2 others v Attorney General* Civil Appeal 98 of 2014 ; [2016] eKLR - (Followed)
10. *Joho & another v Shahbal & 2 others* Petition 21 of 2014; [2014] KESC 1 (KLR); [2014] 1 KLR 111 - (Mentioned)
11. *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others* Civil Appeal 72 of 2008; [2011] KECA 1 (KLR) - (Followed)
12. *Mahamud v Mohamad & 3 others; Muktar (Interested Party)* Petition 7 of 2018; [2018] KESC 26 (KLR) - (Followed)
13. *Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme)*

v Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme Petition 3 of 2016; [2019] eKLR - (Followed)

14. *Munya v Kithinji & 2 others* Application 5 of 2014 ; [2014] 1 KLR 58 - (Followed)
15. *Muriithi, Deynes & 4 others v Law Society of Kenya & another* Petition 507 of 2014; [2015] KEHC 6945 (KLR) - (Followed)
16. *Ndutu & 6000 others v Kenya Breweries Limited & another* Civil Application 291 of 2011; [2012] KECA 8 (KLR); [2012] 2 KLR 804 - (Mentioned)
17. *Ngoge v Ole Kaparo & 5 others* Petition 2 of 2012 ; [2012] 2 KLR 419 - (Followed)
18. *Njihia, Daniel Kimani v Francis Mwangi Kimani & another* Civil Application No 3 of 2014; [2015] eKLR - (Followed)
19. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch* Petition 12 of 2016; [2019] KESC 11 (KLR) - (Followed)
20. *Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petitions 5, 4 & 3 of 2013; [2013] KESC 8 (KLR) - (Followed)
21. *Outa v Odoyo Okello & 3 others* Petition 6 of 2017; [2017] KESC 25 (KLR) - (Followed)
22. *Republic v Ahmad Abolfathi Mohammed & another* Petition 39 of 2018; [2019] KESC 48 (KLR) - (Followed)
23. *Republic v Mohammed & another* SC Criminal Application No 2 of 2018 ; [2018] eKLR - (Followed)
24. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Mentioned)
25. *Shah v Patel & 2 others* Civil Appeal 345 of 2013; [2015] KECA 753 (KLR) - (Followed)
26. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015 ; [2015] eKLR - (Followed)
27. *Twaha v Abdalla & 2 others SC Civil Application No 35 of 2014 [2015] eKLR* Petition 34 of 2018; [2019] KESC 52 (KLR) - (Followed)
28. *University of Eldoret & another v Hosea Sitienei & 3 others* SC Petition No 33 of 2019 ; [2020] eKLR - (Followed)

Nigeria

Alhaji Muhammadu Maigari Dingyadi & anor v Independent National Electoral Commission & 2 Ors (2010) 4 – 7 SC (Pt1) 76 - (Followed)

United Kingdom

1. *Addis v Gramophone Co* (1908-1910) All ER 1 - (Mentioned)
2. *Salomon v A Salomon & Co Ltd* [1897] AC 22 - (Followed)

India

1. *Booz Allen & Hamilton Inc v SBI Home Finance Limited* (2011) 5 SCC 532 - (Mentioned)

2. *Unitech Limited & others v Telangana State Industrial Infrastructure Corporation (TSIIC) & Others* [2021] SCC 99 - (Followed)

United States

Quiroz Franco v Greyston Ridge Condominium 39 Cal App 5th 221 (2019) - (Mentioned)

Texts

Pretorius, DM., (Ed) (2005), *The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law* 122 South African Law Journal 832

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3(2) - (Interpreted)
2. Arbitration Act (cap 49) sections 6(1); 35 - (Interpreted)
3. Competition Act (cap 504) section 21(3) - (Interpreted)
4. Constitution of Kenya articles 19, 23(3); 27; 36; 40; 48; 50; 159(1)(c); 163(4)(a); 165(3)(b)(c); 258 - (Interpreted)
5. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 23(1) - (Interpreted)
6. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5(2)(b)- (Interpreted)
7. Elections Act (cap 7) section 76(1)(a) - (Interpreted)
8. Evidence Act (cap 80) section 97 - (Interpreted)
9. Supreme Court Act (cap 9B) sections 3, 21(1)(a); 22; 28(4) - (Interpreted)

Advocates

Dr. Kiplagat for the appellant
Mr Kamau Karori for the 1st, 4th, 5th respondents
Mr. George Oraro, Senior Counsel for 2nd respondent
Mr. Issa Mansur and *Ms. Ahomo* for the 3rd respondent
Mr. Kiragu Kimani h/b for *Mr. Koyyoko* for the 6th respondent
Mr. Guto Mogere for the 7th respondent

February 17, 2023, the Court delivered the following Judgment:

A. Introduction

1. The petition of appeal herein is dated August 20, 2020 and was lodged on August 21, 2020. The appellant, Bia Tosha Distributors Limited, seeks to set aside the judgment of the Court of Appeal in Civil Appeal No 163 of 2016 delivered on July 10, 2020 which allowed the appeal against the High Court's (Onguto, J) ruling in Constitutional Petition No 249 of 2016 delivered on June 29, 2016.

B. Background

2. In the year 1997, the appellant was appointed as a distributor for the 1st respondent's products within Gachie, Mwimuto, Kanunga, Kiambaa, Banana, Karura, Gathanga, Ndenderu, Ndumberi, Tinganga, Riabai, Kanguya, Wangige, and Ridgeways. Subsequently, in the year 2000, vide a letter dated July 20, 2000 the appellant was offered new distribution areas namely: Baba Dogo, Kariobangi North, Dandora I, and Dandora II on the condition that the appellant would pay a non-refundable goodwill of Kshs 6,630,000/- to the 1st respondent.

3. In the year 2005, the appellant was offered a larger distribution area comprising of Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satelitte, Dagoretti, UDV A, UDV B, and UDV C. For these territories the appellant was asked to pay goodwill amounting to Kshs 31,668,000/- out of which it paid Kshs 27,300,000/-.

4. Sometime thereafter, the 1st respondent re-possessed Baba Dogo, Dandora I and II, and Kariobangi North, from the appellant to enable the appellant to serve the new areas whereupon the appellant requested to be refunded the goodwill for the territories that were repossessed. This, the 1st respondent declined, indicating that the amounts were non-refundable, and further claimed that it was within their discretion to appoint other distributors as the agreement was non-exclusive. Furthermore, based on world practices, the 1st, 2nd, 4th and 5th respondents' implementation of goodwill payments were terminated as being irrational, illegal and improper scheme to lock out competing international beverage manufacturers. The 4th respondent owns majority shareholding in the 3rd respondent who wholly owns the 1st and 2nd respondent.

5. The appellant paid goodwill for the routes it operated along and this amount was appropriated directly to the 1st respondent. The refusal by the 1st respondent to refund the goodwill paid by the appellant, coupled with the former's repossession of most distribution areas initially allocated to the appellant and which were then reallocated to other distributors, triggered this dispute.

C. Litigation History

i. Proceedings at the High Court

6. The appellant lodged against the 1st, 2nd 4th and 5th respondents Constitutional Petition No 249 of 2016 at the High Court which was amended on June 20, 2016, claiming that the respondents' trade practices were unreasonable, unfair, anti-competitive, discriminatory,

and contrary to public policy, and in breach of its fundamental freedoms as enshrined in the *Constitution*. The petition alleged infringement of the appellant's rights under articles 19, 36 and 27 of the *Constitution* being the right to freedom of association and freedom from discriminatory conduct by the respondents in renewing the distributorship contracts on different terms. The appellant also claimed that the actions of the 1st and 2nd respondents of refusing to pay back goodwill amounted to a violation of the appellant's right to property under article 40 of the *Constitution* as it claimed goodwill is an asset, and therefore, property. The appellant sought the following reliefs:

a. A declaration that the distribution routes to which the appellant has paid goodwill on, that is to say Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B, UDV C, belong to and are owned by the appellant exclusively and to the exclusion of the respondents, their employees, agents, servants or any person acting for or connected with the respondents.

b. A declaration that the goodwill paid by the appellant to the respondents for distribution routes creates protected property over the said routes under article 40 of the *Constitution*.

c. A declaration that the respondents' conduct in relation to settling arbitrary and uniform margins, settling a unilateral maximum resale price, compelling the use of a closed data management system and the branding of the appellant's motor vehicles and staff are unreasonable, unfair, anticompetitive and are therefore contrary to public policy.

d. A declaration that the respondents' conduct with regard to the purported termination of the petitioner's contract is null and void as it is discriminatory, unreasonable, unfair, lacking in bona fides and is contrary to public policy.

e. Any other order that this honourable court may deem fit to grant.

7. The petition was filed together with an application for conservatory orders seeking the following orders:

a. ...

b. That pending the hearing and final determination of the petition herein, a conservatory order in the nature of an injunction do issue directed at the respondents, their agents, servants, employees or any person acting for or connected with the respondents barring them from interfering with the exclusive management, control and distributorship of the respondent's products in the following routes,

that is to say, Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDVA, UDV B, UDV C, which are owned by the appellant by virtue of goodwill paid.

c. ..."

8. This prompted the 1st and 2nd respondents to file an application seeking to have the proceedings stayed and or dismissed and direct the dispute to be referred to arbitration pursuant to clause 15.2 of the agreement dated June 3, 2016. They objected to the High Court's jurisdiction to hear and determine the petition in place of arbitration.

9. The trial court (Onguto J) established the two main issues for determination as whether the court had jurisdiction to entertain the petition and, whether the appellant was entitled to conservatory orders.

10. On the court's jurisdiction, the learned Judge, while noting that the High Court indeed had jurisdiction under article 165(3)(b) of the *Constitution* to consider the constitutional petition, proceeded to consider the question of whether the matter was one to be referred to arbitration despite the appellant alleging infringement of constitutional rights and freedoms. He found that where a dispute or claim is laid out as a constitutional issue, then the High Court must deal with the dispute. Further, that since third parties, who were not parties to the arbitration agreement had been joined in the proceedings, it would not be appropriate to dispatch the parties to arbitration. For these reasons, the learned Judge held that the court had the requisite remit. Consequently, he proceeded to issue the conservatory orders as prayed.

ii. Proceedings at the Court of Appeal.

11. Aggrieved by the High Court's ruling, the 1st and 2nd respondents filed Civil Appeal No 163 of 2016 raising 17 grounds of appeal. The same were summarized by the appellate court as follows: that the learned Judge erred in granting the conservatory orders; elevating a purely commercial dispute to a constitutional dispute thus breaching the cardinal rule of party autonomy and freedom of contract; making a ruling that went contrary to the provisions of section 21 of the *Competition Act*; violating the 1st and 2nd respondents right to property under article 40; misinterpreting provisions of article 159(1)(c) of *Constitution*; interfering with the dispute resolution procedure set out in the agreement between the 1st respondent and the appellant; violating the 1st and 2nd respondents' fundamental freedom of contract; and for exceeding the court's jurisdiction by entertaining, hearing and determining issues raised by the appellant in the application dated June 14, 2016.

12. The 1st and 2nd respondents also sought, under rule 5(2)(b) of the *Court of Appeal Rules*, stay of execution of the High Court orders pending the hearing and determination of the appeal. On August 11, 2016, the appellate court ordered that status quo be maintained pending the hearing of the appeal, in consideration of the long-standing special relationship between the appellant and the 1st and 2nd respondents and the hearing of the appeal to be fast-tracked.

13. Before the appeal could be heard, the appellant filed a notice of motion application dated August 23, 2016 seeking to cite the 1st and 2nd respondents for contempt of the court orders issued on the August 11, 2016. The 1st respondent also filed an application dated December 7, 2016 seeking to adduce additional evidence. A third application for joinder was filed by the Chartered Institute of Arbitrators.

14. In a ruling dated May 30, 2017, the Court of Appeal (Waki, Nambuye and Kiage JJ A) directed that the appeal must proceed to its substantive hearing without being sidetracked by any pending applications and that all applications filed before the court be held in abeyance pending the hearing of the appeal.

15. That decision prompted the appellant to file Supreme Court Application No 10 of 2017, seeking a stay of proceedings and the ruling delivered by the appellate court on May 30, 2017. In a ruling delivered on December 11, 2018 this court declined to assume jurisdiction reasoning that the appellant had not properly invoked our jurisdiction under article 163(4)(a) of the *Constitution* since the main petition was still pending before the High Court. Consequently, the court remitted the matter back to the court of Appeal for disposal on priority basis culminating in a judgment delivered on July 10, 2020.

16. In its decision, now challenged in this appeal, the appellate court identified three issues for determination: whether the learned Judge wrongly assumed jurisdiction and granted orders while ignoring party autonomy and freedom of contract in the face of an arbitration agreement; whether the learned judge issued final orders which conferred rights not in the contract before the petition was heard and evidence tested; and whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles.

17. On the first issue, the appellate court found that, the constitutional breaches complained about were predicated on the distributorship agreement which provided mediation and arbitration as a medium for dispute resolution, and that avenue ought to have been exhausted first. It held that there is no way infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which are allegedly breached.

18. On the learned judge's exercise of discretion in granting the conservatory order, the appellate court faulted the learned Judge's conclusion as arising from failure to consider the respective interest of the parties and the fact that the appellant would be entitled to damages and/or restitution as an alternative remedy. The judges of appeal were of the view that there were serious triable issues on whether the goodwill was refundable and whether the routes were exclusive to the appellant, which required serious interrogation and required evidence to resolve before a determination could be made. Further that the conservatory orders issued gave the appellant exclusive control over some disputed territories where there may be other distributors, locking them out of the market.

19. As a result, the Court of Appeal set aside the conservatory order made on the June 26, 2016 and substituted it with one that stayed the proceedings before the High Court pending the dispute being referred to arbitration. It then ordered that the dispute between the appellant and the 1st respondent be referred to arbitration per the respective parties' distributorship agreements.

iii. Proceedings before the Supreme Court

20. Aggrieved by the judgment and orders of the appellate court, the appellant filed this petition of appeal dated August 20, 2020 on the main grounds that the Court of Appeal erred:

    a. In making a final determination of the rights of the parties herein at an interlocutory stage.

    b. In making a final determination of the subject matter of the dispute herein rendering the Court of Appeal's order to refer the matter to arbitration ineffectual.

    c. In not recognizing that the appellant's causes of action are outside the commercial contracts executed between the parties.

    d. In failing to appreciate that the court was obligated to determine all pending applications before dealing with the appeal determination of which would have produced a totally different outcome in the appeal and altered the final judgment.

    e. In refusing to investigate and determine the contempt of court application and proceeding to the hearing of the main appeal without first disposing of the said application or determining the application in its judgment thereby establishing a chaotic new legal paradigm that allows disobedience of court orders provided that an appeal has been lodged.

f. In accepting and adopting a novel jurisdictional granting competence to private arbitrators by expanding that jurisdiction to encompass constitutional determinations, public policy pronouncements and statutory declarations.

21. The appellant now seeks the following reliefs:

a. That the appeal be allowed and the Court of Appeal decision dated July 10, 2020 be set aside in its entirety and the matter be remitted to the High Court for the determination of the rights of the parties on merit and for the High Court orders of June 29, 2016 to be deemed and restored in full.

b. That this honourable court be pleased to grant any or further relief in the interest of justice.

c. Costs.

D. Preliminary Objections

22. The 3rd respondent filed a notice of preliminary objection dated September 14, 2020 on the following grounds:

i. That this honourable court has no jurisdiction to entertain the instant petition of appeal as it stems from an appeal on the conservatory order of the High Court, which does not involve the interpretation or application of the *Constitution*.

ii. That the instant petition of appeal has been brought without certification as required under article 163(4)(b) of the *Constitution* and the same is fatally defective and should be struck out with costs.

23. Similarly, the 1st, 4th and 5th respondents have filed a notice of preliminary objection dated October 13, 2020 on the grounds:

i. That this honourable court lacks jurisdiction to hear and determine the appeal under article 163(4)(a) of the *Constitution*;

ii. That the petition is hinged on contested factual matters which have not been a subject of determination by the High Court or the Court of Appeal. In the circumstances, the issues raised in the petition are not ripe for determination by this honourable court.

E. Submissions

a. Appellant

24. The appellant filed submissions on October 1, 2020. The appellant submits that the appellate court erred in its refusal to decide on pending applications, ignoring settled law and precedent as well as the Supreme Court's order in this matter, where it remitted the case for determination of all pending applications and the main appeal. Citing Supreme Court of Nigeria in *Hon Alhaji Muhammadu Maigari Dingyadi & another v Independent National Electoral Commission & 2 others (2010) 4 – 7 SC (Pt1) 76*, the appellant urges that it would be remiss of a court to proceed to treat an appeal to its conclusion when other processes are pending and proceed not to decide on the pending applications.

25. The appellant claims that the appellate court erred in deciding the case based on contracts that were neither the subject matter of their case nor the High Court ruling. That the appellate court overturned the High Court's decision by relying on purported contracts that contained arbitration clauses yet this was not the case before it. The appellant further asserts that the appellate court erred in applying an arbitration clause retrospectively hence misdirected itself by formulating a dispute based on post facto contracts and purported to compel the parties to abide by the contracts that were not contemplated by the parties when they started their trading relationship.

26. It is the appellant's submission that the Court of Appeal eroded with finality the appellant's rights as it overturned the trial court's decision depriving the appellant of an opportunity to present its evidence and call witnesses on whether goodwill could be categorized as property under article 40. That the court breached settled law in *Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR* where this court warned against the rush to make factual and final determination of matters at an interlocutory stage. In that regard, the appellant alleges that the impugned judgment suggests that a determination by a private arbitrator can set a constitutional precedent that would have precedential value.

27. The appellant further submits that the Court of Appeal erred in formulating a "contested – facts" standard as the basis for granting or rejecting interim relief, and arriving at its decision by purporting to analyze whether the facts relied upon by the High Court were agreed on or were disputed. The appellant urges that it is not the contestation of facts that is the material consideration in the grant of interim relief, but that such a decision should be based on a *prima facie* case made out by an applicant, as in all applications for interim reliefs, the facts are almost always contested.

28. The appellant argues that the Court of Appeal misread the *Competition Act 2010* and wrongly relied on section 21 (3) of the *Competition Act* to find that exclusive territorial

control was barred by the act. That there must be no statutory bar to a supplier appointing a distributor on an exclusive basis to manage an exclusive territory.

29. The appellant submits that the Court of Appeal fell into further error when it purported to base its judgment on the alleged infringement of the rights of other third parties including the 3rd respondent. The appellant deems false the statement by the Court of Appeal that allowing conservatory orders to stand will occasion financial loss to the other distributors and inconvenience their customers and employees.

30. Addressing the unconscionable conduct of the 1st and 2nd respondents, the appellant submits that its trading relationship with these parties is illegal and unconstitutional. To buttress this argument, the appellant relied on *LTI Kisii Safari Inns LTD & 2 others v Deutsche Investitions – Und Enwicklungsgellschaft ('Deg') & others* [2011] eKLR where the court held that where persons with their eyes open willfully and knowingly enter into unconscionable bargains, the law has no right to protect them. The appellant argues that the 2010 Constitution materially changed the previous narrative towards preserving the old notion of the sanctity of contract.

31. The appellant concludes by stating that it was clear that the Court of Appeal replaced the High Court's *prima facie* findings with its own preferred and idiosyncratic view; that the respondents did not satisfy the requirements for the setting aside of discretionary interlocutory orders; and that the appeal herein should be allowed as prayed.

a. 1st, 4th, and 5th Respondents

32. The 1st, 4th and 5th respondents filed their submissions relating to their preliminary objection, and on the substantive appeal on November 18, 2020.

33. They submit that the appeal is incompetent and ought to be dismissed as the court does not have jurisdiction under article 163(4)(a) of the *Constitution* to hear this appeal nor does it meet the threshold set in *Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another* [2012] eKLR and Bia Tosha Limited v Kenya Breweries Ltd & 6 others [2018] eKLR. They argue that the case stems from an interlocutory appeal challenging the exercise of discretion by the High Court which did not call for interpretation or application of the *Constitution* and neither has the appellant identified any instance of interpretation or application of the *Constitution* in the judgment appealed from.

34. Regarding the petition, the respondents submit that the Court of Appeal did not err in not determining the interlocutory applications since the complaint was the subject of Supreme Court Application No 10 of 2017 which was resolved by a ruling dated December 11, 2018 and the Supreme Court found that the ruling of the Court of Appeal did not involve the interpretation and application of the *Constitution* and neither was it a pronouncement of

the appellate court but was an exercise of discretion whose main aim was to give procedural direction as to the conduct of the substantive matter before it. Therefore, the issue of disregarding court orders does not arise since this court did not make an order directing the Court of Appeal to hear the applications. Further, the respondents submit that the pre-trial conference was held on November 1, 2016 and the court directed that the appeal would be heard in priority over the interlocutory applications noting that none of the interlocutory applications had ever been fixed or listed for hearing.

35. As to whether the court erred in determining the appellant's case based on contracts, it is submitted that the issue is still alive at the High Court and the court cannot, therefore, address its mind in respect of disputed facts currently before the High Court. It is the respondents' contention that the Court of Appeal did not apply an arbitration clause retrospectively for the reason that the arbitration clause contained in a contract that is entered into post conclusion of negotiations is and by itself, not a factor to render the arbitration agreement inoperable as was explained in the Court of Appeal of the State of California Fourth Appellate District Division Three case of *Quiroz Franco v Greyston Ridge Condominium,* 39 Cal App 5 221 (2019) .

36. On whether the Court of appeal determined the issues of the parties with finality, it is submitted on behalf of the respondents that the court exercised constitutional avoidance which requires that where there are other mechanisms other than the *Constitution* through which a dispute can be resolved, the said mechanisms ought to be utilized to resolve the dispute as was held in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others*[2014] eKLR. Furthermore, it is the respondents' case that the breach of constitutional rights is arbitrable as the reliefs sought by the appellant are rights in personam and there can be no basis to argue that such dispute is not arbitrable. Towards this, they rely on the case of *Booz Allen & Hamilton Inc v SBI Home Finance Limited*(2011) 5 SCC 532 by the Supreme Court of India.

37. They further submit that the Court of Appeal was right in rejecting interim relief under section 3(2) of the *Appellate Jurisdiction Act* (cap 9). That the court derives jurisdiction to reappraise the facts and arrive at its own conclusion. That the court considered all relevant factors including the possibility of the appellant suffering losses if it was not allowed to carry on the distribution vis a vis the respondents' contention that the goodwill was non-refundable and that the appellant did not have exclusive rights over the territory.

38. As to whether the Court of Appeal made a false determination on the *Competition Act* the respondents submit that the appellant's submissions are contested and are yet to be determined and are therefore prematurely before the court.

39. On the concept of ongoing business, it is submitted that the two-month contracts between the appellant and the 1st and 2nd respondents dated June 3, 2016 expired by effluxion of time on August 2, 2016 and were not renewed. That that was the status quo that existed when the Court of Appeal made the order of August 11, 2016.

40. Concerning the issue of unconscionable conduct, they urge that it is not ripe for determination by this court as it is the subject of the amended petition before the High Court.

b. 2nd Respondent

41. In its submissions dated November 27, 2020, the 2nd respondent contends that this court is not clothed with the requisite jurisdiction as the petition having arisen from an interlocugtory ruling, does not involve the interpretation and/or application of the *Constitution* and neither do the High Court nor the Court of Appeal delve into constitutional issues. To this end, they cite this court's decisions in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014]eKLR, *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* [2012] eKLR and *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] eKLR.

42. As to the issue of its joinder as a party to the petition, they submit that there was no claim against it with regard to orders sought or granted before the High Court or Court of Appeal.

43. On whether the Court of Appeal erred in its refusal to decide on pending applications, the 2nd respondent submits that the issue of pending applications was determined by the Court of Appeal from which an appeal was filed to this Court in Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2018] eKLR and a ruling delivered on December 11, 2018. Accordingly, if the court declares that this issue has been determined, then the same is *res judicata* and cannot be revisited through another appeal.

44. On whether the Court of Appeal erred in considering the appellant's case based on contracts which were neither the subject matter of the appellant's case nor the High Court ruling, it is the 2nd respondent's submission that the existence of the contract between the appellant and the 1st respondent incorporating the dispute settlement provision was at the core of the dispute, which was confirmed by the High Court ruling. Therefore, as the appeal is on matters of law and not facts, the issue of commercial agreements was not one to be argued before this court.

45. On whether the Court of Appeal erred in applying an arbitration clause retrospectively, it is urged that there was in existence an arbitration clause, which clause the appellant acknowledged, and that the claim by the appellant of the contracts being post facto and

thereby belatedly applying the arbitration provision is being raised before this honorable court for the first time. The 2nd respondent contends that an arbitration agreement may be applied prospectively or retroactively so long as the intention of the parties can be derived from the agreement and depending on its terms.

46. On whether the Court of Appeal erred in determining with finality the rights of the parties, it is submitted that the Court of Appeal rightly decided the issue of constitutional protection by holding that it can only be determined at the hearing since the commercial relationship between the appellant and the 1st and 2nd respondents was not disputed.

47. It is their further submission that the parties have agreed to a dispute settlement procedure which involves arbitration, and that the arbitrator and the parties are guided by the principles of the *Constitution*, and should any constitutional indication arise from the proceedings, then the matter was to be resolved within the same forum. They, therefore, urge that the appellant's contention that arbitrators have no jurisdictional competence about public policy decisions has no basis in law.

48. They conclude that this court is without jurisdiction, and that the Court of Appeal applied the correct principles and arrived at the correct, fair, and just determination. They add that the appellant has refused, failed, and/ or neglected to proceed to a full hearing with its case so that the respective rights can all be fully determined on merit. Accordingly, they pray for the petition to be struck off or in the alternative be dismissed with costs.

c. 6th Respondent

49. In its submissions dated July 2, 2021 and filed on September 28, 2021, the 6th respondent contends that the essence of this appeal is whether an arbitration clause in a standard distribution contract is a bar to class action in court by the distributors. It is the 6th respondent's submission that the proceedings before the High Court did not arise under the individual distributorship agreements but were an assault on an entire system of distribution, undermining enshrined constitutional rights, and is not an inquiry that can be undertaken under private individual arbitral proceedings before an arbitrator.

50. The 6th respondent urges that the High Court has the authority as well as a duty under articles 22, 165(3)(,b) and 258 of th *Constitution* to undertake a proper investigation into the complaints raised in the petition and, if well-founded, grant effective relief in terms of article 23.

51. It further submits that it is a reversible error for the Court of Appeal not to address at all, how the presence of the 6th and 7th respondents impacted the proceedings before the High Court, as well as arguments being pressed before them for arbitration by the 1st, 2nd, 4th and

5th respondents (hereinafter Diageo respondents) given the adverse impact that such stay of proceedings and referral would have had on the 6th and 7th respondents.

52. It is its case that the issues raised by the distributors were clearly outside of the contract and did not relate to any breach of contract at all but instead address what the distributors allege were practices "... so grave, so manifestly wrong..." and had been subject of discussion between the parties but did not bear any fruits. That the case by the appellant, the 6th and 7th respondent can only be resolved through coercive orders of a court or public institutions and not by a private arbitrator who would have no jurisdiction over the matters raised either contractually or otherwise, nor the power to grant effective relief.

53. They urge this court to reverse the Court of Appeal decision and reinstate the orders of the High Court.

d. 7th Respondent

54. In its submissions dated June 29, 2021, the 7th respondent submits that while the matter may have originated from an interlocutory application, it has always involved the interpretation and application of the *Constitution*. They contend that this court is clothed with the requisite jurisdiction to entertain this matter, and that it meets the conditions set by this court in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Anor [2012] eKLR* as it originated from a constitutional petition which called upon the High Court to determine if it had jurisdiction to hear the appellant's constitutional grievances under article 165(3)(c) of the *Constitution* of Kenya, 2010 as well as the importance of private personal agreement as considered with article 159(2)(c) of the *Constitution* of Kenya, 2010.

55. It is their further submission that in deciding if it should grant conservatory orders, the High Court found that the power to grant these orders originated from article 23(3) of the *Constitution* of Kenya, 2010. It also analyzed if goodwill could fall within the definition of property under the *Constitution*. Similarly, the Court of Appeal also delved into the issue of constitutional interpretation.

56. As to the main appeal, it is their contention that the High Court had the jurisdiction to hear and determine the constitutional grievances raised by the appellant and that they ought not to be left to an arbitrator, as the appellant has raised the issue of the infringement of their property rights, their right not to be discriminated against and their right to associate freely.

57. Citing the Supreme Court of India in *Unitech Limited & Others v Telangana State Industrial Infrastructure Corporation (TSIIC) & others* 2021 SCC Online SC 99, it submits that the presence of an arbitration clause does oust the jurisdiction under article 226, and is adamant that the question of the High Court's jurisdiction should depend on the nature of the grievance being made and not its origin. They argue that the *Constitution* not

only governs the relationship between the State and its citizens but also extends to those between its citizens, therefore, private relationship agreements do not give parties immunity to provisions of the *Constitution*.

58. It is the 7th respondent's submission that the appellant, and the 6th and 7th respondents did not approach the Constitutional Court to solely interpret the agreements they had made with the 1st and 2nd respondents. They instead presented evidence of how they had been treated by the 1st and 2nd respondents, referred to their rights in the *Constitution*, and requested the court to determine if those rights had been infringed. They agree with the Court of Appeal that the origins of their relationship with the 1st and 2nd respondents formed a part of their dispute, but it was just a part of the dispute and not the whole of it. They had constitutional grievances which they had justifiably pleaded, therefore, the matter took a constitutional trajectory, as required by this court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.

59. It is the 7th respondent's further submission that the dispute dividing the parties cannot be adequately resolved in arbitration as ordered by the Court of Appeal. That arbitration may only be compelled in a dispute which falls squarely within the four corners of a contract, and which relates to a breach of the contract containing an arbitration clause. All other causes of action unrelated to a breach of contract if brought within arbitral proceedings cannot be arbitrated under such contract. *(Addis v Gramophone Co*)(1908-1910) All ER 1 .

60. The 7th respondent contends that by ruling in the manner that it did, the Court of Appeal expressly and effectively terminated the rights of the 6th and 7th respondents without hearing them and inadvertently shielded the 2nd, 4th, and 5th respondents from the claims lodged by the appellant and the 6th and 7th respondents. That this was a clear breach of the rights of the 7th respondents to access justice under article 48 of the *Constitution* of Kenya and a fair hearing under article 50. It is argued that the expertise of the arbitrator is an additional limiting factor to the arbitral process. Even if all the constitutional issues raised by the appellant could legitimately be put to an arbitrator, which is denied, the arbitrator may not possess the legal expertise and experience to understand and resolve the issues raised by the appellant.

61. The 7th respondent urges the court to set aside the judgment of the Court of Appeal and restore the orders of the High Court.

E. Issues for Determination

62. The appellant in its submissions framed the following issues for determination:

    a. Whether the Court of Appeal erred in its refusal to decide on pending applications;

b. Whether the Court of Appeal erred in considering the appellant's case based on contracts which were neither the subject matter of the appellant's case nor the High Court ruling;

c. Whether the Court of Appeal erred in applying arbitration clauses retrospectively;

d. Whether the Court of Appeal erred in determining with finality the rights of the parties;

e. Whether the Court of Appeal erred in its decision on the jurisdictional competence of private arbitrators with regard to public policy decisions;

f. Whether the Court of Appeal erred in its interpretation of the *Competition Act, 2010*;

g. Whether the Court of Appeal erred in basing its judgment on the infringement of the rights of other third parties;

h. Whether there was unconscionable conduct on the part of the respondents.

It is on this basis that the respondents filed their submissions in response to the appeal.

63. Two preliminary objections have been raised by the 3rd respondent and the 1st, 4th and 5th respondents, respectively, on grounds that this court has no jurisdiction to entertain this appeal. This is because the appeal stems out of an interlocutory conservatory order which does not involve the interpretation or application of the *Constitution* and that the petition has been brought without certification; and that this court lacks jurisdiction under article 163(4)(a) since the appeal is hinged on contested factual matters that have not been the subject of determination in the superior courts, respectively.

64. Having carefully considered and evaluated the two preliminary objections, pleadings, arguments and submissions in this appeal, we are of the considered view that the following issues suffice to dispose of the appeal:

i. Whether this court has jurisdiction to determine this appeal;

ii. Whether the Court of Appeal erred in declining to decide on pending applications;

iii. Whether the Court of Appeal erred in granting the reliefs contained in its judgment.

A consideration of the above issues, shall have addressed the rest of the issues as framed, some of which form the basis of the decision of the Court of Appeal or arise as a consequence thereof.

F. Analysis And Determination

i. Whether this court has jurisdiction.

65. Our jurisdiction having been challenged, it must follow that the question be determined in limine. This is because in the event that we uphold the objection, that would determine the whole matter, without need to venture into the merits or lack thereof. The jurisdiction question now before us arises in two respects, all arising from the preliminary objections by the respondents as earlier pointed out – the general jurisdiction under article 163(4)(a) of the *Constitution* and the specific jurisdiction to deal with a matter emanating from an interlocutory application for conservatory relief.

66. As we have variously stated before, our jurisdiction stems from the *Constitution* itself, and also from Statute. While it is for the litigant to choose which jurisdiction to invoke, once that decision is made, the same must meet our set threshold. In this instance, the appellant maintains that this Court has jurisdiction as the determination subject to the appeal regards the constitutionality of the appellant's rights. The appellant invokes article 163(4)(a) of the *Constitution* in approaching us. That being the case, the issue of certification under article 163(4)(b) does not arise. This is because, as we held in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* SC Civil Application No 35 of 2014 [2015] eKLR it bears restating that the litigant coming before the Supreme Court has the duty of categorizing his or her case, so as to beckon the constitutional opening under which the matter falls. The court cannot exercise concurrent jurisdiction simultaneously.

67. The established guiding principles when invoking article 163(4)(a) were indeed pronounced in cases such as Lawrence Nduttu (*supra*), Hassan Ali Joho (*supra*), Gatirau Peter Munya (*supra*) and *Peter Oduor Ngoge* (*supra*). As can be deduced from the above quoted cases, in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior courts below leading to the present appeal. In order to establish that fact, the court needs to ask itself the following questions: (i) What was the question in issue at the High Court and the Court of Appeal? (ii) Did the superior courts below dispose of the matter after interpreting or applying the *Constitution*? (iii) Does the instant appeal raise a question of constitutional interpretation or application which was the subject of judicial determination at the High Court and the Court of Appeal? This is a test that was aptly captured in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* SC Petition No 2 of 2016 [2018] eKLR.

68. Applying the above test to the present circumstances, what then was the question in issue at the High Court? It is not in dispute that the appellant filed a petition under article 22

alleging violation of certain articles of the *Constitution*. Notably, the appellant called in aid articles 19, 36, 27(2) and 40 of the *Constitution*. More pronounced is the relief sought in the nature of a declaration that the goodwill the appellant had paid creates protected property over the said routes under article 40 of the *Constitution* and the relief seeking to declare the respondents' conduct in terminating the appellant's contract as null for, *inter alia* , being discriminatory, unreasonable and unfair. While we note that the petition was yet to be heard on the merits, it is evident that whatever determination that would be made by the court eventually, a decision would have to be made one way or the other in relation to the said quoted provision of the *Constitution*. This decision would involve testing the evidence and arguments leading the court to either agreeing or disagreeing with the appellant. This decision, in our view inevitably involves interpreting and/or applying the *Constitution* in the matter before court, in line with the first test.

69. article 165(3)(b) of the *Constitution* clothes the High Court with jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. In determining whether it had jurisdiction, the High Court established that the matter raised constitutional issues and questions that were not appropriate for arbitration.

70. What about the second test? Again, we note that the High Court's jurisdiction was challenged on account that the dispute was of a commercial and not constitutional nature. Of interest to us is whether in the decision now subject of appeal, it can be concluded that the Court interpreted or applied constitutional provisions. This is key because, despite it being a ruling on grant of conservatory orders, the test is whether any interpretation or application of the *Constitution* can be readily identified from the pleadings and from the court decision. Looking at the ruling, the High Court was no doubt being asked to directly determine whether the matter involved constitutional questions or was merely a dispute arising out of a purely commercial agreement. On that invitation, the High Court stated:

> "My view is that the petition as drawn reveals that there did and do exist commercial agreements between the parties. For stated consideration certain proprietary rights are alleged to have been acquired and the same rights are also alleged to be taken away. Relevant articles of the *Constitution* have been identified and stated. The question for the court at the hearing of the petition will be whether what has been identified as constituting proprietary interest is 'property' within the provisions of article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified. That is the core question in this Petition and it is purely a question of constitutional interpretation and determination, in my view. This court has the requisite remit in my view."

This finding by the High Court appreciated that there existed a constitutional question arising out of article 40 of the *Constitution* in so far as it related to the dispute at hand.

71. On appeal, the Court of Appeal, overturning the decision of the High Court addressed itself to, *inter alia*, whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles. In differing with the High Court, the appeal judges rendered themselves thus:

> " [41] ... In our considered view therefor in as much as the constitutional breaches complained about by the 1st respondent which are supported by the 5th and 6th respondents, were predicated on the distributorship agreements which provided mediation and arbitration as a medium for dispute resolution, that avenue ought to have been exhausted first. It is apparent from the record that the appellants filed a motion under section 6(1) of the *Arbitration Act* seeking inter alia, stay and/or dismissal of the court proceedings; and the dispute being referred to arbitration as per the agreement."

72. The Court of Appeal went ahead to further state that:

> " (46) We differ with the learned judge's conclusion that the issues of constitutional rights raised by the 1st respondent were not suitable for arbitration as the said issues arose from the distributorship agreement. There is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See section 97 of the *Evidence Act*). The learned judge also failed to give due consideration to the provisions of article 159(2)(c) of the *Constitution* that mandates courts to promote alternative dispute resolution such as mediation and arbitration by disregarding the terms contained in the distributorship agreement. It is clear to us the learned judge

> did not heed to the dictates thereto to promote alternative dispute resolution in this matter but rather downgraded it."

73. The appellate court, acknowledging the existence of complaints of constitutional breaches, favoured the exhaustion of the alternative dispute resolution mechanism as permitted under article 159(2)(c) of the *Constitution* predicated on the distributorship agreements. Moreover, in considering whether the High Court had judicially exercised discretion in granting the conservatory relief, the learned judges of appeal stated:

> "(47) ... It is in that context that we will examine this issue by first setting out the guiding principles on interlocutory applications for conservatory orders within the framework of article 23 of the *Constitution*...."

74. For our purpose, this is an indication that indeed the Court of Appeal appreciated that constitutional questions were not only before it but also the guiding principles within the constitutional framework were applicable to the matter. The court eventually was of the view that the resolution of those acknowledged constitutional breaches would be done under commercial dispute resolution mechanisms.

75. The last test on whether the appeal raises a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal is a no brainer as the appellant challenges the rationale for the Court of Appeal decision and its resultant effect on the infringement of rights. This includes a challenge on the preferred forum as directed by the Court of Appeal in the use of a private arbitrator to determine the arising constitutional question and the attendant recourse by third parties in that particular forum as well as the principles for grant of conservatory relief. This test, we find, is satisfied.

76. As to the second front of the preliminary objection, should we down our tools on account of the appeal having emanated from conservatory orders? This is the import of the objection by the 3rd respondent. In dealing with this objection, we must first distinguish between an appeal emanating from an interlocutory ruling such as a decision emanating from an application under rule 5(2)(b) of the *Court of Appeal Rules* and an appeal from a conservatory order.

77. Our position on an appeal from a ruling emanating from the Court of Appeal's exercise of its discretion is that we would not ordinarily entertain such an appeal, more so since the substantive appeal at the Court of Appeal would still be pending. In *Teachers Service Commission v Kenya National Union of Teachers & 3 others* SC Application No 15 of 2015 [2015] eKLR the court decided with finality, in our view, on the question of whether

article 163(4) of the *Constitution* confers upon this court the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule (5)(2)(b) of that court's rules of 2010. Citing the Joho case we stated:

> "In the Joho case, we heard and determined an appeal emanating from a substantive determination by the Court of Appeal of a constitutional question. The appeal had originated from an interlocutory application filed within the election petition before the High Court, challenging the constitutionality of section 76(1)(a) of the *Elections Act, 2011*, (Act No 24 of 2011). This application triggered the appellate jurisdiction of this court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal."

78. Similarly, as we noted in *Geoffrey M Asanyo & 3 others v Attorney General* [2020] eKLR, we do not venture into administrative judicial processes. This followed from our earlier pronouncement in *Daniel Kimani Njihia v Francis Mwangi Kimani & another* SC Civil Application No 3 of 2014 [2015] eKLR:

> "[21] We are in agreement with the Court of Appeal. For a party to be granted leave to appeal to this court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of courts, and has been the subject- matter of judicial determination. It is clear to us that this court had not been conceived as just another layer in the appellate - court structure. Not all decisions of the Court of Appeal are subject to appeal before this court. One category of decisions we perceive as falling outside the set of questions appealable to this court, is the discretionary pronouncements appurtenant to the appellate court's mandate. Such discretionary decisions, which originate directly from the appellate court, are by no means the occasion to turn this court into a first appellate court, as that would stand in conflict with the terms of the Constitution (Emphasis ours)"

79. This is because, unlike the High Court which has express supervisory jurisdiction over the subordinate courts, we do not, under the existing constitutional structure, enjoy similar powers over other superior courts. This is notwithstanding the apex nature that the court is placed under the *Constitution* and our decisions being binding under the doctrine of stare decisis.

80. In Gatirau Peter Munya (*supra*) we held that:

> "Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the 'prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

81. Thus, conservatory orders are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the supreme law of the land. Indeed, the appeal emanates from the learned judge's exercise of discretion under rule 23(1) of the *Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012)* and to that extent the *Constitution* itself. Article 23(3) of the *Constitution* empowers the court to, inter alia , grant conservatory orders. Just as we held in the Joho case, in the course of issuing the ruling, the learned judge made certain pronouncements touching on the interpretation and application of the *Constitution*, which have now found their way to this court.

82. It is worthy of note that the way the dispute is prosecuted through litigation and the surrounding issues determine whether indeed it qualifies to be considered as a constitutional question or not. It is readily determinable for some of them and almost improbable to distinguish constitutional and other underlying issues in others. It is therefore best left to the court on a case to case basis upon critically evaluating the facts, evidence and arguments before it. There will be a level of factual contestations that will inform the court's determination even at an interim stage to determine whether or not the court should exercise its discretion in favour of the applicant seeking conservatory orders.

83. This matter emanates from commercial agreements between the appellant and the 1st and 2nd respondents concerning the distribution of the 1st respondent's products. The 1st respondent sought to repossess the distribution territories of Baba Dogo, Dandora 1 and II, and Kariobangi North that had been previously granted to the 1st appellant in the year 2000 and declined to refund goodwill paid by the appellant, on the ground that the amounts were non-refundable. The 1st respondent further appointed other distributors to that distribution territory. In reaction to the 1st respondent's measures, the appellant chose to pursue the constitutional path by instituting the petition before the High Court. The appellant alleges that following the coming into force of the *Competition Act* in 2011, the relationship between it and the Diageo respondents was re-ordered as it was no longer

permissible for the appellant as an independent distributor to commit exclusively to serve the Diageo respondents. The appellant therefore moved to challenge not just the contract but more so the conduct of the Diageo respondents which the appellant stated, stifled the appellant's enjoyment of the benefits of the new legal environment as protected by the *Constitution* that had just come in place.

84. Secondly, in the year 2012, distributors came together and registered a new association by the name of Beverage Distributors of Kenya (BDK). This was to bring together beverage distributors from across the country to address matters of common interest in the beverage industry. According to the appellant, the Diageo respondents violently resisted engaging BDK and insisted on dealing with BDK members individually. The appellant has pleaded that this was a clear effort to prevent the appellant from benefitting from the gains resulting from the adopting of a common strategy. As a result, the appellant alleges that that is a term of a contract that is contrary to the values enshrined in the *Constitution*. This, we understand, is the basis of the decisions of the superior courts below although with diametrically opposed outcomes, and we strongly uphold that that it is a matter that can and must be resolved by this court by dint of its mandate under section 3 of the *Supreme Court Act*.

85. To this end therefore, we see no difficulty in assuming jurisdiction over the present matter. We affirm that we have the requisite jurisdiction to hear and dispose of this matter and none of the preliminary objections is merited and consequently all of them are hereby dismissed.

86. In the same breadth, in Rutongot [*supra*] and *University of Eldoret & another v Hosea Sitienei & 3 others* SC Petition No33 of 2019 [2020] eKLR, we were persuaded that the disputes did not involve interpretation of the *Constitution* after all and upheld objections raised in those matters. This is something we can only do once the superior courts below have conclusively expressed themselves on the merits, the parties being entitled to and having taken up the appellate mechanisms. We reiterate that both objections are unmerited and are hereby dismissed.

87. With the above finding on the preliminary objections, we now proceed to consider the appeal before us on merit.

ii. Whether the Court of Appeal erred in its refusal to decide on the pending applications;

88. As earlier pointed out, among the grievances by the appellant on the decision of the Court of Appeal is that court's failure to determine the pending applications. In essence there were three applications before the Court of Appeal. On the application by the 1st and 2nd respondents for stay pending appeal under rule 5(2)(b) of the *Court of Appeal Rules*, the Court of Appeal had directed that parties maintain the status quo. Then there were three other applications. The first one was an application by the appellant to cite the 1st and 2nd

respondents for contempt of court of the status quo orders. The second application was by the 1st respondent to adduce additional evidence while the third one was for joinder of the Chartered Institute of Arbitrators. None of these three applications was ever heard as applications nor determined in the eventual judgment.

89. The Court of Appeal judgment ably captures the situation thus:

> " 13. In an Extempore ruling dated May 30, 2017, this court reiterated the directions given on November 1, 2016 by the court, regarding a priority hearing date to be given for the main appeal in lieu of all the applications. This is what the court stated in a pertinent paragraph of the said ruling: -
>
> > 'Having given the matter full and anxious consideration, we are quite clear that this court (differently constituted) did direct in unequivocal terms on November 1, 2016 (and in answer to an attempt to agitate an application in lieu of the appeal proper on that day) that the dispute between the parties herein must be fully and finally resolved by the hearing and determination of the appeal itself and that interlocutory matters or issues cannot take precedence over hearing of the appeal itself.'
>
> 14. This prompted the 1st respondent to file an application before the Supreme Court seeking a declaration that its constitutional rights had been violated by the court. However, the Supreme Court held that the petition before the Supreme Court failed to properly invoke the provisions of article 163(4)(a) of the *Constitution* since the main petition before the High Court was still pending and the Court of Appeal was as yet to exercise its appellate jurisdiction, thus there was no substantive decision from which the 1st respondent could appeal. Declining to exercise its jurisdiction, the Supreme Court remitted the matter to this court for hearing on priority basis.
>
> 15. Even in the face of the said ruling by the Supreme Court, and prior directions given by this court on the hearing of the appeal in lieu of the applications, when the appeal came up for hearing before us on March 4, 2020, Mr Nowrojee, senior counsel appearing with Dr Kiplagat for the 1st respondent still insisted that the notice of motion dated August 23, 2016 seeking to commit the appellants for contempt of court be heard first. This argument was met by stiff

> opposition by counsel for the appellants who urged us to follow the earlier directions of this court and proceed with the main appeal which was also in line with the direction made by the Supreme Court. We stuck to the directions given earlier by this court and proceeded to hear the main appeal."

90. What is manifestly clear is that the appellant was keen to prosecute its application for contempt of court at every available window of opportunity. The other parties seemed satisfied with the directions of the Court of Appeal on focusing on the main appeal and did not make any concerted effort to bring to the court's attention their desire to prosecute the applications. The matter therefore proceeded for hearing and the court reserved its judgment. We have perused the judgment and note that upon conclusion of the submissions, the judges of appeal in distilling issues before them for determination made the following remark regarding these pending applications:

> " [31] ... It is also our considered view that many other issues arising from the grounds of appeal not considered in this judgment were deliberately left out for the obvious reason that we must consider only issues that do not compromise the actual hearing and determination of the dispute. " (Emphasis ours)

91. In the end, despite the spirited attempt by the appellant, the court went ahead to render its judgment without addressing the fate of the appellant's application for contempt or any other application for that matter. This was a deliberate step by the appellate court as noted above, the court having considered that the applications fell within the realm of those issues that did not compromise the actual hearing and determination of the dispute. Bearing in mind that the nature of the judgment was a final decision on the dispute, coupled with the final orders which had reversed the High Court orders and divested the dispute from the courts to the arbitrator, what is the appellant left with?

92. It is trite that every litigant before court is entitled to a decision. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* SC Petition No 12 of 2019 [2020] eKLR, we were faced with a situation whereby the Court of Appeal, though referred to the cross appeal in its judgment, failed to determine it. We held that "there is no doubt that, for the regularity and normalcy of the trial process, the cross-appeal ought to have been determined. As the opportunity was missed, we addressed ourselves to the proper remedy to be granted." It was clear in that matter that the substance of the judgment rendered the cross appeal to be without merit and it would serve no purpose to refer the cross appeal back to the appellate court.

93. By dint of the above, it therefore follows that the Court of Appeal fell into error by not making any determination on the application for contempt, both when the same was live before it and in the judgment that disposed of the matter with finality.

94. Before addressing ourselves to the available remedy, it is imperative that we first address ourselves to our exceptional jurisdiction to determine this issue, the same not having transcended through the court hierarchy but having emanated from the Court of Appeal. The issue before us, despite having arisen at the Court of Appeal, requires our intervention. In doing so, we echo the position we adopted in *Geoffrey M Asanyo & 3 others v Attorney General* SC Petition No 21 of 2015 [2018] eKLR in which we stated as follows:

> " We have no doubt that whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates would necessitate that this court should assume jurisdiction and interrogate those alleged wrongs. In stating so, we reiterate our holding in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* Petition No 6 of 2014; [2017] eKLR (" Outa case") that:
>
> > 'The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice.The *Constitution* from which this court, and indeed all courts in the land, derive their legitimacy decrees that we must do justice to all."'

95. We also underscored the place of contempt proceedings in invoking our jurisdiction in the ruling delivered on September 4, 2020, in *Stephen Maina Githiga & 5 others v Kiru Tea Factory Company Ltd* SC Application No 12 of 2019; [2020] eKLR pitting parties who were keen on participating in all manner of duels between them as a result of competing factions. There, we stated:

> " [33] As stated above, we have in a separate ruling determined that we have the jurisdiction to hear the petitioners' appeal and have, in that ruling, stated that the controversy around conduct of contempt proceedings by the Court of Appeal will require this Court's interrogation against constitutional principles . The respondent's submissions on jurisdiction in the present application are therefore overruled." (Emphasis ours)

In that case, just like in the present one, throughout the proceedings before the Court of Appeal, the sword of contempt had continuously been pointed at the appellants before

the court. The contest was so pronounced that in that case, the substantive appeal had been shelved and contempt proceedings took centre stage. Summing up the position of the parties, we held as follows:

> "(35) Lastly, we have no doubt that contempt proceedings are a matter of public interest more so where allegations are made that one party is misusing the same to get at another without due process. Contempt proceedings may lead to imprisonment and therefore, where allegations of breach of the right to fair hearing are raised, this court ought to lend an ear to the complaining party."

96. We also find it necessary to consider the nature and impact of the application for contempt that was held in abeyance. In doing so, did our earlier ruling in which we declined to accept jurisdiction over the appeal against the court of appeal ruling validate the position eventually taken by the appellate court? We do not think so. Just as we did in *Geoffrey M Asanyo & 3 others v Attorney-General* SC Petition No 7 of 2019 [2020] eKLR, we only pointed out that the appeal was premature as the Court of Appeal was yet to determine the dispute with finality. It was not for this court to direct how the appellate court would have dealt with the matters before it. That was a matter properly before that court which court knew or ought to have known how to deal with all issues placed before it for determination.

97. At the same time, there is no doubt that contempt is something to be taken most seriously in the administration of justice. As we noted in *Republic v Ahmad Abolfathi Mohammed & another*SC Criminal Application No 2 of 2018; [2018] eKLR :

> "[28] It is, therefore, evident that not only do contemnors demean the integrity and authority of courts, but they also deride the rule of law. This must not be allowed to happen."

98. We reiterated this position in the same *Republic v Ahmad Abolfathi Mohammed & another*SC Petition No 39 of 2018 [2019] eKLR by stating:

> "[28] There is no doubt that an act in contempt of the court constitutes an affront to judicial authority; and the court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the court's authority; secondly, to uphold honourable conduct among advocates, in their standing as officers of the court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice."

In our view, just like a preliminary objection, when an issue of contempt of court arises, it is one which should be prioritised and determined in limine as soon as it arises. Authority of the courts over a matter is an ongoing process that should be safeguarded during and after the court process. The effect of taking court processes and in particular court orders lightly even in the face of the court is that it is likely to encourage descend into anarchy and loss of confidence in the court process.

99. It was an unfortunate misdirection, in our view, that the appellate court, in the wake of such an application, deliberately ignored the same and shelved it as a side show. It is more disturbing that such an omission did not find any place for explanation in the judgment. The appellant argues that had the Court of Appeal dealt with the pending applications, it would have made a different determination. The 1st and 2nd respondents, in their submissions made the argument that the distributorship agreement in issue between the parties had since lapsed and that the orders of status quo made by the Court of Appeal should be construed in that context. We reiterate our edict in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)*SC Petition No 7 of 2018 [2019] eKLR that:

> "(83) It is our position that, in the absence of a determination by the Court of Appeal on an issue, no appeal can properly fall before the Supreme Court in exercise of its appellate jurisdiction. In *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others*[2015] eKLR, we posed the following question:
>
> 'In the absence of a judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this court be sitting on appeal over?'"

100. The inevitable conclusion that we make from the above position is to agree with the appellant and find that the Court of Appeal erred in its refusal to decide on the pending applications either in a ruling or indeed in the judgment. We shall address the consequences of this error at the opportune time when dealing with reliefs. As to whether that court would have arrived at a different determination had it considered the application, the same is otiose, hypothetical, speculative and overtaken by events.

iii. Whether the Court of Appeal erred in granting the reliefs contained in its judgment

101. The appellant effectively challenges the Court of Appeal judgment in its entirety. In considering the extent of the Court of Appeal judgment, we note that it not only overturned the ruling of the High Court, but also granted relief in favour of the respondent and adverse to the appellant, while at the same time denying the High Court jurisdiction over the dispute

between the parties. Contextualizing the dispute, the appellant's amended petition filed at the High Court, as we have found, raised constitutional questions that required resolution as such.

102. Notwithstanding the underlying commercial transaction between the parties, there was no basis under these circumstances for the Court of Appeal to resolve the dispute based on contracts which were neither the subject matter of the appellant's case nor the High Court ruling. In making the orders, the Court of Appeal completely changed the landscape of the dispute. First, it deprived the appellant of its recourse since the distribution territories subject to the dispute were no longer available to the appellant but were instead granted to third parties. Secondly, the third parties were not privy to or expected to be bound by the said commercial agreement and third, the decision inversely created obligations and rights of the parties, with the interim relief resulting to a finality of the rights of the parties.

103. Why do we say so? In granting the conservatory orders, the High Court retained control over the dispute as it was seized of the case and all parties were before it without any recourse to arbitration. In total contrast, the Court of Appeal, in overturning the conservatory orders and issuing further interim relief while referring the matter to the arbitrator, thereby divested itself of control over the case as the parties were deprived the liberty to proceed with the litigation. No further recourse by the parties on the interim orders was available to them before the High Court as it is equally bound by the decision of the Court of Appeal. And the Court of Appeal had on its part ceded its potential intervention in the matter to the arbitrator.

104. The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred t0 as "party autonomy". Breaches, violations and infringements of the *Constitution* do not fall within the jurisdiction of arbitrators and such breaches cannot be the basis of setting aside arbitral awards. We asserted this position in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* SC Pet No 12 of 2016; [2019] eKLR:

> "[76] Reading each of the above provisions, alleged breaches of the *Constitution* cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the *Constitution* are properly governed by articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the *Arbitration Act*."

105. What is more, there are parties in this matter who were not privy to the commercial transactions upon which arbitration would accrue. For instance, while the dispute was initially between the appellant and the 1st and 2nd respondents, other parties had since been added to the suit through the pleadings filed. The 3rd respondent is purported to have taken over distribution of the 1st and 2nd respondents' products within the appellant's distribution area; the 4th respondent is the holding company controlling the operations of the 1st and 2nd respondents; the 5th respondent is the 1st, 2nd, and 4th respondents' controlling entity of these entities and their operations; the 6th and 7th respondents are distributors of the 1st and 2nd respondents. In stating so we bear in mind the doctrine of corporate personality as enunciated in *Salomon v A Salomon & Co Ltd* [1897] AC 22 by the House of Lords in the United Kingdom and accepted in our jurisdiction.

106. This court has insisted on the exhaustion of the local remedies in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/ Beneficiaries of the Kenya Ports Authority Pensions Scheme* SC Petition No3 of 2016 [2019] eKLR. This, however, refers to remedies set out in statutory provisions. The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.

107. It is now clear that the Court of Appeal, by overturning the ruling by the High Court, fell into error in more than one respect. This was by failing to appreciate and uphold that the dispute before the court related to breach of constitutional rights. In issuing the relief countermanding that made by the High Court and by referring the matter to the arbitrator, and making a full and final determination on matters still pending before the High Court, the Court of Appeal fell into further error. We hereby correct those errors by overturning the Court of Appeal decision in its entirety. In doing so, we are alive to the fact that arbitration must remain an option open to any party within their understanding of their contract and we have seen no bar to any of them invoking any arbitral clause to assert their rights under the said contract. The filing of proceedings under the *Constitution* cannot per se be a bar.

G. Reliefs

108. What commends itself for our determination at this moment is the consequential reliefs to be granted in line with our finding. We note that the appellant asks the Court to set aside in entirety the Court of Appeal decision and remit the matter to the High Court for determination on merit. The appellant also seeks the full restoration of the High Court orders issued on June 29, 2016.

109. In addressing this grievance, we cannot lose sight of the fact that, sadly the substantive petition before the High Court is yet to be determined since the year 2016 when the appellant first approached court. As the dispute is still live at the High Court, it is only proper that the High Court be allowed to proceed to hear the matter on its merits on the basis of the amended petition filed in Constitutional Petition No 249 of 2016.

110. As already observed, the Court of Appeal erred in not making any determination on the applications pending before it, what then becomes of these applications? In our view, the applications can be disposed of in two ways because the applicants were entitled to a decision one way or the other. The first option is for this court to assume jurisdiction and deal with the applications on merit within this judgment. The other option is to remit the applications back to the Court of Appeal which was seized of them for disposal.

111. In determining the appropriate path, we note that the Court of Appeal already having rendered itself in its judgment, now the subject of this appeal, that court is *functus officio*. In *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR , the court cited with approval an excerpt from an article by Daniel Malan Pretorius titled, "*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*" (2005) 122 SALJ 832 which reads: -

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

In the present matter, the Court of Appeal was aware of the pending applications, yet did not find a place to decide on the same in its final decision. In rendering the judgment, the matter concluded. There is therefore no entry window upon which that court may entertain any matter, considering that the nature of the pending applications required that they be handled in the course of the proceedings, prior to the final judgment.

112. This leaves us with the second option of seizing the jurisdiction. This is permitted under section 21(1)(a) of the *Supreme Court Act 2011* which provides:

> "(1) On appeal in proceedings heard in any court or tribunal, the Supreme Court -
>
> a. May make any order, or grant any relief, that could have been made or granted by that court or tribunal; and "

Moreover, no purpose would be served by reopening the entire judgment of the Court of Appeal on the limited but crucial issues of contempt of court proceedings, application for joinder of a party and application for adducing more evidence in view of our finding on the fate of the Court of Appeal judgment. In addition, the inherent jurisdiction of the Court as observed in Geoffrey M Asanyo; Fredrick Outa and Stephen Maina Githiga cases (*supra*) point to our need to exercise such jurisdiction to remedy any apparent wrongs arising from the decision of the Court of Appeal. article 159(2)(b) of the *Constitution* implores the courts to ensure that in exercising judicial authority, they are guided by the principle that justice should not be delayed. This matter having started in 2016, needs to have closure as quickly as possible, including the disposal of the applications that were undetermined by the Court of Appeal.

113. In *Hon Gitobu Imanyara & 2 others v Hon Attorney General* SC Petition No 15 of 2017, we expressed ourselves in the following manner:

> "(72) ... We further note the gravity of the admitted constitutional breach and violations, and the amount of time and expense, it has taken to prosecute the matter before court. In the peculiar circumstances of this case, referring the matter back to the trial court for purposes of assessing damages while this Court has the power to grant appropriate reliefs for constitutional violations as set out above, would further delay access to justice. ..."

The present matter calls for application of the above principle that calls for our determination of the issues as opposed to remittance to the superior courts below.

114. With the above background, what then is our position on the application for contempt? We appreciate that the contempt proceedings arise out of the Court of Appeal's orders on an application made for stay pending appeal under rule 5(2)(b) of the *Court of Appeal Rules*. In order to expedite the proceedings before it, the Court of Appeal, ordered that the status quo as at the August 11, 2016 be maintained. On October 31, 2016, the appellants made

an application for the Court of Appeal to find the appellants to have breached the 'status quo' orders that were issued, the compliance of which is the gravamen of the contempt application.

115. Having underscored the centrality of the contempt of court proceedings within any judicial proceedings, we are of the considered position that such an application must be most expeditiously dealt with as soon as it arises. The approach taken by the Court of Appeal was to subordinate this application to the main hearing as parties were instead directed to engage their energies towards the substantive appeal. That being said, from the record before us, it is certain that there is a contest on what exactly amounted to 'status quo' which the Court of Appeal desired to preserve. It is desirous that this status quo be ascertained as it is only upon such ascertainment that it will be possible to discern whether any contempt occurred as urged or not.

116. The general divergence on the extent of the status quo position pits two sides, understandably. On one hand, the appellant is of the view that the status quo means the position accruing from the High Court orders made on June 29, 2016. The alternative position by the 1st, 4th and 5th respondents is that the status quo refers to the position of the parties as at August 11, 2016. Adopting the latter position would mean that as at August 11, 2016, there was no subsisting contractual relationship between the appellant and the 1st, 4th and 5th respondents.

117. Without descending into the factual contestation, the record shows that the appellant, upon the issuance of the status quo orders on August 11, 2016 by the Court of Appeal, approached the High Court on August 23, 2016 seeking to cite the 1st and 2nd respondents for contempt of the High Court order issued on June 29, 2016 and to have its key personnel punished for such contempt by way of fine and committal of the directors of the 1st and 2nd respondents to civil jail. This application before the High Court was opposed by way of a replying affidavit on behalf of the 1st and 2nd respondents. In the said affidavit, the nature of the court of appeal orders and the contempt thereon is brought out, the basis upon which we distilled the two competing positions stated above.

118. At this juncture, we need to caution that courts should be careful when issuing conservatory and other interim relief to parties. In particular, while it is well intended to preserve the substratum of the case by way of status quo orders, sight should never be lost of the fact that parties appearing before courts for such urgent relief are always at the height of their contest. If indeed the courts must use the term status quo, it is only practical that the same be accompanied by the descriptive particulars of the exact position that the court seeks to preserve. This will avoid situations like the present one where each party is left to its own perception as to what the court meant. This ultimately erodes the very essence of court

intervention and subjects the court to undesirable controversy regarding compliance with the said order.

119. This is a position that the Court of Appeal itself has previously grappled with. In *Saroj K Shah v Naran Mani Patel & 2 others* [2015] eKLR it expressed itself regarding the lack of clarity on status quo orders as follows:

> " We need to state, however, that counsel for the respondents is justified in raising concerns about the issuance of generic status quo orders. An order to maintain the status quo can mean anything, everything and nothing. Unless it is clearly spelt out in precise and unambiguous terms what the status at a particular point in time is, it is a recipe for frustration and embarrassment for the court to simply order, without more, that the status quo be maintained. Such vague and imprecise orders serve only to embolden individuals so-minded to do that which is intended to be prohibited or injuncted secure that they can escape because status quo was never spelt out clearly."

120. In our view, there is no doubt that the Court of Appeal status quo order with which we are faced fits in the foregoing crucible of unclarity. The order of the court made on August 11, 2016 provided:

> " ... In the interim however there is apparent disagreement as regards the current status quo . There is however no dispute that the parties continue to trade and have done so over a long period . To fast track the hearing of the appeal, we make the following orders and give the following directions.
>
> (5) In the interim as the parties have been trading and have a special relationship we order that the status quo obtaining as at today be maintained pending the hearing and determination of the appeal.
>
> ..." (Emphasis ours)

This was not made any better by the failure of the Court of Appeal to explain itself in the judgment in regard to the meaning of the three short sentences under (5) above.

121. To us, the above orders appreciate the existence of certain facts. First, the parties were not in agreement as to what the prevailing position was and second, the parties were still trading, as they had done over a period of time. The High Court was caught up in this predicament as captured in Bia Tosha Distributors Limited v Kenya Breweries Limited & 4 others [2016] eKLR when, in a ruling made on October 24, 2016 on the 2nd respondent's preliminary

objection to the appellant's application dated August 23, 2016 for contempt, stated as follows:

> "It is not in doubt that a status quo order was issued by the Court of Appeal on August 11, 2016. A status quo order simply maintains a state of affairs between the parties. It is best suited and applied by the court when the state of affairs is pellucidly defined. Unfortunately, and with unfeigned respect to the Court of Appeal, it would not be wrong to state the state of affairs it intended to have the parties herein maintain simply left the parties in an apparent quagmire. (sic) I will however not endeavour to try and demystify the state of affairs as of August 11, 2016 which obtains till now ." (Emphasis ours)

122. So, what then was the status quo? After our careful consideration, we are persuaded that it could only mean the position as obtaining at the High Court. Our underpinning of this position is that the proceedings before the Court of Appeal only ensued as a result of the decision by the High Court made on June 29, 2016. A perusal of the said application made before the Court of Appeal by the 1st and 2nd respondents dated July 6, 2016 resulting in the status quo orders reveals that the applicants therein sought four main prayers, to wit:

a. Stay of the orders made by the Honourable Mr Justice Onguto on June 29, 2016 allowing the appellant's application dated June 14, 2016 pending the inter partes hearing and determination of the appeal;

b. Stay of further proceedings in High Court Petition No 249 of 2016 pending the hearing and determination of the appeal filed before the Court of Appeal;

c. An order of injunction restraining the appellant, its principals, agents, servants, employees or any other person from interfering with the distributorship of the products pending the inter partes hearing and determination of the appeal;

d. In the alternative, an order for parties to resume the status quo obtaining before June 14, 2016.

123. The application was grounded on the position that had been argued before the High Court calling for referral of the matter to arbitration pursuant to clause 15. 2 of the agreement dated June 3, 2016. No evidence has been presented to demonstrate that it was brought to the Court of Appeal's attention that the situation had changed either at the time of filing the application or at the time the order of August 11, 2016 was made by the Court of Appeal. It is indeed the very basis of the High Court proceedings that the respondents sought to refer the matter to the arbitrator under the situation that was prevailing at the time, the merits of which are still pending before the High Court. The reason the said respondents moved

to the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules* was to prevent the execution and implementation of the decision of the High Court.

124. What we make of the order by the Court of Appeal is that the issues raised were to be resolved in the substance of the appeal and that no direct orders sought were granted as to affect the orders of the High Court in place as at August 11, 2016. It is for this very reason that the appeal was fast tracked for determination. For avoidance of doubt, the position then obtaining is as in the High Court orders of June 29, 2016, preserving the dealings of the parties as at February 2, 2006. The High Court had rendered itself as follows:

> " 133. The application dated June 14, 2016 succeeds on the following terms:
>
> a) Pending the hearing and final determination of the petition herein a conservatory order will issue preserving the petitioner's Bia Tosha territory exclusively to the petitioner under the area of operation arrangement obtaining as at February 2, 2006.
>
> ..."

125. The rationale by the High Court in basing its decision as at February 2, 2006 is that the appellant had paid goodwill to the 1st respondent in the sum of Kshs 27,300,000/= on that day which must have accrued some rights over a distribution route. The High Court had initially granted ex parte orders on June 14, 2016 which the 1st and 2nd respondents on the one hand and the 3rd respondents on the other hand had unsuccessfully tried to vary. This can only mean that the appellant, by the conservatory orders issued had its routes stated in the petition and the application for conservatory orders being Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satelitte, Dagoretti, UDV A, UDV B, and UDV C, protected.

126. We cannot, by this judgment, conclusively determine the merits of the case by the appellants that is otherwise pending before the trial court. However, we can deduce and establish from the declaration by the superior courts below that there existed continuing business arrangement with the 1st and 2nd respondents as at February 2, 2006 which the High Court preserved. The status quo orders by the Court of Appeal did not vary this position by the High Court and that explains why the appellant moved the Court of Appeal for contempt proceedings against the 1st and 2nd respondents.

127. It is ingenious for the respondents to now turnaround and raise expiry of contract that was never the subject of the court proceedings and determination. Even if that were to be the case, it is absurd that the 1st, 4th and 5th respondents would on one hand invoke the expiry of the contract to justify noncompliance with the court orders while at the same time relying on the same 'expired' contract to refer the matter to the arbitrator. One cannot simultaneously simply approbate and reprobate. Moreover, the order of the Court of Appeal affirms that as at August 11, 2016, when the contract relied upon by the respondents had ostensibly expired, the parties were still trading. This is the trading arrangement that both superior courts below preserved during the pendency of the hearing.

128. This, in our view, points to the fact that there was breach of the status quo orders. This was manifest in the 1st and 2nd respondents' attempt to terminate the contract with the respondent or otherwise interfere with the said routes as revealed in the position on record taken by the said respondents. In the replying affidavit sworn by Nadida Rowlands in response to the appellant's application dated August 23, 2016 the 1st and 2nd respondents state that the routes allocated under the two-month agreement were: Hurlingham, Industrial Area, Kenyatta, Langata, Nairobi West, South B and Upper Hill. In the letter dated August 5, 2016 the 1st and 2nd respondents' advocates request for evidence from the appellant of distribution routes as at February 2, 2006 was in our view mischievous in view of their long-standing partnership. This by extension amounted to contempt of court on the part of the 1st and 2nd respondents and prompted the applications to court by the appellant.

129. Having overturned the Court of Appeal judgment and having established that there was contempt of court, the same should not go unpunished. The Supreme Court has, under section 28(4) of the *Supreme Court Act* the same powers and authority as those of the High Court to punish for contempt of court. The Supreme Court may also, under section 22 of the *Supreme Court Act*, remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter. We have already stated that the dispute is live before the High Court. We also note that the application for contempt was promptly filed by the appellant both at the High Court and at the Court of Appeal once the appellant noticed that the respondents had altered the obtaining status.

130. For these reasons we direct the High Court to, on the basis of our finding on contempt, issue suitable punishment for contempt of court on priority basis as it deals with the petition pending before it on its merits. We note that there is a pending application before the High Court for contempt arising out of what we have now set out to be the status quo. The said respondents can only appear at this point before the High Court to purge the contempt before they can be allowed audience before the court, now seized with the matter. This is not

novel. It is the position we took in *Hon Gitobu Imanyara & 2 others v Hon Attorney General* (*supra*) wherein we found as follows:

> " [102] ...We do therefore find that the losses suffered by the Finance Magazine was as a result of an infraction of the 2nd appellant's fundamental rights and freedoms. Consequently, we will allow his prayer but subject to the matter being referred back to the trial court to determine the 2nd appellant's claim and quantum for special damages based on the evidence on record."

131. The logical upshot of this finding is that the orders of June 29, 2016 made by the High Court be, and are so fully restored to enable the court resume the hearing on merit of the amended petition pending before it. Having found that there was contempt of court, the High Court should also proceed to assess the suitable punishment arising out of the contempt application dated August 23, 2016 by the appellant pending before it. As for costs, it is the settled principle that costs follow the event. Accordingly, the appellant is awarded costs in the Court of Appeal and in this court as against the 1st and 2nd respondents who are the primary disputants.

132. Before we conclude, we thank all counsel for their erudite input, research and presentation in the course of the hearing of this matter.

133. In conclusion and for all the reasons given, we find merit in this appeal and grant relief as set out hereunder.

H. Orders

134. Consequently, upon our conclusion, we order that:

i. The appeal dated August 20, 2020 be and is hereby allowed;

ii. The judgment and orders of the Court of Appeal in Civil Appeal No 163 of 2016 delivered on the July 10, 2020 be and are hereby set aside in entirety;

iii. The High Court orders of June 29, 2016 be and are hereby reinstated and the court do consider the consequences of any disobedience of those orders;

iv The matter be and is hereby remitted to the High Court for disposal of the amended petition dated June 20, 2016 pending before the High Court on priority basis; considering the age of this matter;

v Costs in the Court of Appeal and in this court are awarded to the appellant as against the 1st and 2nd respondents.

It is so ordered.

Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2023] KESC 11 (KLR)

Civil Practice and Procedure *– costs – security for costs – guidelines that guided courts when determining whether to order security for costs - what guidelines did the courts consider before issuing an order for security for costs - whether the imposition of additional security for costs in itself and as a condition to hearing a matter was unconstitutional – when was it unreasonable to impose security for costs - Court of Appeal Rules, 2010 (cap 9 Sub Leg), rule 107(3).*

Constitutional Law *– fundamental rights and freedoms – right of access to justice – definition of the word fee - whether the use of the word fee in the wording of the right to access to justice extended to both filing fees and costs (inclusive of applications for additional security for costs) - Constitution, article 48.*

Statutes *– interpretation of the Constitution – interpretation of article 48 of the Constitution of Kenya, 2010 – definition of the word 'fee' - whether the use of the word 'fee' in the wording of the right of access to justice extended to both filing fees and costs (inclusive of applications for additional security for costs).*

Words and Phrases *– security for costs – definition of - money, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses - Black's Law Dictionary Ninth Edition at page 1478.*

Brief facts

The appellant was dissatisfied with the order of the Court of Appeal that required it to deposit the sum of Kshs 20,000,000 in court as security for costs, failure to which the appeal at the Court of Appeal would stand struck out. Aggrieved, the appellant unsuccessfully sought leave from the Court of Appeal to appeal to the Supreme Court. Further aggrieved, the appellant filed the instant application challenging both the Court of Appeal's orders on security for costs and its refusal to grant certification for leave to appeal. The appellant sought the order for security for costs be declared to be in contravention of articles 48, 50 and 159 of the Constitution.

Issues

i. What were the guidelines to be considered by courts before issuing an order for security for costs?
ii. Whether imposition of additional security for costs in itself, and as a condition to hearing a matter, was unconstitutional.
iii. Whether the use of the word 'fee' in the wording of the right to access to justice extended to both filing fees and costs (inclusive of applications for additional security for costs).

Relevant provisions of the Law

Constitution of Kenya

Article 48 - Access to justice

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Court of Appeal Rules, 2010

Rule 107(3) - Security for costs in civil appeals

(3) The Court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal.

Held

1. Jurisdiction of the Court of Appeal to award security for costs and specifically in regard to the nominal amount was provided for in the law. The requirement for security for costs including additional security was provided under rule 107(3) of the Court of Appeal Rules which gave the Court of Appeal authority to exercise its discretionary jurisdiction in determining whether to award further security for costs above the set nominal amount, which was set at Kshs 2,000. That discretion ought not to be exercised whimsically but in a manner that would not impede a party's access to justice. The exercise of discretion depended upon the circumstance of each case with the final result being reasonable and modest.
2. In interpreting the Constitution and developing jurisprudence a court ought to take a purposive interpretation as guided by article 259(1) of the Constitution. Courts being the entities empowered with the duty to adjudicate disputes and dispense justice, were required to be mindful of the spirit, values, and principles of the Constitution; and stand guided by the principles prescribed under article 159 while exercising their judicial authority. That ensured that justice was done to all irrespective of status and in a manner that protected and promoted the purpose and principles of the Constitution. The Constitution safeguarded a person's right to have any dispute resolved by the application of law decided in a fair and public hearing as provided under article 50 thereby ensuring a party's access to justice was not violated.
3. A person as defined under article 260 of the Constitution included a company, association or other body of persons whether incorporated or unincorporated. The drafters of the Constitution intended to have a properly functioning judicial system that was accessible to all persons to ensure and promote the equality of all persons before the law. Access to courts could be improved by reducing court fees or paying fees in installments. The significance of the provision in article 48 of the Constitution was that poverty was no bar to litigation and therefore, courts should consider the issue of a litigant's impecuniosity when ordering security for costs.
4. While there was a distinction between filing fees and costs, the use of 'and' in article 48 of the Constitution indicated that every citizen first and foremost was entitled to access to justice. However, if any fees were required to facilitate the access to justice, then the fee should be reasonable and not impede access to justice. The fees contemplated under the Constitution encompassed any monetary payment made as a condition to access justice. That extended to

both filing fees and costs inclusive of the application for additional security for costs which was payable in the course of proceedings in the wider context of access to justice.

5. The purpose of security for costs order was to alleviate the concerns of potential difficulties in seeking to recover costs. An applicant of such an order, was required to establish that the respondent, if unsuccessful in the proceedings would be unable to pay costs. The objective was to protect a party from circumstances where one was dragged to court and made to incur costs due to litigation. It was meant to prevent frivolous and vexatious litigation.

6. The rationale for security for costs was aimed at balancing the overarching objectives in the administration of justice as expressed under articles 48, 50 and 159 of the Constitution, that courts should aim to dispense justice. The costs protected the defendant or a respondent against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff's impecuniosity. An order for security for costs would normally affect the interest of plaintiff's access to the court system, regardless of their financial status; shield a successful defendant from litigation costs; and conserve the courts processes: costs and security for costs could discourage frivolous claims, and encourage the parties to conduct litigation in a manner that was proportional to the matters at issue.

7. The Kenyan legal position on the subject of security for costs was inexplicit. In certain instances, the amount payable was provided for in legislation or regulations, in other cases the same was left to the discretion of the concerned court.

8. In civil proceedings before subordinate courts and the High Court, the Civil Procedure Act provided that costs of and incidental to all suits were to be in the discretion of the court or judge, and the court had full power to determine by whom, and out of what property and to what extent such costs were to be paid, and would follow the event unless the court or judge were to for good reason otherwise order under section 27. However, order 26 of the Civil Procedure Rules 2010, provided that in any suit, courts may order for the whole or any part of the costs any defendant or third party be given by any other party.

9. In any suit brought by a person not residing in Kenya, if the claim was founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs was to be in the discretion of the court. If the security for costs was not given within the time ordered and if the plaintiff was not permitted to withdraw the suit, the court was to, upon application, dismiss the suit. If a suit was dismissed and the plaintiff proved that he was prevented by sufficient cause from giving the required security of costs, the court could set aside the order dismissing the suit and extend the time for giving the required security. The rules gave an option to have a dismissed suit reinstated if the plaintiff showed cause that he was prevented from giving the required security for costs.

10. At the Court of Appeal, under order 42, rule 14, at any time after the memorandum of appeal had been served, in its discretion, the court could order the appellant to give security for the whole or any part of the costs of such appeal. If the appellant was not ordinarily resident in Kenya and had no sufficient property in Kenya (other than the property to which

the appeal relates) the court was to order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order. If security for costs was not given within the time ordered the court could dismiss the appeal.

11. Rule 107 of the Court of Appeal Rules provided that, subject to rule 115, there was to be lodged in court on the institution of a civil appeal as security for the costs of the appeal the sum of two thousand shillings. Where an appeal had been withdrawn under rule 96 after notice of cross-appeal had been given, the court could, on the application of any person who was a respondent to the cross-appeal, direct the cross-appellant to lodge in court as a security for costs the sum of two thousand shillings or any specified sum less than two thousand shillings, or may direct that the cross-appeal be heard without security for costs being lodged.

12. The imposition of security for costs by a court was in itself constitutional; there were no clear guiding principles on what a court considered when making an order for security for costs; at times the amount payable was left to the discretion of the court; in other times, the amount payable was set out in statute or regulations; in other times, although the amount payable was prescribed by legislation or regulation, the court had the discretion of reducing or enhancing the same or even waiving payment of the same; a suit maybe dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non-payment of ordered costs. Different courts in Kenya's judicial system had crafted their own rules of procedure to govern them including those of security for costs. However, there were no standard guidelines on factors to be considered whilst making an order for security for costs.

13. In determining whether it was appropriate to make an order that a party gave security for costs, the court could have regard to the following matters and such other matters as it considered relevant in the peculiar circumstances of each case: –

a. the prospects of success or merits of the proceedings.
b. the genuineness of the proceedings.
c. the impecuniosity of the plaintiff.
d. whether the plaintiff's impecuniosity was attributable to the defendant's conduct.
e. whether the plaintiff was effectively in the position of a defendant.
f. whether an order for security for costs would stifle the proceedings and/or impede access to justice.
g. whether the proceedings involved a matter of public importance.
h. whether there had been an admission or payment in court.
i. whether delay by the plaintiff in commencing the proceedings had prejudiced the defendant.
j. the costs of the proceedings.
k. Whether the security sought was proportionate to the importance and complexity of the subject matter in dispute.
l. the timing of the application for security for costs.
m. Whether an order for costs made against the plaintiff would be enforceable within the Republic of Kenya.
n. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant.
o. if the plaintiff was a natural person, an order for security for costs could not be made merely on account of his or her impecuniosity.
p. security for costs was to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
q. if the plaintiff failed to comply with an order under the instant rule, the court could order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
r. the provisions of any Act under which the court could require security for costs to be given such as the Elections Act.
s. a second motion for security for costs would not succeed unless there was an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff had come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
t. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based

on an assessment of the complexity of the case which hindsight has established was not realistic.

u. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise unless the gap between what was ordered and what later appears to be necessary is significant.

14. Rule 107 of the Appellate Jurisdiction Act did not expressly provide for any condition to be imposed when the court made an order for security for costs. The Appellate Jurisdiction Act did not expressly make provision for the limitation of the right to access justice based on security for costs. A right or fundamental freedom could not be limited through regulations. That was in contradistinction with, for instance, Rule 7 of the Supreme Court (Presidential Election Petition) Rules 2017 which stipulated that before filing a petition a petitioner was to deposit a sum of one million as security for costs. That was a prerequisite before filing a presidential election petition arising from an election as mandated under article 163(3)(a) of the Constitution over which the Supreme Court had original and exclusive jurisdiction. In the instant circumstances, the statute expressly fixed an amount payable as security, as it did for matters that challenged elections arising out of an election held under the Constitution. It was not left to the court to determine the costs to be deposited as security for costs.

15. A court could impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances such as extraordinary and important cases, for instance, election petitions. The same was, however, to be done in a manner that was reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent was not in itself unconstitutional provided it was not unreasonable to the extent that it impeded a party's access to justice.

16. The issuance of bail and bond in criminal matters was not a tool that was to be used to punish an accused person who was regarded innocent until proven guilty, but to secure the attendance of an accused person in court. In the same way, security or further security for costs should not be used:

a. to discriminate;

b. to punish;

c. to castigate; and

d. as a penal measure against a party in a manner that would deter such a party from pursuing its claim as a result of failure to deposit the prerequisite costs.

17. Instead, it should be used as an instrument that ensured that there was a balance of interests between parties in the suit. Any directive by the court that placed a barrier on the path to justice obstructs the right to access justice and defeated the purpose of having the dispute determined on its merits. Such an order would be contrary to the spirit and letter of *the Constitution*. Reasonability was a matter to be determined on a case-to-case basis.

18. The instant matter having been filed in October 1998, had been in the corridors of justice for over twenty years. By the time it was reinstated by the Court of Appeal in 2013, the appellant was already wound up as it is alleged to have been wound up on May 21, 2002. Also, Jasmine See was already the holder of powers of attorney for both the appellant and Lynwood from October 23, 2001. Bearing that in mind, no order for further security for costs was issued at the High Court when it was reinstated and heard on merit in 2013 and at the time of the filing of the application for security for costs before the Court of Appeal. Therefore, the status was the same when the matter proceeded to the appellate court on appeal. Secondly, the 1st respondent alleged that Kshs 87,620,000/- was the approximate costs payable at the High Court. However, the same had not been taxed. Thirdly, the sum of Kshs 185,000,000/- which was the subject matter of the suit was already in the possession of the 1st respondent, whether as part payment of debt or as deposit towards purchase price. Lastly, the appellate court did not elaborate how it came up with the figure of Kshs 20,000,000.00 which was one million times above the set nominal amount of Kshs 2,000.00 already paid at the time of filing the appeal.
19. The Supreme Court could not assume jurisdiction over a matter that was pending before the Court of Appeal. Each of the parties should be allowed to ventilate their cases to the full extent of the law. The question before the Supreme Court by way of certification was a question of security for costs and not an outright appeal. Extending the case to the merits of the appeal was not called for. The Court of Appeal was ready to dispose of the appeal on the merits and there was no reason to interfere with that. Considering the possible right to appeal to the Supreme Court, determining the matter at the instant stage would deny the parties that opportunity and to an extent interfere with their right to access justice.

Appeal partly allowed.

Orders

i. *The petition of appeal dated November 2, 2021 was allowed in the following specific terms:*
   a. *Declaration issued that the order for the security of costs made in Civil Application No 37 of 2017 delivered on December 8, 2017 was unreasonable as it impeded the appellant's access to justice by imposing a condition precedent before a matter could be heard contrary to articles 48, 50 and 159 of the Constitution of Kenya.*
   b. *The appeal was allowed and the order of the Court of Appeal in Civil Application No 37 of 2017 delivered on December 8, 2017 be set aside and in its place an order was issued dismissing the Notice of Motion Application dated October 13, 2017.*
ii. *The matter was remitted to the Court of Appeal for determination of the appeal on merit.*
iii. *Each party was to bear their own costs.*

Citations

Cases

Kenya

1. *Apollo Mboya v Attorney General, National Assembly & Senate* Petition 472 of 2017; [2018] KEHC 6933 (KLR) - (Explained)
2. *Gulf Engineering (East Africa) Ltd v Amrik Singh Kalsi Muter & Oswald (Kenya) Ltd* Civil Case 2558 of 1975; [1976] KEHC 5 (KLR) - (Explained)
3. *Imanyara, Gitobu & 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] KECA 557 (KLR) - (Explained)
4. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 3 (KLR); [2011] 2 KLR 32 - (Followed)
5. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] 3 KLR 718 - (Explained)
6. *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* Civil Appeal 132 & 133 of 2014; [2016] KECA 73 (KLR) - (Explained)
7. *Kibiwott & 4 others v Registered Trustees of Monastry Our Lady of Victory* Civil Case 146 of 2004; [2004] KEHC 1147 (KLR) - (Explained)
8. *Marco Tool & Explosives Ltd v Mamujee Brothers Ltd* Civil Appeal 107 of 1986; [1988] KECA 65 (KLR) - (Explained)
9. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Civil Appeal(Application) 38 of 2013; [2014] eKLR - (Explained)
10. *Njihia, Daniel Kimani v Francis Mwangi Kimani & another* Civil Application No 3 of 2014; [2015] eKLR - (Explained)
11. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR)- (Applied)
12. *Shollei v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Explained)

Uganda

Goodman Agencies Ltd v Attorney & another [2014] UGSC 124 - (Explained)

United Kingdom

1. *Keary Developments v Tarmac Construction* [1953] 3 All ER 534 - (Explained)
2. *Marcan Shipping (London) Ltd v Kefalas & another* [2007] EWCA Civ 463 - (Explained)
3. *Sir Lindsay Parkinson and Company Limited v Triplan Ltd* [1973] EWCA Civ J0119-1 - (Explained)
4. *Whistler v Hancock* [1878] 3 QBD 83 - (Explained)

Canada

1. *Cigar500.com inc v Ashton Distributors (2009)* 2009 CanLII 46451 (ON SC), 99 OR (3d) 55, (SCJ) - (Explained)
2. *Hryniak v Mauldin* [2014[1 SCR 87; 2014 SCC 7 - (Explained)
3. *Ontario Inc v Ross* 2017 ONSC 1295, (SCJ) - (Explained)
4. *Spot Coffee Park Place Inc v Concord Adex Investments Ltd* 2021 ONSC 978 - (Explained)

5. *Websports Technologies v Cryptologic Inc* [2005] OTC 347 (SC) - (Explained)

Australia

Stapleton & Bryant (Security for Costs) [2009] FamCAFC 63; (28 April 2009) - (Explained)

Regional Court

Fort Hall Bakery Supply Co v Fredrick Muigai Wangoe [1959] EA 474 - (Explained)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Advocates (Remuneration) Order (cap 16 Sub Leg) In general - (Cited)
2. Appellate Jurisdiction Act (cap 9) section 107(3) - (Interpreted)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 24 rule 3(2); order 26 - (Interpreted)
4. Constitution of Kenya articles 10, 24(1)(d); 40; 48; 50(1); 132(3); 159(2)(d); 163(3)(a), (4)(b); 231; 259(1)(a)(b)(c)(d); 260 - (Interpreted)
5. Court of Appeal Rules, 2010 (Repealed) (cap 9 Sub Leg) rule 107(3) - (Interpreted)
6. Elections Act (cap 7) section 78(1) - (Interpreted)
7. Limitation of Actions Act (cap 22) In general - (Cited)
8. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 7 - (Interpreted)
9. Supreme Court Act (cap 9B) sections 3, 21(1)(a) - (Interpreted)

Advocates

Mr. Paul Muite, Senior Counsel and *Mr. Kithinji Marete* for the appellants
Mr. Philip Murgor, Senior Counsel and *Mr. George Ouma* for the 1st respondent

February 17, 2023, the Court delivered the following Judgment:

A. Introduction

1. This petition of appeal is dated November 2, 2021 and was lodged on November 5, 2021. The appellant seeks to set aside the ruling of the Court of Appeal (Visram, Karanja and Koome JJA) in Civil Appeal (Application) No 37 of 2017 delivered on December 8, 2017.

2. Upon the appellant challenging the Court of Appeal's decision (Nambuye, Kiage and Kantai JJA) which declined to grant certification for leave to appeal to this court under article 163 (4) (b) of the *Constitution*, this court through its ruling dated October 8, 2021 certified this matter as one of general public importance paving way for the filing of this appeal.

B. Background

3. On December 11, 1996, through a public advertisement in the local newspapers, the 1st respondent (CBK) announced its intention to sell property Number LR 209/9514 and all buildings comprising the Grand Regency Hotel (GRH). This was in exercise of its statutory power of sale under a charge over the said property by Uhuru Highway Development Limited (UHDL), the 3rd respondent. The charge over the property, securing the debt to CBK was executed on October 21, 1993 and was registered against the title on December 31, 1993 as IR No 36755/17. The amount secured was Kshs 2.5 Billion stated as owing by Exchange Bank and Kamlesh Pattni, being the balance due and owing as per the decision in High Court Civil Case No 29 of 1995.

4. In January 1997, the 2nd respondent, Kamlesh Pattni, made a proposal to CBK for settlement of all disputes between CBK and treasury on the one hand, and himself and Pan African Bank Group (in liquidation), UDHL, Safariland Club Hotel Limited and Pansal Investments Limited on the other hand which would include the redemption of the suit property from the charge held by CBK. On February 26, 1997, CBK stated its agreement that UDHL would pay to CBK the value of the suit property as determined by a joint valuation carried out by Tysons Ltd & Lloyd Masika Ltd. This was accepted by Kamlesh Pattni vide his letter dated March 14, 1997 except for unilateral charges. The terms of the agreement between CBK and Pattni on his own behalf and as an agent of UDHL, shareholder and directors of Pan Africa Group and Pansal Investment Limited were settled on May 7, 1997.

5. Subsequently, Lynwood Development Limited (hereinafter "Lynwood") as the agent for the sale and purchase of UDHL, the company which is the proprietor of the hotel situated on LR No 209/9514 transacting under the name of GRH appointed the appellant as its agent for the purchase of GRH. The appellant then entered into negotiations with the 1st and 2nd respondents, culminating in the sale and purchase agreement signed on March 25, 1997 (GRH Agreement). The agreement was entered into between Pansal Investments Limited, Hotel Enterprises Development and Management Limited and one Mukesh Vaya, on the part of the vendors in their capacity as the shareholders of UDHL and the appellant, on behalf of Lynwood. On April 1, 1997 Lynwood transferred a sum of Kshs 185,000,000 to CBK as deposit towards the purchase of GRH through their respective Advocates.

6. It is the appellant's contention that the GRH Agreement was entered into with the knowledge and participation of CBK which agreed that the deposit and the entire purchase price was being made by Lynwood directly to CBK. On the other hand, CBK acknowledged that the deposit received was in accordance with an agreement made on May 7, 1997 between it and Mr. Pattni on his own behalf and as an agent of the UDHL, shareholder

and directors of Pan Africa Group (now in liquidation) and Pansal Investment Limited. It is their contention that it had entered into an agreement with Mr. Kamlesh Pattni and not with the appellant and therefore it did not owe the appellant any amount

7. Subsequently, the sale having fallen through and the 1st respondent failing to refund the deposit led to the filing of a suit before the High Court.

C. Litigation History

i. Proceedings at the High Court

8. In October 1998, Kamlesh Mansukhlal Pattni and the appellant instituted a suit in the High Court seeking refund of Kshs 185,000,000 paid to the 1st respondent as deposit towards the purchase of Grand Regency Hotel by Lynwood. They made the following prayers:

    i. The principal sum of Kshs 185,000,000.00 to be refunded to the 2nd plaintiff.

    ii. Interest at commercial rates.

    iii. Damages for repudiation of the agreement between the 2nd plaintiff and the defendant.

    iv. Costs of the suit plus interest on costs.

    v. Any other or further relief the Honourable court may deem just and fit to grant.

9. By way of a counterclaim, the 1st respondent sued Kamlesh Pattni, the appellant and the 3rd respondent citing, among other reasons, the appellant's lack of legal competence to file the lawsuit as it had already been wound up on May 21, 2002 and that, in its opinion, the lawsuit had abated. Furthermore, the 1st respondent contended that it had entered into an agreement with the 2nd respondent and not with the appellant and therefore it did not owe the appellant any amount of money.

10. Neither of the parties took steps to progress the suit between December 2002 and April 2008. As a consequence, thereof the suit was dismissed for non- prosecution. An application to reinstate the suit was dismissed. On appeal, the Court of Appeal in Civil Appeal No 118 of 2013 reinstated the suit and ordered that the hearing of the same be expedited.

11. The trial judge, vide a ruling dated October 3, 2015, determined that the proper parties in the claim and counterclaim were those mentioned in the heading of the judgment, that is, Kamlesh Pattni and Westmont as plaintiffs with CBK as the defendant. As for the counterclaim, the parties as determined by the court in the said ruling were CBK as the plaintiff, Kamlesh Pattni, Westmont and the 3rd respondent as the defendants.

12. CBK took out a preliminary objection raising six grounds, inter alia: that pendency of the suit offended the mandatory provisions of the *Limitations of Action Act* Cap 22 Laws of Kenya, and order 24 rule 3(2) of the *Civil Procedure Rules*; the purported suit by the appellant had abated and was non-existent *ab initio*; the appellant having been wound up was non-existent incapable of donating any powers, appointing any agent, or continuing any suit; Lynwood was not, and could not be a party and was an imposter in the suit; the trial court lacked jurisdiction to adjudicate over the suit in the absence of leave to extend limitation of time; and the appellant's claim was scandalous frivolous, vexatious and an abuse of the process of the court.

13. The court determined the preliminary objection together with the merits of the suit. In determining the preliminary objection, the trial court outlined two issues for determination: what the effect of the Court of Appeal's order was; and whether the suit before it was competent. It found that Jasmine See, holder of the powers of attorney for the appellant and Lynwood, admitted that the appellant was wound up. The court noted that when it directed the parties to submit to clarify the parties to the suit, nothing was disclosed by the appellant regarding the status, and whether winding up had occurred.

14. To answer the question whether there was a principal and agency relationship between the appellant and Lynwood and the scope of the agency, the court found that there was nothing that had been disclosed. In that regard, Lynwood was an undisclosed principal. Additionally, the letter appointing the appellant as an agent of Lynwood was to negotiate the purchase of GRH, sign the agreement and operate the hotel on completion of purchase.

15. As to whether the appellant had the authority to institute legal proceedings, the court held that at the time of entering into the sale agreement neither the appellant nor Jasmine See appeared to have been in possession of a power of attorney enabling the execution of the deed for sale of the hotel. Additionally, that whereas there was an agency relationship between Lynwood and Westmont, the scope of the powers thereunder was insufficient to bind the principal in the purchase of the hotel.

16. The trial judge concluded that the appellant, in the absence of a power of attorney, did not have the capacity to enter into an agreement for completion of the sale and purchase on behalf of Lynwood. In that regard, Lynwood was held not to be a proper party to the suit to prosecute the matter or benefit from the Court of Appeal decision. The suit was thus dismissed on the ground that there was no competent plaintiff in situ.

17. Regardless, the court proceeded to assess the claim on merit and proceeded to dismiss both the plaint and counterclaim with costs. Although Kamlesh Pattni withdrew from the case in the middle of the proceedings, he was ordered to pay costs. The court proceeded to issue the following orders:

a. That the plaintiffs' case fails in its entirety and is hereby dismissed.

b. That the counterclaim fails in its entirety and is hereby dismissed.

c. That costs follow the events. The 1st plaintiff withdrew as plaintiff during the course of the hearing, and therefore cannot escape liability for costs. The defendant CBK shall have the costs of the claim and shall pay the costs of the counterclaim.

ii. Proceedings at the Court of Appeal

18. Being dissatisfied with the decision of the High Court the appellant filed Nairobi Civil Appeal No 37 of 2017 on the following grounds citing the trial judge for:

a. Wholly misconstruing the claim before him by treating the same as an offshoot of what he termed as the hydra-headed Goldenberg Scandal yet it was no more than a claim for the money demonstrably and irrefutably paid to CBK in respect of which it has enjoyed benefit from May 12, 1997.

b. Holding that there was nothing before him to show that the agency relationship between Lynwood and the appellant had been disclosed.

c. Having erred in law in holding that Lynwood could only enable the appellant to act as its agent by way of power of attorney thereby negating Lynwood's undisputed letter of instruction and appointment of the appellant as its agent in the matter.

d. By holding that Lynwood and the appellant's agency agreement was imperfect.

e. Contradicting himself by holding on the one hand that it was abundantly clear that there was an agency relationship between Lynwood and the appellant yet holding that the appellant in the absence of a power of attorney was incapable of concluding the agreement of sale and purchase of GRH.

f. In holding that Lynwood was not competent to sue in the matter before him or to benefit from the decision of the Court of Appeal in Civil Appeal No 118 of 2013.

g. By disregarding the evidence before him of the 1st respondent's representations relied on by the appellant and the acknowledgement of the sum of Kshs 185,000,000.00 yet proceeded to hold that there was no justiciable agreement with the appellant.

h. In holding that the 1st respondent was aware of the agreement between the parties for the sale of the GRH yet failing to hold CBK liable from the attendant representations and obligations in the said agreement.

i. Misconstrued and misplaced the law of contracts in holding that the agreements for the sale of the GRH and that between 1st and 2nd respondents created through correspondence were wholly distinct and separate yet the evidence before him demonstrated that they inextricably intertwined.

j. In holding that despite there being no doubt that the 1st respondent was fully aware of the GRH Agreement and facilitated the same, they were entitled to treat the amounts received on account thereof as part of a wider debt despite their full knowledge that the same was paid pursuant to the terms of the said GRH Agreement.

k. Countenanced the unjust enrichment of CBK by Kshs 185,000,000.00 that it had benefited from since 12th May, 1997 despite the overwhelming evidence that the same was paid by Westmont's principal, Lynwood, in reliance of assurances and representations made by the 1st respondent.

l. Perpetrated a grave miscarriage of justice by holding that the principal sum of Kshs 185,000,000.00 paid to the 1st respondent and interest thereof was irrecoverable.

m. Misconstrued and misapplied the facts and the rules against the weight of the evidence before him and on the whole failed to do justice to Westmont and its principal.

19. Before the appeal could be heard on its merits, the 1st respondent filed an application dated October 13, 2017 seeking the following orders:

i. That the respondent /appellant be ordered to provide security for costs for the Applicant's costs in the High Court in the sum of Kshs 87,620,000/=, being the approximate costs payable under the *Advocates (Remuneration) Order*, deposited with this Hon. Court within 30 days.

ii. That in the alternative to prayer 1 above, the appellant's purported attorney/agents including Jasmine C See, and its Advocates on record be ordered to provide security for the Applicant's costs in the High Court in the sum of Kshs 87,620,000/= being the approximate costs payable under the *Advocates (Remuneration) Order,* deposited with this hon. court within 30 days.

iii. That the respondent/appellant be ordered to provide the necessary and reasonable security for the applicant's costs for the appeal, in the event that this hon. court makes an order of costs against the respondent/appellant.

iv. That in the alternative to prayer 3 above, the appellant's purported attorney/agents including Jasmine C See, and its Advocates on record be ordered to provide the

necessary and reasonable security for the applicant's costs for the appeal, in the event that this hon. court makes an order of costs against the respondent/appellant.

v. That the Civil Appeal No 37 of 2016 be stayed pending the deposit of such security, failure of which, the appeal be struck out with costs.

vi. That the costs of this application be provided for.

20. In support of the application, the 1st respondent stated that they were awarded costs in the High Court which are approximately Kshs 87,620,000. It was their assertion that the sum is not recoverable from the appellant due to its lack of existence since being wound up on May 21, 2002. As a result, it cannot legally own any assets in Kenya. In addition, the appellant's agent, Jasmine C See, is a foreigner and does not reside in Kenya while the appellant's purported principal, Lynwood Development Ltd, is a foreign company with no registered office or assets in Kenya.

21. The appellant in opposing the application filed grounds of opposition stating that the application had been brought too late in the day with the intent to delay the hearing which was scheduled for the next day whereas the appeal had been served upon the 1st respondent way back in February 2017. Nonetheless, the amount of Kshs 87,620,000 had not been taxed and the 1st respondent had not requested security for costs in the High Court. On top of that, the High Court failed to accept/admit the substitution of the appellant with Lynwood, the principal, as per the re-amended plaint which issue is at the heart of the appeal.

22. The court being mindful of the provisions of articles 48 and 50(1) of the *Constitution* and placing reliance on the case of *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others*, Civil Appeal No (Application) No 38 of 2013; drawing insights from the English cases of *Sir Lindsay Parkinson and Company Limited v Triplan Ltd* [1973] 2 WRR and *Keary Developmentsv Tarmac Construction* (1953) 3 All ER 534; the amount in dispute; the fact that there are other costs that were ordered to be paid by the appellant in the High Court; and the enormous amount of resources in terms of professional services and attendant costs likely to be incurred in defending the appeal, allowed the 1st respondent's application to the extent that the appellant deposits the sum of Kshs 20,000,000 in court as security for costs failure to which the appeal would stand struck out.

iii. Proceedings before the Supreme Court

23. Dissatisfied with the decision of the Court of Appeal on the award for security for costs, the appellant sought certification of the matter as one of general public importance at the appellate court in Civil Application No 6 of 2018. On July 23, 2021, the Court of Appeal in dismissing the application found that the issue of award of costs or an order directing the payment of security for costs not to be a substantial one.

24. Upon review of the decision by this court, the matter was certified as one of general public importance and framed the issue as: "Whether an order for security for costs is unreasonable as it impedes a litigant's access to justice by imposing a condition precedent before the latter can be heard, contrary to articles 48, 50 and 159 of the *Constitution*".

25. Based on the framed issue, the appellant raises the following grounds of appeal:

    a. Breach of articles 10 and 40 of the *Constitution*

    The appellant contends that in placing the obligation upon the appellant to deposit Kshs 20,000,000.00 before its appeal can be sustained, the Court of Appeal exonerated the 1st respondent from its obligation to ensure transparency and accountability in its dealings for the sum of Kshs 185,000,000 paid to it by Lynwood, its principal. In so doing, it breached its proprietary rights over the same as guaranteed under article 40 of the *Constitution*.

    b. Breach of the appellant's rights under article 48 of the *Constitution* It is the appellant's contention that its right to access to justice was subjugated when the Court of Appeal imposed the onerous obligation to deposit security for costs in the sum of Kshs 20,000,000 before its appeal could be heard and aggravated the situation by decreeing that the said appeal would stand dismissed with costs in the event the appellant did not deposit the said security for costs.

    c. Breach of the appellant's rights under article 50 of the *Constitution* The appellant avers that every person is guaranteed to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court. Additionally, the appellant holds the position that by imposing the requirement for the deposit of security for costs, the Court of Appeal diminished and in fact defeated the appellant's rights under Article 50.

    d. Breach of the appellant's rights under Article 159 of the *Constitution* The appellant states that the appellate court in considering the application for security for costs before it, was enjoined not to delve into technicalities or merits of the appeal or dispute before it. It evidently strayed to the minute legal technicalities as would arise in the appeal and thereby instead of ensuring that justice was done and seen to be done proceeded to impede the appellant's quest for justice by undue regard to procedural technicalities contrary to Article 159(2)(d).

    e. Breach of article 259 of the *Constitution*

    The appellant avers that by imposing the condition of further deposit of security for costs, the Court of Appeal defeated the appellant's quest for justice thereby failing

to promote the purpose, values and principles of the *Constitution* and also failed to advance the rule of law, human rights and the fundamental freedoms which in the appellant's view did not contribute to good governance contrary to Article 259(1)(a)(b)(c) and (d).

26. The appellant prays for the following reliefs:

1. A declaration that an order for security for costs is unreasonable as it impedes a litigant's access to justice by imposing a condition precedent before a matter can be heard contrary to articles 48, 50 and 159 of the *Constitution* of Kenya.

2. This appeal be allowed and the order of the Court of Appeal in Civil Application No 37 of 2017 delivered on December 8, 2017 be set aside and in its place an Order do issue dismissing the notice of motion application dated October 13, 2017.

3. Pursuant to section 21(1)(a) of the *Supreme Court Act*, this Court be pleased to allow Civil Appeal No 37 of 2017 *Westmont Holdings Limited v Central Bank of Kenya* as prayed in the memorandum of appeal dated February 9, 2017 filed therein.

4. The costs of this appeal be awarded to the appellant.

5. Any other order this honourable court shall *deem mete* and just.

D. Submissions

a. Appellant

27. The appellant's submissions are dated December 17, 2021 and were filed on December 20, 2021. The appellant submits that the appellate court in directing that it deposits the sum of Kshs 20,000,000.00 as security for costs before its appeal could be heard, places an impediment to its access to justice as guaranteed under article 48 of the *Constitution*, which right is non-derogable under article 24. It relies on the Canadian Supreme Court case of *Hryniak v Mauldin* (2014) 1 SCR and *Apollo Mboya v Attorney General & 2 others* [2018] eKLR to buttress its argument that access to justice cannot be compromised.

28. According to the appellant, the appellate court in exercise of its powers under rule 107(3) of the *Court of Appeal Rules* 2010 (repealed) to impose additional security by one million times, was neither judicious nor in consonance with the *Constitution*, given that the appellant had already deposited the nominal security for costs as required under rule 107(1) of the said rules at the time of filing the appeal.

29. The appellant is of the view that the Court of Appeal failed to balance the interests of the parties before it ordered the appellant to pay Kshs 20,000,000.00 as security bearing in mind that the 1st respondent holds a lien over the sum of Kshs 185,000,000.00 which is the

subject of the suit and continues to unlawfully benefit from it. Relying on the decision of *Guff Engineering (East Africa) Ltd v Amrik Singh Kalgi & another* [1976] eKLR, the 1st respondent submits that even in the absence of a guarantee to access to justice, the imposition of costs is not mandatory as the appellate court appears to suggest. To that end, the appellant asserts that the *Supreme Court Act* bestows upon this court power to determine the appeal and grant the prayers sought. Whence, it prays for the appeal to be allowed.

b. 1st Respondent

30. The 1st respondent submissions are dated January 18, 2022 and filed on even date. The respondent states that since the appellant was wound up on May 21, 2002, there is no legal person currently before the court. To support its assertion, the respondent referred to the case of *Kenya Power Lighting Co Ltd v Benzene Holdings Ltd t/a Wyco Paints* [2016] eKLR, where the court cited with approval the case of *Fort Hall Bakery Supply Co v Fredrick Muigai Wangoe* (1959) EA 474 to cement the position that a party seeking to maintain an action must be a party in the eyes of the law not just in name only.

31. In any case, the 1st respondent declares that the issue of Lynwood being a proper party to prosecute the appeal was determined by the High Court's order of October 3, 2015 which established the proper parties in the suit before it; and there was never an application filed to substitute the appellant with Lynwood or any other party for that matter. According to the 1st respondent, Lynwood has never been a party in the suit before the High Court or the Court of Appeal and cannot be party before the Supreme Court.

32. Equally, it is the 1st respondent's argument that the right to access justice accrues to it as well because just as much as it is expensive to prosecute a claim it is also equally expensive to defend. To that end, an order for security for costs enhances the rights under article 50 by ensuring that there is a consideration and balance of the right to access to justice and Article 159 which obligates the court to ensure justice shall be done to all irrespective of status. Similarly, the prayer for security for costs is not novel because it is given based on settled legal principles and on the circumstances of every case; and this court's rules also provide for them.

33. The 1st respondent further states that the orders of the Court of Appeal which took the form of an "unless order", in striking out the appeal on failure to pay costs within 45 days, dates back to the nineteenth century in the case of *Whistler v Hancock* (1878) 3 QBD 83 which recognized that once a condition on which the order was depended had been satisfied, the sanction became effective without the need for any further order. Consequently, in the 1st respondent's view, the order of the Court of Appeal on costs should be upheld.

34. Then again, the 1st respondent asserts that with regard to the prayer that this court allows Civil Appeal No 37 of 2017, it is an affront to this court's ruling of October 8, 2021, and

to the 1st respondent's right of appeal to the Supreme Court. It cites the decision of *Daniel Kimani Njihia v Francis Mwangi Kimani and another* SC Civil Application No 13 of 2014, where it was held that this court had not been conceived as just another layer in the appellate court structure and decisions of the Court of Appeal should not turn this court into a first appellate court. Similarly, the 1st respondent submits that the prayers as framed by the appellant would entail comments from the court on the merits prematurely on issues yet to be adjudicated before the Court of Appeal.

E. Analysis and Determination

35. The court defined one issue for determination pursuant to its ruling dated October 8, 2021 as follows:

> " Whether an order for security for costs is unreasonable as it impedes a litigant's access to justice by imposing a condition precedent before the latter can be heard, contrary to articles 48, 50 and 159 of the *Constitution*."

36. Jurisdiction of the Court of Appeal to award security for costs and specifically in regard to the nominal amount is provided for in the law. The requirement for security for costs including additional security is not strange. Rule 107(3) of the *Court of Appeal Rules*, 2010 Court of Appeal Rules, 2010 states:

> " (3) The court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal."

37. This legislation gives the Court of Appeal authority to exercise its discretionary jurisdiction in determining whether to award further security for costs above the set nominal amount, which is set at Shs 2,000/-. This discretion ought not to be exercised whimsically but in a manner that would not impede a party's access to justice. In *Marco Tools & Explosives Ltd v Mamujee Brothers Ltd*, [1988] KLR 730 it was stated that in exercising this discretion, it depends upon the circumstance of each case with the final result being reasonable and modest.

38. Moreover, courts stand guided by established principles set out in two jurisprudential cases to which the appellate court directed its mind in this matter. In *Sir Lindsay Parkinson and Company Limited v Triplan Ltd*, [1973] 2 WRR, Lord Denning MR set out the parameters that should guide a court in determining whether to order security for costs as follows:

    i. Whether the claimant's claim was bona fide and not a sham;

ii. Whether the claimant had a reasonably good prospect of success;

iii. Whether there was admission by the defendant on the pleadings or elsewhere that money was due;

iv. Whether there was a substantial payment into court or an "open offer" of a substantial amount;

v. Whether the application for security was being used oppressively, for example so as to stifle a genuine claim;

vi. Whether the claimant's want of means had been brought about by the conduct of the defendant's, such as delay in payment or doing their part of the work;

vii. Whether the application for security was made at a late stage in the proceedings.

Also, in *Keary Development v Tarmac Construction* (1995) 3 All ER 534, guidelines were laid down to guide a court while exercising discretion on whether to order a plaintiff, which is a limited liability company, to provide security for costs to a defendant in a suit as follows:

1. The court has complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.

3. The court must balance the injustice to the plaintiff prevented from pursuing a proper claim against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.

4. The court will look to the prospects of success, but not go into the merits in detail.

5. In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.

6. Before refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.

7. The lateness of the application can properly be taken into account.

39. On that account, there being no contention as to the court's power to grant orders of security for costs as laid down in legislation, guided by the principles stated in the foregoing cases; also taking into account that this matter arises from a first appeal from the appellate court based on its discretionary pronouncements, falling outside the set of questions appealable to this court (see *Daniel Kimani Njihia v Francis Mwangi Kimani & another*; SC Civil Application No 13 of 2014; [2015] eKLR); what then warrants this court's intervention on this matter of security for costs as a matter of general public importance?

40. In answering this question based on what this court established as an issue for determination as a matter of general public importance, three issues arise: is imposition of additional security for costs in itself unconstitutional? What about imposing security for costs as a condition precedent to the hearing of the matter? And when does it become unreasonable and/or stifling to impose security for costs? We now proceed to address the said issues.

(a) Is it unconstitutional to impose an order for security for costs?

41. In regard to interpretation of the *Constitution*, article 259(1) of the *Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." In interpreting the *Constitution* and developing jurisprudence therefore, a court ought to take a purposive interpretation as guided by the *Constitution*. This was expressed by this court in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, SC Advisory Opinion No 2 of 2012 [2012] eKLR as well as *In the Matter of Interim Independent Electoral Commission,* SC Const Application No 2 of 2011 [2011] eKLR.

42. Courts being the entities empowered with the duty to adjudicate disputes and dispense justice, are required to be mindful of the spirit, values, and principles of the *Constitution*; and stand guided by the principles prescribed under article 159 of the *Constitution* while exercising their judicial authority. This ensures that justice is done to all irrespective of status and in a manner that protects and promotes the purpose and principles of the *Constitution*. The *Constitution* safeguards a person's right to have any dispute resolved by the application of law decided in a fair and public hearing as provided under article 50 of the *Constitution*, thereby, ensuring a party's access to justice is not violated.

43. Article 48 states that "the State should ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice". (emphasis ours) A person as defined under article 260 of the *Constitution* includes a company, association or

other body of persons whether incorporated or unincorporated. A perusal of the CKRC Final Report shows that it was the intention of the drafters of the *Constitution* to have a properly functioning judicial system that is accessible to all persons to ensure and promote equality of all persons before the law. In their views, Kenyans stated that access to courts could be improved by reducing court fees or paying fees in instalments. The significance of the provision in article 48 is that "poverty is no bar to litigation" and therefore, courts should consider the issue of a litigant's impecuniosity when ordering security for costs.

44. While there is a distinction between filing fees and costs, the use of 'and' in the constitutional provision indicates that every citizen first and foremost is entitled to access to justice. However, if any fees are required to facilitate the access to justice, then the fee should be reasonable and not impede access to justice. Hence, we can construe the fees contemplated under the *Constitution* to encompass any monetary payment made as a condition to access justice. This, in our view, extends to both filing fees and costs inclusive of the application for additional security for costs which is payable in the course of proceedings in the wider context of access to justice.

45. Security for costs is defined in the *Black's Law Dictionary* Ninth Edition at page 1478 as money, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses. The purpose of security for costs order is to alleviate the concerns of potential difficulties in seeking to recover costs. An applicant of such an order, is required to establish that the respondent, if unsuccessful in the proceedings will be unable to pay costs. The objective is to protect a party from circumstances where one is dragged to court and made to incur costs due to litigation. It is meant to prevent frivolous and vexatious litigation.

46. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*: Civil Appeal(Application) 38 of 2013; [2014] eKLR, the Court of Appeal gave the rationale for security for costs which is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. Further, the court stated that in an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. In *Kibiwott & 4 others v Registered Trustees of Monastery of Victory* Nakuru, HCCC No 146 of 2004 the court there observed that for a party to succeed in an application for security for costs has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

47. The rationale for security for costs therefore is aimed at balancing the overarching objectives in the administration of justice as expressed under articles 48, 50 and 159 of the *Constitution*, that courts should aim to dispense justice. As such, the costs protect the defendant or a respondent against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff's impecuniosity. An order for security for costs will normally affect the interest of plaintiff's access to the court system, regardless of their financial status; shield a successful defendant from litigation costs; and conserve the courts processes: costs and security for costs may discourage frivolous claims, and encourage the parties to conduct litigation in a manner that is proportional to the matters at issue.

48. On balancing the right to access to justice and the right to security for costs, article 24(1)(d) of the *Constitution*, provides: -

> " 24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
>
> a. .....
>
> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others "

49. Beyond articles 48 and 24, what is the law governing security for costs in Kenyan courts? Does the same impede access to justice?

50. In our judicial system, the legal position on the subject of security for costs is inexplicit. In certain instances, the amount payable is provided for in legislation or Regulations, in other cases the same is left to the discretion of the concerned court.

An example is section 78(1) of the *Elections Act* which specifically provides that a person who presents a petition to challenge an election shall deposit security for costs of: one million shillings, in the case against a presidential candidate; five hundred thousand shillings, in the case of a petition against a Member of Parliament or a County Governor; or one hundred thousand shillings in the case of a petition against a member of county assembly. The Act also provides that "where a petitioner does not deposit security as required, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the

respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs."

51. In civil proceedings before subordinate courts and the High Court, the Civil Procedure Act provides that costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge has full power to determine by whom, and out of what property and to what extent such costs are to be paid, and shall follow the event unless the court or judge shall for good reason otherwise order under section 27. However, order 26 of the *Civil Procedure Rules* 2010, provides that in any suit the court may order for the whole or any part of the costs any defendant or third party be given by any other party. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court. If the security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit. If a suit is dismissed and the plaintiff proves that he was prevented by sufficient cause from giving the required security of costs, the court may set aside the order dismissing the suit and extend the time for giving the required security. Here we see the Rules giving an option to have a dismissed suit reinstated if the plaintiff shows cause that he was prevented from giving the required security for costs.

52. At the Court of Appeal, under Order 42, rule 14, at any time after the memorandum of appeal has been served, in its discretion, the court may order the appellant to give security for the whole or any part of the costs of such appeal. If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than the property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order. If security for costs is not given within the time ordered the court may dismiss the appeal.

53. Rule 107 of the *Court of Appeal Rules* provides that, subject to rule 115, there shall be lodged in court on the institution of a civil appeal as security for the costs of the appeal the sum of two thousand shillings. Where an appeal has been withdrawn under rule 96 after notice of cross-appeal has been given, the court may, on the application of any person who is a respondent to the cross-appeal, direct the cross-appellant to lodge in court as a security for costs the sum of two thousand shillings or any specified sum less than two thousand shillings, or may direct that the cross-appeal be heard without security for costs being lodged.

54. Rule 115 provides that if in any appeal from a superior court, in its original or appellate jurisdiction in any civil case the court is satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the court may by order direct that the appeal may be lodged without prior payment of fees of court, or any payment of any

specified amount less than the required fees; without security of costs being lodged, or on lodging of any specified sum less than the amount specified by rule 107.

55. The approach in other jurisdictions is different. In New South Wales, procedural regulations provide for security for costs and the factors a court has to consider before making such an order. In that regard, r 42.21 of the *Uniform Procedure Rules* 2005 makes provision on security for costs as follows:

> 1. If, in any proceedings, it appears to the court on the application of a defendant-
>
> a. that a plaintiff is ordinarily resident outside Australia, or
>
> b. that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or
>
> c. that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or
>
> d. that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or
>
> e. that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, or
>
> f. that there is reason to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings, the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given. (1A) In determining whether it is appropriate to make an order that a plaintiff referred to in sub-rule (1) give security for costs, the court may have regard to the following matters and such other matters as it considers relevant--
>
> a. the prospects of success or merits of the proceedings,
>
> b. the genuineness of the proceedings,
>
> c. the impecuniosity of the plaintiff,
>
> d. whether the plaintiff's impecuniosity is attributable to the defendant's conduct,

e. whether the plaintiff is effectively in the position of a defendant,

f. whether an order for security for costs would stifle the proceedings,

g. whether the proceedings involves a matter of public importance,

h. whether there has been an admission or payment in court,

i. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,

j. the costs of the proceedings,

k. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,

l. the timing of the application for security for costs,

m. whether an order for costs made against the plaintiff would be enforceable within Australia,

n. the ease and convenience or otherwise of enforcing a New South Wales court judgment or order in the country of a non-resident plaintiff.

(1B) If the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.

2. Security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.

3. If the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.

4. This rule does not affect the provisions of any Act under which the court may require security for costs to be given."

56. We are also persuaded by the finding of the Family Court of Australia in *Stapleton & Bryant (Security for Costs)* [2009] FamCAFC 63; (28 April 2009) where the court found that in considering whether or not to make an order for security for costs, matters which maybe relevant include the following: the means of an applicant to satisfy an order for costs if he or she is unsuccessful (ordinarily the means of the applicant is not alone sufficient to justify an order for costs because of the rule that poverty should not be a bar to justice; however, the financial weakness maybe relevant, for example, if the applicant is a company); the prospects of success is a relevant matter to take into consideration(ordinarily, the court

will not undertake a detailed assessment of the likelihood of the applicant's success unless it can be demonstrated that there is a high probability of success or failure); whether the applicant's claim is made bona fide, whether it is genuine and not trivial, vexatious or a sham; whether or not an order for costs would be oppressive or stifle the litigation; whether or not the litigation may involve a matter of public importance; whether or not there has been delay in bringing the application; and any difficulties of enforcing an order for costs and the amount of costs to be incurred.

57. In Canada, rule 56 of the *Civil Procedure Chapters*, the court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that, the plaintiff or applicant is ordinarily resident outside Ontario; the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere; the defendant or respondent has an order against the plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay costs of the defendant or respondent; or a statute entitles the defendant to security for costs.

58. In *Ontario Inc v Ross*, 2017 ONSC 1295, (SCJ), Justice Henderson stated that when making an order for security for costs, the initial onus is on the defendant to satisfy the court that it appears there is good reason to believe that the matter comes within one of the circumstances enumerated in rule 56.01...;

once the first part of the test is satisfied, the onus is on the plaintiff to establish that an order for security for costs would be unjust...; the plaintiff can meet the onus by demonstrating that: (a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation; (b) the plaintiff is impecunious and the plaintiff's claim is not plainly devoid of merit... or (c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must satisfy the court that the plaintiff's claim has a good chance of success on the merits.

59. In *Cigar500.com inc v Ashton Distributors (2009)*, 2009 CanLII 46451 (ON SC), 99 OR (3d) 55, (SCJ), the court observed that when making an order for security for costs, the court should be guided by two principles namely, everyone should be able to have their day in court; and defendants need reasonable protection from claims that have no merit.

60. Furthermore, r 56 of the Canadian *Civil Procedure Chapter*, makes provision for the amount and form of security for costs in that a court has discretion in determining the amount of security, form of security, and timing for having any funds paid into court. Typically, security for costs orders are made as "pay-as-you- go" orders, providing that a certain amount is to be

paid up until a given stage of the proceedings. In *Websports Technologies v. Cryptologic Inc*, [2005] OJ No 1320 (SCJ, Ont master) it was observed as follows:

> " For at least the last 20 years, the court has responded to motions for security for costs with "pay as you go" orders...Thus, if the motion is brought at an early stage in the proceedings, the quantum of costs to be posted generally does not include all costs incurred and to be incurred up to completion of trial. Instead, the quantum awarded usually covers the cost of what has been done to-date and the anticipated cost of the next step or the next few steps in the litigation process. As a result, if, after the completion of that event, the parties are unable to agree, they can return to court, via motion, in order to revisit the issue of quantum. If the plaintiff's financial position has not improved since the initial motion, the quantum of security to be posted is usually increased to take the parties through the next event or series of events. It is also open to the plaintiff, at the return of the motion, to demonstrate that they are now financially stable, such that no further security is required and that which has been posted may be ordered released. As a result, it is well understood that orders for security for costs are not, and cannot, be final. Circumstances change and it is therefore appropriate to revisit the issue of whether security is merited, and, if so, in what amount, from time to time (see rule 56.07)."

61. In *Spot Coffee Park Place Inc v Concord Adex Investments Ltd*, 2021 ONSC 978 (SCJ Ont master) the court set principles and factors to apply to a motion for increased security for costs under rule 56.07 as follows:

i. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument;

ii. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic;

iii. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant...".

62. Having considered the various legal provisions in Kenya and noting the jurisprudence elsewhere, this is what we make of it: the imposition of security for costs by a court is in itself constitutional; there are no clear guiding principles on what a court considers when making an order for security for costs; at times the amount payable is left to the discretion of the court; in other times, the amount payable is set out in statute or regulations; in other times, although the amount payable is prescribed by legislation or regulation, the court has the discretion of reducing or enhancing the same or even waiving payment of the same; a suit maybe dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non-payment of ordered costs. We are also cognizant of the fact that different courts in our judicial system have crafted their own rules of procedure to govern them including those of security for costs. However, there are no standard guidelines on factors to be considered whilst making an order for security for costs.

63. In the result, and conscious of this court's core mandate under section 3 of the *Supreme Court Act* as the court with final judicial authority, we deem it fit to set guiding principles which will assist courts below when considering an application by a defendant or respondent for security for costs. Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –

    i. the prospects of success or merits of the proceedings,

    ii. the genuineness of the proceedings,

    iii. the impecuniosity of the plaintiff,

    iv. whether the plaintiff's impecuniosity is attributable to the defendant's conduct,

    v. whether the plaintiff is effectively in the position of a defendant,

    vi. whether an order for security for costs would stifle the proceedings and/or impede access to justice,

    vii. whether the proceedings involve a matter of public importance,

    viii. whether there has been an admission or payment in court,

    ix. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,

    x. the costs of the proceedings,

xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,

xii. the timing of the application for security for costs,

xiii. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya,

xiv. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant.

xv. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.

xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.

xvii. if the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.

xviii. the provisions of any Act under which the court may require security for costs to be given such as the *Elections Act*.

xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.

xx. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.

xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.

64. We agree with the jurisprudence from other jurisdictions that a court ought to take into consideration several factors before making an order for security for costs.

b. The constitutionality of imposing a condition precedent

65. The Court of Appeal in granting the order for additional security for costs of Kshs.20,000,000 added a condition precedent in its impugned ruling. It directed as follows:

> " Accordingly, we order the said sum be deposited in court as security for costs in this appeal within 45 days of this ruling, failing which the appeal will stand struck out with costs to CBK."

This in essence affirmed what the respondent had sought in the application before the appellate court. Is it constitutional to impose a condition precedent to an order for security for costs?

66. Rule 107 of the *Appellate Jurisdiction Act* which was relied upon does not expressly provide for any condition to be imposed when the court makes an order for security for costs. We have had occasion to peruse the *Appellate Jurisdiction Act*, chapter 9 of the Laws of Kenya and note that the same does not expressly make provision for the limitation of the right to access justice on the basis of security for costs. The same is, however, as demonstrated elsewhere in this judgment extensively provided for in the Rules guiding the court. We reiterate our finding in the case of *Gladys Shollei v Judicial Service Commission & another*, SC Petition 34 of 2014; [2022] eKLR, that a right or fundamental freedom cannot be limited through regulations, in this case rules.

67. This is in contradistinction with, for instance, rule 7 of the *Supreme Court (Presidential Election Petition) Rules 2017* which stipulates that before filing a petition a petitioner shall deposit a sum of one million as security for costs. This is a prerequisite before filing a presidential election petition arising from an election as mandated under article 163(3)(a) of the *Constitution* over which this court has original and exclusive jurisdiction. However, it is important to point out that in these circumstances, the statute expressly fixes an amount payable as security, as it does for matters challenging elections arising out of an election held under the *Constitution*. It is therefore not left to the court to determine the costs to be deposited as security for costs.

68. Imposition of a condition precedent to a court order is an 'unless' order which is defined in the English case of *Marcan Shipping (London) Ltd v Kefalas & another* [2007] EWCA Civ 463 as:

> " Unless" orders have a long history, dating back well into the nineteenth century and it was recognized at an early stage that once the condition on which it depended had been satisfied, the sanction became effective without the need for further order. In *Whistler v Hancock* (1878) 3 QBD 83 the defendant obtained an

order that unless the statement of claim were delivered within a week the action should be at an end."

69. To that end, we are of the considered view that a court may impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances such as extraordinary and important cases, for instance, election petitions. The same should, however, be done in a manner that is reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent is not in itself unconstitutional provided it is not unreasonable to the extent that it impedes a party's access to justice. The question then becomes, when does the condition precedent become unreasonable?

c. When then does it become unreasonable?

70. In the Supreme Court of Uganda *Goodman Agencies Ltd v Attorney & another* (Constitutional Application 1 of 2012) [2014] UGSC 124 (03 July 2014) stated as follows:

> "If the Supreme Court were to turn away an appellant who is dissatisfied with a decision of the constitutional court and to strike out a constitutional appeal without hearing its merits merely because the appellant has not deposited further security for costs as was ordered by the court in this case, this would be contrary to not only the spirit, but also the letter of the *Constitution*, as clearly provided for under article 132(3). Access to the Supreme Court of Uganda, sitting as a final appellate court to determine constitutional appeals or applications, should not depend on how deep a constitutional appellant's pocket is. Otherwise, it would mean that those who are loaded with cash will have their constitutional appeals heard by this court because they can overcome the financial barriers imposed by an order of the court requiring payment of further security for costs of the other party."

71. Equally, the issuance of bail and bond in criminal matters is not a tool that is to be used to punish an accused person who is regarded innocent until proven guilty; but to secure the attendance of an accused person in court. In the same way, security or further security for costs should not be used (a) to discriminate; (b) to punish; (c) to castigate; and (d) as a penal measure against a party in a manner that would deter such a party to pursue its claim as a result of failure to deposit the prerequisite costs. Instead, it should be used as an instrument that ensures that there is a balance of interests between parties in the suit. Any directive by the court that places a barrier on the path to justice obstructs the right to access justice and defeats the purpose to have the dispute determined on its merits. Such an order would be contrary to the spirit and letter of the *Constitution*.

72. From the foregoing, reasonability is a matter to be determined on a case to case basis based on judicious parameters embodied elsewhere in this judgment.

73. Turning to the case at hand, was the order for further costs by the appellate court unreasonable? It is the appellant's submission that the appellate court failed to balance the parties' interests because it ordered the appellant to pay Kshs 20,000,000 before the appeal could be heard yet the appellant had already paid Kshs 185,000,000 to the 1st respondent, which amount is the subject of the dispute before court. However, according to the 1st respondent, the appellant has no locus standi as it was wound up and does not exist. What's more, the appellant's purported agent, Jasmine See, is a foreign national. It is for this specific reason that an order for security was issued.

74. The appellate court in awarding further security for costs of Kshs 20,000,000/- was of the preliminary view that the appellant was wound up and in their view its state of affairs placed anxiety on the 1st respondent in its ability to recover costs in the event that the appeal was unsuccessful; Jasmine See's identity, place of abode, and ability to guarantee the payment of costs remained questionable; the amount in dispute; and the fact that there are other costs that were ordered to be paid in the High Court. The appellate court noted that it was not drawing into the merits of the appeal.

75. This matter having been filed in October 1998, has been in the corridors of justice for over twenty years. By the time it was being reinstated by the Court of Appeal in 2013, the appellant was already wound up as it is alleged to have been wound up on May 21, 2002. Also, Jasmine See was already the holder of powers of attorney for both the appellant and Lynwood from October 23, 2001. Bearing that in mind, no order for further security for costs was issued at the High Court when it was reinstated and heard on merit in 2013 and the time of the filing of the application for security for costs before the Court of Appeal. Therefore, the status was the same when the matter proceeded to the appellate court on appeal. Secondly, the 1st respondent alleged that Kshs 87,620,000/- was the approximate costs payable at the High Court. However, the same has not been taxed. Thirdly, the sum of Kshs 185,000,000/- which is the subject matter of the suit is already in the possession of the 1st respondent, whether as part payment of debt or as deposit towards purchase price. Lastly, the appellate court did not elaborate how it came up with the figure of Kshs 20,000,000.00 which is one million times above the set nominal amount of Kshs 2,000.00 already paid at the time of filing the appeal.

76. We are conscious of the fact that the Central Bank of Kenya, the main respondent herein, is an institution established under Article 231 of the *Constitution*, to which the alleged sum of money the appellant is claiming was deposited. Likewise, we cannot close our eyes to the

issue of public interest while endeavouring to give the appellant access to the court system. This is a fundamental aspect of our democracy which is recognized in our Constitution.

77. Towards that end, it is our finding, that this is a perfect example where an order of security for costs would stifle the proceedings and completely lock out the appellant out of the doors of justice. The Court of Appeal's order put an end to the appellant's litigation journey before being heard on merit thereby denying them opportunity to secure their legal rights. We must fault the Court of Appeal's finding on security for costs in this regard. Of particular interest is paragraph [12] where the court states as follows:

> (12) Having considered all the foregoing guidelines and constitutional underpinnings, we do not wish to be drawn into the merits of the appeal, as that would prejudice or embarrass the Bench that will deal with it save to state that the issues raised regarding the winding up of Westmont which is the appellant and the multiple identities of Jasmin See who is the named agent/attorney are weighty matters in regard to the issue at hand that is security for costs. We do not think this application was brought on the basis that the appellant or its agent were merely impecunious. It is predicated on the fact that Westmont who is the appellant does not exist in law and this being a common ground counsel for CBK submitted quite strongly that in the event the appeal is dismissed, public tax payers' money will have been expended in pursuing an appeal filed by a phantom. This argument that Westmont was wound up was not discounted by counsel for the appellant, save to state that there was an amendment whereby Westmont was substituted by Lynwood Developers Ltd. Whereas those are matters for merit determination within the appeal itself, our preliminary view of the matter is, this appeal, as it appears in this record of appeal, is filed in the name of Westmont who is the appellant; it is undisputed that Westmont was wound up and in our view this state of affairs lends credence to CBK's anxiety regarding its ability to recover costs in the event that the appeal was unsuccessful. [Emphasis added]

78. Despite acknowledging that the substitution and winding up of the appellant and their subsequent substitution by Lynwood Were matters for determination on merit in the pending appeal, the Court of Appeal still proceeded to determine the same itself, an unfortunate embarrassment to the eventual trial bench.

79. We also take issue with the Court of Appeal's finding at paragraph 13 where it is stated as follows:

> "(13) We have also considered the second line of argument that the only disclosed agent/ attorney is one Jasmin See who was given the power of attorney by Westmont to act on its behalf in this matter. In the event that Westmont lacks capacity would the said Jasmin See

> pay the legal costs? or whose agent is she, who is the appellant or the beneficiary of the appeal proceedings? Unfortunately, those questions were not answered by the appellants as no replying deposition was filed but only grounds of opposition. Going by the information given in the affidavit in support of the application, part of which is reproduced here above, which was not controverted by Westmont, it is obvious to us that Jasmin See's identity, place of abode, and ability to guarantee the payment of costs remained questionable. It is the way Jasmin See described herself variously in the proceedings and documents before the High Court and the fact that she is a foreigner with two nationalities and multiple passports that brings into question her identity and ability to pay the costs should the appeal be un- successful and she is ordered to pay the costs."

80. In the instant application, the burden of proving the appellant's inability to pay any awardable costs should the appellant fail in their appeal, was on the 1st respondent. However, in the foregoing paragraph, it is obvious to us that the 1st respondent did not discharge their burden of proof that is why, to us, the pertinent questions "In the event that Westmont lacks capacity would the said Jasmin See pay the legal costs? or whose agent is she, who is the appellant or the beneficiary of the appeal proceedings?" remained unanswered. The learned Judges of appeal did not consider the fact that the appellant's impecuniosity if any, may have been contributed to by the 1st respondent's action who, if proved, could be holding lien of Kshs 185,000,000/- which the appellant alleges to have deposited to it.

81. In our view, there ought to be a balance for the two competing rights that is, the right to access to justice and the right to security for costs. Unlike the right for security for costs, the right to access to justice is guaranteed in the *Constitution* and as demonstrated in article 24 above, can only be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

82. Borrowing from these constitutional tenets above, it is our view that the grant of the said costs was unreasonable to the extent that it impacted against the appellant's appeal in the negative and sought to punish it, considering it is allegedly wound up and substitution of the appellant with its principal Lynwood is in contention. With the inability to pay the security

for costs, the appellant, despite being entitled to pursue an appeal from the decision of the High Court, no longer had recourse to litigate for the court's ultimate determination of the issues raised. Resultantly, the order for further security for costs did impede its right to access to justice contrary to articles 48, 50 and 159 of the *Constitution* as the appeal stood struck out in the failure of the payment of the security for costs as ordered.

83. We have shown that it is the duty of the court to balance the injustice to the plaintiff pursuing a proper claim. We state that the final result in such a balance must be reasonable and modest. An order for additional security must neither impede access to justice nor stifle genuine claims and most definitely must not be oppressive. A court is not bound to make an order of a substantial amount. It is paramount that the order be just and not impede access to justice.

F. Remedies

84. Taking all the above into consideration and the nature of this matter as that involving general public importance, our finding transcends beyond the parties before the court. We note that the appellant seeks us to allow Civil Appeal No 37 of 2017 *Westmont Holdings Limited v Central Bank of Kenya* as prayed in the memorandum of appeal dated February 9, 2017 filed therein. Aware that the appellant's appeal before the Court of Appeal was never heard on merit, the Court of Appeal having previously acknowledged that this is a matter that should be determined on the merits, we would allow the appeal to facilitate the reinstatement, hearing and determination of Civil Appeal No 37 of 2017 at the Court of Appeal. In doing so, the circumstances call for the setting aside in entirety the order meted on the appellant by the Court of Appeal requiring it to pay a further security for costs in the sum of Kshs20,000,000.00 as being unreasonable particularly to the extent that such further security for costs was payable as a condition precedent to the disposal of the appeal. The appellant had already paid the nominal sum of Shs 2,000.00 towards security for costs as permitted under the rules.

85. We were invited to determine the appeal still pending before the Court of Appeal. We are, however, not persuaded to assume jurisdiction over the merits of the appeal. Owing to the considerable nature of the dispute, the parties involved and the immense public interest, it is only proper that each of the parties be allowed to ventilate their cases to the full extent of the law. Despite the fact that the matter may have taken time in the court corridors, we reiterate the position we took in *Hon Gitobu Imanyara & 2 others v Attorney General* (*supra*) that:

> " Cognizant of the period it has taken for this matter to be prosecuted, and in order to do justice for all the parties involved herein, we direct that the High Court hears and determines this matter on a priority basis."

We add that the question which was before us, by way of certification as opposed to an outright appeal, related to the order for security for costs, as we had specifically framed. Extending the case to the merits at this stage is in our view not called for. The Court of Appeal was ready to dispose of the appeal on the merits and we see no reason to interfere with that. Moreover, considering the possible right to appeal to this court, determining the matter at this stage would deny the parties that opportunity and to an extent interfere with their right to access justice, the very essence of the dispute before us.

86. On the issue of costs, this court has in the past settled the law, that costs follow the event, and that, a judge has the discretion in awarding costs as we stated in the decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] eKLR. We note that the appeal has aided clarification on grey areas of our justice system and for that reason, we shall not award any costs. Each party shall bear their own costs

G. Orders

87. In consideration of the foregoing, it is our considered view that there was a violation of the appellant's rights in the manner expressed above and issue orders as follows:

    a. The petition of appeal dated November 2, 2021 be and is hereby allowed in the following specific terms:

        i. A declaration be and is hereby made that the order for the security of costs made in Civil Application No 37 of 2017 delivered on December 8, 2017 is unreasonable as it impedes the appellant's access to justice by imposing a condition precedent before a matter can be heard contrary to articles 48, 50 and 159 of the *Constitution* of Kenya.

        ii. This appeal be allowed and the order of the Court of Appeal in Civil Application No 37 of 2017 delivered on December 8, 2017 be set aside and in its place an Order do issue dismissing the notice of motion application dated October 13, 2017.

    b. The matter is hereby remitted to the Court of Appeal for determination of the appeal on merit.

    c. Each party shall bear their own costs.

    It is so ordered

Wanjigi v Chebukati & 2 others (Petition 19 (E022) of 2022)
[2023] KESC 15 (KLR) (17 February 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 15 (KLR)

Civil Practice and Procedure *- appeals - appeals to the Supreme Court - appeals as of right in any case involving the interpretation or application of the Constitution - where the appeal to the Supreme Court was from a matter which had originated in the High Court by way of judicial review - what were the requirements for one to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution - what were the principles to be complied with when appealing to the Supreme Court in a matter which had originated in the High Court by way of judicial review - Constitution of Kenya, 2010 article 163(4)(a).*

Brief facts

The appellant was the nominated Safina Political Party presidential candidate for the August 9, 2022 general elections. On June 6, 2022 he presented his nomination papers before the 1st respondent, the duly gazetted returning officer for the presidential election, for registration as a candidate. Upon examining the documents, the 1st respondent ruled that the appellant was unqualified to be nominated to contest in the presidential election and rejected his candidature based on the following reasons: lack of a university degree; lack of nomination by at least 2,000 voters each from at least 24 counties; and lack of a nomination certificate by Safina Political Party for the appellant's running mate.

Aggrieved, the appellant lodged a complaint with the 3rd respondent, the Independent Electoral and Boundaries Commission Disputes Committee (the Committee) challenging the validity of the grounds upon which the 1st respondent refused to register him. The Committee dismissed the complaint and upheld the 1st respondent's decision. Aggrieved by the Committee's decision, the appellant commenced judicial review proceedings at the High Court. The High Court dismissed the application with costs for lacking merit. The court held that based on the traditional limits of judicial review, a judicial review court did not assume appellate jurisdiction or a merit review or interrogation of facts upon which an impugned decision was made, but only the decision-making process.

Further dissatisfied, the appellant lodged an appeal to the Court of Appeal which dismissed the appeal with costs to the respondents. Aggrieved by the Court of Appeal's decision, the appellant filed the instant appeal at the Supreme Court. In opposing the appeal, the 1st and 2nd respondents filed a preliminary objection challenging the court's jurisdiction. It was the 1st and 2nd respondents' argument that the appeal did not raise any matter involving the interpretation or application of the Constitution of Kenya, 2010 (Constitution) as contemplated under article 163(4)(a) of the Constitution.

Issues

i. What were the requirements for one to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution?

ii. What were the principles to be complied with when appealing to the Supreme Court in a matter which had originated in the High Court by way of judicial review?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163 - Supreme Court

(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

(5) A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

Held

1. The Supreme Court's appellate jurisdiction was set out in article 163(4) of the Constitution. The issues that the court would exercise its jurisdiction over pursuant to article 163(4)(a) were only issues involving the interpretation or application of the Constitution, which constitutional issues had been considered and determined by the superior courts. A question identified as involving interpretation or application of the Constitution thus had to be one that was argued in the court of first instance and canvassed through the hierarchy of courts, at the Court of Appeal, and finally in the instant court.
2. Mere allegation by a party that a question of constitutional interpretation or application was involved did not automatically bring the appeal within the ambit of article 163(4)(a) of the Constitution unless the party could show that the matter by virtue of the court's determination took a constitutional trajectory of interpretation and application.
3. By no means was the court an open forum for all cases from the appellate court on judicial review matters. Each appeal was to be considered on its merits on a case-to-case basis. Only causes bearing a real constitutional issue could be heard by the court and a plain claim that a matter raised issues of interpretation or application of the Constitution did not suffice. The principles a party should comply with when appealing to the Supreme Court in a matter which had originated in the High Court by way of judicial review were:
    a. Not all judicial review matters were appealable to the Supreme Court, as of right.
    b. It was open to the party concerned to move the court on appeal under article 163(4)(b) of the Constitution, in which, the normal certification process applied.

c. Where such an appeal came under article 163(4)(a) of the Constitution, the petitioner was to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal.

4. The party concerned should demonstrate that the superior courts had misdirected themselves in relation to prescribed constitutional principles, and either granted, or failed to grant judicial review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional.

5. A question regarding the interpretation or application of the Constitution could arise from a multiplicity of factors and interrelationships in the various facets of the law, and the Constitution should be interpreted broadly and liberally to capture the principles and values embodied in it.

6. The Court of Appeal addressed each of the appellant's grievances. The main grievance was the qualification of the appellant based on section 22(2) of the Elections Act and as read with regulation 47(1) of the Elections (General) Regulations. While the provisions and grievances by the appellant were underpinned by articles 38 and 83(3) of the Constitution, the gravamen of the dispute had nothing to do with the interpretation or application of the Constitution but rather a factual exercise by the superior courts below to evaluate the appellant's compliance. None of the provisions of the statute were by themselves under challenge.

7. Although the appellant cited several provisions of the Constitution, he had not set out, to any extent and to the court's satisfaction, how the superior courts interpreted and applied the Constitution one way or the other. It could not thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the Constitution to warrant an appeal to the instant court under article 163(4)(a) of the Constitution. The appellant seemed to be inviting the court to reprise the evidence and be persuaded to make a conclusion that resonated with his. That was an invitation that the court had to decline.

8. Despite asking the court to determine the matter for the sake of posterity, the appellant had not shown the existence of any constitutional moment to be seized and the extent of such moment. The provisions of the Constitution not being in contention, qualifications and nomination of candidates would continue to be addressed as and when they arose based on peculiar circumstances.

The 1st and 2nd respondents' preliminary objection upheld; petition of appeal struck out; each party to bear their own costs.

Citations

Cases

1. *Attorney General v Kituo Cha Sheria & 7 others* Civil Appeal 108 of 2014; [2017] KECA 773 (KLR) - (Explained)
2. *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Explained)

3. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR); [2017] eKLR - (Explained)
4. *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
5. *Joho & another v Shahbal & 2 others* Petition 10 of 2013) [2014] KESC 34 (KLR); [2014] eKLR; [2014] 1 KLR 111 - (Explained)
6. *Kiliswa, Peninah Nadako v Independent Electoral & Boundaries Commission (IEBC) & 2 others;* Petition 28 of 2014; [2015] eKLR - (Explained)
7. *Kimani & 2 others v Kenya Airports Authority & 3 others* Petition No 4 of 2015; [2021] eKLR - (Explained)
8. *Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR) - (Explained)
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 - (Explained)
10. *Mbete, Janet Ndago Ekumbo v Independent Electoral and Boundaries Commission & 2 others* Petition 39 of 2013; [2013] KEHC 5193 (KLR) - (Explained)
11. *Mongare v Chebukati & 2 others* Constitutional Petition E318 of 2022; [2022] KEHC 10186 (KLR) - (Explained)
12. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR; [2014] 1 KLR 54 - (Explained)
13. *Muruli, Mable v Wycliffe Ambetsa Oparanya & 3 others* Election Petition 5 of 2013; [2013] KEHC 5991 (KLR) - (Explained)
14. *Muruli, Mable v Wycliffe Ambetsa Oparanya & 3 others* Petition 11 of 2014; [2016] eKLR - (Explained)
15. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
16. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR); [2013] 1 KLR 685 - (Explained)
17. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)
18. *Shollei, Gladys Boss v Judicial Service Commission & another* Petition 34 of 2014; [2018] KESC 42 (KLR) - (Explained)
19. *Attorney General v Prof Peter Anyang Nyongo & 10 others* EACJ Application No 5 of 2007 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 25, 38, 47, 50, 83(3); 88; 99; 136; 137; 138; 148; 163(4)(a); 165; 249; 258; 259- (Interpreted)

2. Elections (General) Regulations, 2012 (cap 7 Sub Leg) regulations 16, 18, 47- (Interpreted)
3. Elections Act, 2011 (cap 7) sections 22(2); 23(1)(d) - (Interpreted)
4. Independent Electoral and Boundaries Commission Act (cap 7C) sections 11, 12 - (Interpreted)
5. Interpretation and General Provisions Act (cap 2) section 52- (Interpreted)

Advocates

Mr. Willis Otieno for the appellant
Mr. Ochola, Moses Kipkogei and *Anthony Mwangi* for the 1st & 2nd respondents
Mr. Ndaiga Gacheru for the 3rd respondent

February 17, 2023, the Court delivered the following Judgment:

A. Introduction and Background

1. This is a petition of appeal dated July 29, 2022 and filed on August 1, 2022 by the appellant, Jimi Richard Wanjigi, pursuant to article 163(4)(a) of the *Constitution*. The appeal challenges the entire judgment and orders of the Court of Appeal (Makhandia, M'Inoti & Omondi, JJA) in Civil Appeal No E404 of 2022 delivered extempore on July 12, 2022 and whose reasons were rendered on July 29, 2022.

2. The appellant was the nominated Safina political party presidential candidate for the August 9, 2022 general elections. On June 6, 2022 he presented his nomination papers before the 1st respondent, the duly gazetted returning officer for the presidential election, for registration as candidate pursuant to regulation 16 of the *Elections (General) Regulations*. Among the documents he submitted were: a letter from Daystar University indicating that he was pursuing a degree of Bachelor of Arts in International Relations and Security Management and had completed his coursework; copies of his transcripts; a letter from the Commission for University Education confirming that Daystar University was accredited and its degree is recognized in Kenya; and lists of voters from 24 counties who had nominated him for his presidential bid.

3. Upon examining the documents, the 1st respondent ruled that the appellant was unqualified to be nominated to contest in the presidential election and rejected his candidature based on the following reasons: lack of a university degree as required by section 22 (2) of the *Elections Act*; lack of nomination by at least 2,000 voters each from at least 24 Counties as required by section 23(1)(d) of the *Elections Act*; and lack of a nomination certificate by Safina Political Party for the appellant's running mate.

B. Litigation History

i. Before the Independent Electoral and Boundaries Commission Disputes Committee (the Committee)

4. Aggrieved by the 1st respondent's decision, the appellant on June 7, 2022, lodged a complaint with the 3rd respondent, the Independent Electoral and Boundaries Commission Disputes Committee (the Committee) challenging the validity of the grounds upon which the 1st respondent refused to register him.

5. In its decision rendered on June 17, 2022, the Committee (George Murugu, Juliana Cherera & Boya Molu) dismissed the complaint and upheld the 1st respondent's decision, *inter alia*, that:

   (a) the appellant did not comply with the requisites for registration to vie for the position of president in the general elections;

   (b) the appellant did not have sufficient supporters as required under the law;

   (c) the appellant did not submit a degree as is required under section 22(2) of the *Elections Act* as read with regulation 47 (1) of the *Elections (General) Regulations* 2012;

   (d) the degree envisaged under section 22(2) of the *Elections Act* as read with regulation 47 (1) of the *Elections (General) Regulations, 2012* connotes a physical document; and

   (e) that the appellant did not submit the nomination certificate in respect of his running mate to the returning officer.

   No orders of costs were made.

ii. Proceedings at the High Court

6. Aggrieved by the Committee's decision, and upon being granted leave, the appellant commenced judicial review proceedings in High Court Judicial Review Application No E083 of 2022 where he sought an order of *certiorari* to quash the decisions of the 1st and 3rd respondents dated June 6, 2022 and June 17, 2022 respectively, an order of mandamus directing the 1st respondent to gazette and include the appellant's name in the ballot paper and issue him with a nomination certificate as a presidential candidate for the elections scheduled for August 9, 2022. The judicial review proceedings were instituted on the grounds of illegality, irrationality, unreasonableness, bias and legitimate expectation.

7. On illegality, the appellant complained that the decisions of the 1st and 3rd respondents were contrary to the Constitution; section 22 (2) of the *Elections Act*, which requires that a person nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor be a holder of a degree from a university recognized in Kenya; and binding precedence from the High Court in *Janet Ndago Ekumbo Mbete v IEBC & 2 others* [2013] eKLR, and *Mable Muruli v Hon Wycliffe Ambetsa Oparanya & 3 others* [2013] eKLR which held that a candidate need not present a hard copy certificate to satisfy the requirements in section 22(2) of the *Elections Act*. He urged that in holding that the appellant submitted the documents to the 1st respondent late, the 3rd respondent acted in violation of the law when it purported to base its decision on an issue which was not contested or complained of by the 1st respondent. He further averred that in any event, the 1st respondent had accepted and acted upon the documents arriving at a decision on the appellant's compliance in 24 counties.

8. On irrationality, the appellant pleaded that the 1st and 3rd respondents' decisions were made without regard to his fundamental rights and freedoms guaranteed under the *Constitution* and in violation of due process of the law. He claimed that the finding that he had not garnered the required 2,000 supporters in 24 counties was irrational as the evidence and material before the Committee confirmed that he was compliant and had met the threshold under article 137 of the *Constitution*. Further, that the 1st respondent acted irrationally by rejecting his running mate's nomination certificate, whereas article 148 of the *Constitution* requires only that the running mate be nominated by the presidential candidate.

9. On unreasonableness, the appellant averred that the 1st and 3rd respondents' decisions were unreasonable on account of being *ultra vires* the , section 22(2) of the *Elections Act*, and fair administrative action for not being reasonably justifiable in a democratic state.

10. On bias, it was the appellant's contention that the decision of the 3rd respondent was tainted by apparent bias and conflict of interest as the 1st respondent appointed Mr George Murugu as the chairperson of the Committee whereas he had acted for the 1st respondent as a private advocate in High Court Misc Application No E033 of 2021 in which case leave was being sought to institute contempt proceedings against the 1st respondent. The appellant argued that the 1st respondent, being a party to the proceedings before the 3rd respondent, could not at the same time appoint members of the Committee who would proceed to hear and determine the disputes lodged against him.

11. On legitimate expectation, the appellant argued that it was his legitimate expectation that the 1st and 2nd respondents would act in accordance with the *Constitution*, Laws of Kenya and binding precedent.

12. The 1st and 2nd respondents opposed the application and averred that the appellant was not qualified for registration as required by the law as he did not present a certified copy of a degree from a recognized university in Kenya; was not nominated by not fewer than 2,000 voters registered in each of a majority of the counties as required by article 137 (1) of the *Constitution*; that the appellant's list of nominators did not bear some of the particulars required by the *Elections (General) Regulations*, namely the names, signatures and identity card or passport numbers; and that the appellant did not submit the list of his supporters at least five days before the date for registration of candidates as required by regulation 18 of the *regulations*. As regards the precedents, they averred that they were based on the law as it was in 2013 whereas the law has since been amended. On the complaint of bias, they contended that the appellant did not raise this issue when he appeared before the 3rd respondent whose decision was strictly in accordance with the *Constitution* and the law.

13. The 3rd respondent also in opposition urged that it was lawfully constituted under article 252 (1) of the *Constitution* and sections 11 and 12 of the *IEBC Act*; and that its decision was fair, unbiased and properly justified under the Constitution, the *Elections Act* and the regulations made thereunder.

14. The trial court (Ngaah J) *vide* the judgment dated July 1, 2022 dismissed the application with costs for lacking merit. In his considered view, based on the traditional limits of judicial review, a judicial review court does not assume appellate jurisdiction or a merit review or interrogation of facts upon which an impugned decision was made, but only the decision-making process. Consequently, he concluded that he would not be concerned about whether the 3rd respondent was correct in concluding that the appellant had not satisfied the requirements to contest as a presidential candidate, but whether, in coming to that decision, the 3rd respondent confined itself within the four corners of the law from which it derives its mandate. Consequently, it was his finding that the 3rd respondent's decision was not vitiated by any judicial review grounds, and that the appellant had failed to substantiate the grounds argued.

iii. Proceedings at the Court of Appeal

15. Further dissatisfied, the appellant lodged an appeal to the Court of Appeal, in Civil Appeal No E404 of 2020 premised on ten grounds of appeal, which were summarised by the appellate court into two. Firstly, whether the appellant's application disclosed grounds for judicial review and Secondly, whether, if properly considered the appellant's complaints were meritorious enough to warrant interfering with the decisions of the 1st and 3rd respondents.

16. The appellate court dismissed the appeal with costs to the respondents. On the first issue, it determined that the appellant's application disclosed cogently and in detail the grounds for judicial review which warranted a decision from the trial court. It was its view that under the Constitution 2010, a judicial review court has jurisdiction to review both the decision-making process and merits of a quasi- judicial administrative decision.

17. On the second issue, the appellate court found no basis to fault the 1st and 3rd respondents' decisions as: the appellant, in not producing a certified copy of a degree certificate, did not satisfy the requisite educational qualifications when he appeared for registration before the 1st respondent; the respondents correctly applied the doctrine of *stare decisis* as the precedents relied on were before Legal Notice No 72 of 2017 which amended regulation 47 of the *Elections (General) Regulations, 2012*; the appellant failed to meet the threshold under article 137(1) as read with section 23 of the *Elections Act* and regulation 18 of the *Elections (General) Regulations*; the appellant failed to submit his running mate's nomination certificate contrary to articles 148 (1) as read with article 137(1) of the Constitution; there was no basis to legitimately expect that a provision of the law will be interpreted and applied the same way even after it is amended; and on allegations of bias, the appellant, did not prove any actual bias on the 3rd respondent, the court having applied the test of reasonable apprehension.

C. Proceedings before the Supreme Court

a. Appellant's case

18. The appellant, aggrieved by the decision of the Court of Appeal, has now filed the present petition of appeal. The appeal is premised on grounds that the superior courts erred in law and misapprehended the Constitution by:

    a. failing to uphold the established principles of stare decisis and binding precedents of superior courts on subordinate courts, administrative tribunals and committees in matters of interpretation and application of the Constitution, in contravention of article 10 of the Constitution and this court's decision in *Attorney General & 2 others v Ndii & 79 Others* (Petition No 12, 11 and 13 o 2021 Consolidated) [2022] KESC 8 (KLR) (BBI Matter);

    b. failing to consider the import and effect of section 22 (2) of the *Elections Act* and binding precedents of the superior courts on subordinate courts, administrative tribunals and committees exercising quasi-judicial functions, thereby denying the appellant the legitimate expectation that such precedent would be applicable to him when he presented his nomination papers;

c. misapplying and misinterpreting article 10 of the *Constitution* by finding that a regulation can amend provisions of a statute, and in any event, failing to find that regulation 47 as amended in 2017 did not occasion material changes to section 22(2) of the *Elections Act*, but only introduced the word 'certified';

d. misconstruing and misapplying the appellant's political rights and freedoms under article 38, in respect of his quest to participate in the Presidential Election scheduled for August 9, 2022;

e. Failing to consider the misapplication of article 83(3) of the *Constitution* which grants the right to stand for election and further provides that administrative arrangements are designed to facilitate, but not to deny the right of an eligible citizen to stand for election, (but instead relied on undisclosed administrative infractions);

f. Misapplying article 83(3) of *Constitution* by relying on unsubstantiated qualitative measures to determine that he had failed to meet the threshold;

g. Failing to apply the provisions of article 83 (3) of the *Constitution* when they failed to consider that the petitioner was compliant in 24 counties and thereby met the threshold of supporters in a majority of counties but proceeded to deny him registration as a presidential candidate on the ground of insufficient supporters;

h. Misapplying the provisions of article 83(3) of the *Constitution* when having determined that he met the threshold of supporters in a majority of the Counties proceeded to rely on unsubstantiated qualitative measures to determine that he had failed to meet the threshold;

i. failing to apply the provisions of articles 88 and 249 of the *Constitution* on the functions and independence of the 2nd respondent from external control by conflicted and biased strangers;

j. misapplying the provisions of article 10 and principles of natural justice by failing to find that the 1st respondent had no power to appoint his personal advocate to preside over an independent function of the 2nd respondent and holding that allegations of bias must be proved and are not apparent;

k. Misapplying the provisions of article 88 and 249 of the *Constitution* and failed to consider the purpose of independent commissions and the import of a stranger presiding over important functions of the Commission who was conflicted and has apparent bias in proceedings.

l. misapplying the right to fair administrative action when it failed to consider that the petitioner submitted his running mate's certificate and additional supporters on June 6, 2022; and

m. Misapplying settled principles on costs by awarding costs against the appellant despite partially allowing his appeal on grounds that it had met the threshold and had disclosed sufficient grounds for judicial review.

19. The reliefs the appellant seeks are as follows:

a. The petition of appeal be allowed.

b. The Judgment of the Court of Appeal delivered on July 12, 2022 in Civil Appeal No E404 of 2022 be and is hereby set aside with an order allowing the appeal.

c. he honourable court do find that the petitioner met the minimum requirements for clearance and registration as a presidential candidate in the August 9, 2022 presidential elections.

d. The honourable court do issue an order directing the 1st respondent to register the petitioner as a presidential candidate in the Presidential Elections to be held on the August 9, 2022.

e. the honourable court do issue an order directing the 1st respondent to include the name of the petitioner in the Presidential Elections ballot papers to be used in the August 9, 2022 presidential elections.

f. Any other and further relief that the honourable court may issue to achieve the ends of justice.

g. Costs of this petition and of the appeal before the Court of Appeal.

20. The appellant filed submissions dated August 3, 2022 in support of the petition of appeal and submissions of even date in opposition to the 1st and 2nd respondents' preliminary objection dated August 2, 2022.

21. On jurisdiction, the appellant submits that the appeal involves questions of interpretation and application of the *Constitution*. He specifically urges that the appeal challenges the application of articles 10, 25, 38, 47, 50, 83, 88, 99, 137, 148 and 249 of the *Constitution* as well as sections 22(2) of the *Elections Act*. He emphasizes that the determination of the dispute before the 3rd respondent all the way to the appellate court involved the enforcement of the appellant's political rights enshrined under article 38, and actualized under article 83(3), 137(1), 99(1)(b) and 148(1) of the *Constitution*.

22. The appellant contends that the principles enshrined under article 10(2) of the *Constitution* demand that public bodies and private individuals must comply with court decisions. It is his case that this court has upheld the application of the doctrine of *stare decisis* as a constitutional principle in *AG & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (amici curiae)* (Petition No 12, 11 and 13 of 2021 Consolidated) [2022] KESC 8 (KLR); *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR; and *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others* SC Petition No 11 of 2014 [2016] eKLR wherein the court held that adherence to precedent is the rule and not the exception and is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. He reiterates the arguments he made in the superior courts that they failed to take into consideration binding precedent settled in *Jane Mbete* and *Mable Muruli* cases (*supra*) and faults the appellate court's reliance on regulation 47 of the *Elections (General Regulations) 2012* as amended in 2017 on the grounds that there was no material amendment effected in 2017 to warrant departure from the settled precedents. He maintains that the 2017 amendment only introduced the word 'certified copies of educational certificates' in place of 'copies of educational certificates.'

23. He submits that the appellate court's insistence on a physical copy of a degree certificate was an administrative arrangement that violates his rights protected under articles 38 and 83(3) of the Constitution. He buttresses that the importance and value of these two provisions was restated by this court in *Attorney General v Kituo Cha Sheria & 7 others* [2017] eKLR. In the circumstances, he urges that he had met the purposes and intent of section 22(2) of the *Elections Act* and the decision by the 3rd respondent was illegal and unlawful.

24. The appellant submits that he organized his affairs in full knowledge and legitimate expectation that the doctrine of *stare decisis* was binding on the 3rd respondent, and that precedent on the interpretation and application of section 22(2) of the *Elections Act* would be relied on and applied by superior courts.

25. On the issue of whether the appellant was supported by at least 2,000 registered voters in a majority of the counties, the appellant submits that the 1st respondent, having made a finding that he was compliant in 24 counties, could not place unspecified and unidentified additional administrative arrangements to undermine his right under article 83. It is argued that neither the respondents nor the Court of Appeal were able to point out which of the appellant's county lists had illegible identification cards or even more, which administrative measures were not complied with and in which county.

26. It is his submission that the appellate court failed to consider uncontroverted evidence that his running mate's nomination certificate was submitted on the day of nomination,

but instead the appellate court proceeded on a tangent as if the running mate nomination certificate was never submitted at all.

27. On the issue of impropriety and conflict of interest the appellant submits that the Court of Appeal misapplied the provisions of article 10 and 50 on principles of natural justice and fair hearing when it failed to consider that the presiding member of the 3rd respondent (George Murugu) was biased as he was the 1st respondent's personal lawyer. By the 1st respondent appointing the presiding member of the 3rd respondent, he undermined the independence of the 2nd respondent as protected under article 249.

28. Lastly, the appellant faults the Court of Appeal for awarding costs against him in an appeal that had partially succeeded for reason that it goes against settled principles on costs. It is on the above submissions that the appellant asks the court to overturn the Court of Appeal's finding on costs.

b. 1st and 2nd respondents' case

29. In opposing the appeal, the 1st and 2nd respondents rely on their preliminary objection dated August 2, 2022 and filed on August 3, 2022 challenging this Court's jurisdiction; a replying affidavit sworn and filed on August 3, 2022 by Chrispine Owiye, the 2nd respondent's Director of Legal and Public Affairs, in response to the petition of appeal; and two sets of submissions in support of their preliminary objection and in opposition of the petition both filed on August 3, 2022.

30. It is the 1st and 2nd respondents' argument that the appeal does not raise any matter involving the interpretation or application of the Constitution as contemplated under article 163(4)(a) of the *Constitution* since the articles cited by the appellant were neither in issue nor decided on by the courts below. They aver that the appellant has not presented any grounds in support thereof.

31. It is urged that pursuant to section 22(2) of the *Elections Act* as read with regulations 47 of the *Elections (General) Regulations 2012*, the appellant was required to demonstrate that he was a holder of a degree by submitting to the Commission a certified copy of the degree certificate, which he failed to do.

32. The 1st and 2nd respondents object to the appellant's reliance on the impugned precedent on grounds that: regulation 47 (7) was amended post 2017 to introduce the requirement of certified educational qualification; the impugned precedent was set prior to the said amendment; the issue in the aforesaid precedent was 'who is a graduate' as opposed to 'who is a holder of a degree certificate'; decisions cited were decisions of court of concurrent jurisdiction; and in any event, the 3rd respondent considered a more recent decision in the case of *Walter Ochonga Mong'are v Wafula Chebukati, IEBC & another*; HC Petition No

E318 of 2022 [2022] KEHC 10186 (KLR) which analyzed the issue at hand post the 2017-amendment.

33. On the issue of whether the appellant's nomination was supported by at least 2000 registered voters in a majority of the counties, it was the 1st and 2nd respondents' contention that the appellant's application for registration was non- compliant with article 137 (1) as read with section 23 of the *Election Act*. They contend that in the appellant's supporters' lists, there was mismatch of supporters and their identities; inconsistency between the electronically submitted copy and the hard copy; and were supported by illegible copies of identification documents.

34. As regards the appellant's running mate's nomination certificate, the 1st and 2nd respondents submit that pursuant to articles 148 and 137 of the *Constitution*, a presidential candidate as well as their running mate must be persons who qualify for nomination for election as President and consequently, clearance by the nominating political party was a prerequisite.

35. Concerning the issue of bias, it is submitted that a reasonable apprehension of bias of the 3rd respondent in the discharge of its mandate had not been met for reasons that: it was not true that George Murugu was a personal lawyer of the 1st respondent; the firm of George Murugu was one of the law firms enlisted in the panel of the 2nd respondent and only represented the 1st respondent in his capacity as the chairperson of the 2nd respondent; allegations of bias were an afterthought and not founded on any bona fide grounds; and in appointing George Murugu, the 1st respondent was at all times exercising his official functions under section 12 of the *IEBC Act* and section 52 of the *Interpretation and General Provisions Act* cap 2 of the Laws of Kenya.

36. It was consequently urged that the appellant's contestation has failed to meet the standards settled in *Gladys Boss Shollei v JSC & another* SC Petition 34 of 2014 [2018] eKLR (at para 53) and *Attorney General v Prof Peter Anyang Nyongo & 10 others*, EACJ Application No. 5 of 2007, to wit, that the circumstances must give rise to reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public that the judge will not exercise his/her mind to the case impartially.

c. 3rd respondent's case

37. The 3rd respondent in opposing the appeal relies on its grounds of objection to the petition of appeal and written submissions both dated and filed on 3rd August 2022 and August 4, 2022 respectively. The 3rd respondent agrees with the 1st and 2nd respondents that the appellant has failed to properly invoke the jurisdiction of this court under the provisions of article 163(4)(a) of the *Constitution*. It argues that in any event, the appellant also fails the criteria for certification as a matter of general public importance under article 163(4)(b), as he has

not been certified by this court or the Court of Appeal. In these circumstances, it is the 3rd respondent's submission that the appeal is incompetent, fatally defective and an abuse of the court's processes.

38. The only other issue the 3rd respondent submits on is the issue of bias. It is its argument that this issue does not constitute a question of constitutional interpretation and application appealable under article 163 (4) (a) of the *Constitution*. In any event, it submits that the Court of Appeal correctly found that nothing had been placed before it to meet the objective test in support of an apprehension that there was reasonable likelihood of bias.

D. Issues for Determination

39. First and foremost, the jurisdiction of this court has been brought to question by the respondents by way of preliminary objection and grounds of objection filed on their respective behalf. secondly, the cause of action of this matter arises from a pre-election dispute wherein the appellant sought to be registered as a presidential candidate in the general elections held on August 9, 2022. Acknowledging that the general elections were already conducted, the court during highlighting of the submissions on October 18, 2022 posed the question to the appellant's counsel as to what remedies he seeks from the court. It was his submission that they sought clarity on the law and that the remedies they seek are for posterity.

40. Having considered parties respective cases and their submissions thereof as well as the remedies sought, the issues that arise for determination before this court are:

    i. Whether this honourable court has jurisdiction to hear and determine the appeal under article 163(4)(a) of the *Constitution*;

    ii. Whether the Court of Appeal erred in dismissing the appeal; and

    iii. Whether the appellant is entitled to the remedies sought.

    In framing the above issues, we are conscious that should we find that we do not have jurisdiction, it may be unnecessary to proceed with the other issues as framed.

E. Analysis and Determination

i. Whether this honourable court has jurisdiction to hear and determine the appeal under article 163(4)(a) of the Constitution

41. The respondents argue that the appeal does not raise any matter involving the interpretation or application of the *Constitution* as stated under article 163(4)(a) of the *Constitution*. They aver that the articles cited by the appellant were neither in issue nor decided by the superior

courts and that the appellant has made mere allegations and does not present any grounds that can clothe this court with jurisdiction. It is their averment that the appeal does not qualify as an appeal as of right to invoke this court's jurisdiction under article 163(4)(a) of the *Constitution*. Then again, the 3rd respondent asserts that the appellant also fails the criteria for certification as a matter of general public importance under article 163(4) (b) for the reason that this matter has not been certified as such.

42. On the contrary, it is the appellant's position that the present appeal is proper before this court as it involves questions of interpretation and application of the *Constitution* since it touches on the enforcement of his political rights enshrined under article 38 and actualized under articles 83(3), 137(1), 99(1)(b) and 148(1) of the *Constitution*. The appellant submits that the appeal challenges the application of articles 10, 25, 38, 47, 50, 83, 88, 99, 137, 148 and 249 of the *Constitution* as well as section 22(2) of the *Elections Act*.

43. Jurisdiction is a preliminary issue that ought to be dealt with at the onset given that, without jurisdiction a court is obligated to down its tools as it does not have the power to adjudicate upon the proceedings before it. A court's jurisdiction normally emanates from either the *Constitution* or legislation or both. This court stated so in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* SC Application No 2 of 2011 [2012] eKLR as follows:

> "(68) A court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus, a court of Law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"

44. The Supreme Court's appellate jurisdiction is set out in article 163(4) of the *Constitution of Kenya* which states:

> "(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
>
> a. as of right in any case involving the interpretation or application of this Constitution; and
>
> b. in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

> (5) A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

45. This court has stipulated the confines of its jurisdiction under article 163(4)(a) of the Constitution in a plethora of its decisions. In *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, Sup Ct Petition No 3 of 2012; [2012] eKLR, a two-judge bench of this court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:

> "(28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."

46. Further, in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, Sup Ct Petition No 10 of 2013 this court stated as follows:

> "(37) In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*. ..."

47. In *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney- General & 2 others* Sup Ct Petition 45 of 2018 [2020] eKLR we held that it is not enough to invoke constitutional provisions in order to sustain an appeal to this court. We stated:

> "(62) We cannot over-emphasize the specialized nature of article 163(4)(a)'s appellate jurisdiction of this court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower court invoked specific constitutional provisions, that

fact alone is not enough for one to invoke and sustain an appeal before this court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the *Constitution*. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the court(s)'determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under article 163(4)(a) of the *Constitution*:

i. The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

ii. The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of *Constitution* interpretation and application.

iii. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the *Constitution* does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).

v. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)."

48. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Sup Ct App No 5 of 2014 [2014] eKLR we emphasized that at the very least where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, an appellant should demonstrate that the appellate court's reasoning and conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

49. It is therefore evident that the issues that this court would exercise its jurisdiction over pursuant to article 163(4)(a) of the *Constitution* are only issues involving the interpretation or application of the *Constitution*, which constitutional issues had been considered and determined by the superior courts. A question identified as involving interpretation or application of the *Constitution* thus must be one that was argued in the court of first instance and canvassed through the hierarchy of courts, at the Court of Appeal and finally in this court. Mere allegation by a party that a question of constitutional interpretation or application is involved does not automatically bring the appeal within the ambit of article 163(4)(a) of the *Constitution*, unless the party can show that the matter by virtue of the court's determination took a constitutional trajectory of interpretation and application.

50. The appellant is aggrieved by the decision of the 1st respondent, as affirmed by the 3rd respondent, rejecting his application to be registered as a presidential candidate in the elections scheduled for August 9, 2022 on account of failure to meet the requisite qualifications. His judicial review application was subsequently dismissed by the High Court and his appeal disallowed by the Court of Appeal.

51. Having perused the record before us, we note that at the High Court, the grounds set out in support of the Judicial Review Application were illegality, irrationality, unreasonableness, and bias. The appellant submitted that the 1st and 3rd respondents' actions were contrary to section 22(2) of the *Elections Act*, and that he had legitimate expectation that the respondents would apply the law and the *Constitution* including binding precedent. The trial Judge dismissed the application holding that judicial review does not concern itself with the merits of the decision but only on the decision-making process. For that reason, the learned judge found he had no jurisdiction to hear the matter as he could not look into the correctness or otherwise of the 3rd respondent's conclusion that the appellant had not satisfied the requirements to contest as a presidential candidate.

52. At the Court of Appeal, the issues framed for determination by the court were whether the appellant's application disclosed grounds for judicial review in the context of the nature of judicial review proceedings and whether, properly considered, the appellant's complaints were meritorious enough to warrant interfering with the decision of the 1st and 3rd respondents in finding the appellant as unqualified to contest in the elections scheduled for August 9, 2022.

53. In its determination, the Court of Appeal faulted the trial court for strictly constricting judicial review to the pre-2010 constitutional dispensation and for failing to see that the appellant's application revealed in sufficient detail grounds for judicial review which necessitated a decision from the court. The appellate court identified and determined the issues based on the grounds raised by the appellant for judicial review, and proceeded to make a determination on whether the complaints were meritorious enough to warrant interference by the court, specifically whether the appellant was qualified for registration as a presidential candidate in the elections scheduled for August 9, 2022.

54. Having identified that the genesis of the appeal is from a judicial review application at the High Court, we note that this court in *Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others*; SC Petition No 28 of 2014 [2015] eKLR stressed that by no means is this court an open forum for all cases from the appellate court on judicial review matters and that each appeal is to be considered on its merits on a case-to-case basis. We enunciated that only causes bearing a real constitutional issue can be heard by this court and a plain claim that a matter raises issues of interpretation or application of the *Constitution* does not suffice. We set out principles a party should comply with when appealing to the Supreme Court in a matter which has originated in the High Court by way of judicial review, as follows:

    i. Not all Judicial Review matters are appealable to the Supreme Court, as of right;

    ii. It is open to the party concerned to move the court on appeal under article 163(4)(b) of the *Constitution*, in which, the normal certification process applies;

    iii. Where such an appeal comes under article 163(4)(a), the petitioner is to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal;

    iv. The party concerned should demonstrate that the superior courts had misdirected themselves in relation to prescribed constitutional principles, and either granted, or failed to grant Judicial Review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional.

55. Based on the foregoing, the appellant having moved this court under article 163(4)(a) of the *Constitution*, we have to interrogate whether this appeal meets the criteria set out under the *Constitution* and the decisions set out above. The first question to answer therefore is whether the appellant has identified particular issues of constitutional interpretation and application, and secondly whether the issues were canvassed at the superior courts which progressed through the normal appellate mechanism so as to reach this court by way of appeal as of right and or demonstrated that the superior courts misdirected themselves in relation to prescribed constitutional principles. All these have to be further looked at in the context that not all appeals from judicial review satisfy this court's jurisdictional prerequisite.

56. The appellant is adamant that his appeal is as of right under article 163(4)(a) of the *Constitution* as it involves the interpretation and application of the *Constitution* and specifically articles 10, 38, 47, 27, 83, 88 and 249 of the *Constitution*. He avers that the decision of the Committee was challenged at the High Court seeking its intervention pursuant to its supervisory powers under articles 1, 2, 3, 10, 25, 27, 38, 47, 48, 50, 81, 88, 136, 137, 138, 165, 258 and 259 of the *Constitution*. It is the appellant's submission that the Court of Appeal in making its determination considered the provisions of articles 10, 38, 47, 50, 88, 137, 148 and 249 of the *Constitution*. He submits that application of article 10 was core in the determination of the dispute before the 3rd respondent. He adds that the appeal relates to the application of articles 10, 50, 88 and 249 of the *Constitution* as canvassed before the court.

57. To him, the key determination of the dispute is the application of the right to contest for public office under article 38 including article 83(3) of the *Constitution* which provides for the facilitation rather that denial of an eligible citizen of the right to vote or stand for election. He faults the Court of Appeal for failing to consider the import and effect of section 22(2) of the *Elections Act* and regulation 47 of *Elections (General) Regulations* 2012 as amended in 2017 as well as binding precedent.

58. As we noted in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) a question regarding the interpretation or application of the *Constitution* may arise from a multiplicity of factors and interrelationships in the various facets of the law, and the *Constitution* should be interpreted broadly and liberally so as to capture the principles and values embodied in it.

59. Evaluating the record, we discern that the appellant was partly successful with his argument on the extent of the jurisdiction of the court in relation to judicial review applications. This paved way for the appellate court to proceed to analyse the merits of the decision by the 1st and 3rd respondents, in exercise of its powers as the first appellate court to reprise

the evidence. In addressing itself to the crux of the appellant's contention relating to his qualification to contest as a candidate, the appellate court addressed itself to the import of the previous decisions in *Janet Ndago Ekumbo Mbete v IEBC & 2 others* (*supra*) rendered on March 15, 2013 based on section 22(2) of the *Elections Act* as read with regulation 47(1) of the *Elections (General) Regulations* as they stood in 2013. The court also took into account the decision in *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others* [2013] eKLR and the amendment of regulation 47(1) by Legal Notice No 72 of 2017 and the more recent judgment rendered on June 30, 2022 in *Walter Onchonga Mongare v. Wafula Chebukati & 2* (*supra*).

60. In addition, on the mismatch of the appellant's supporters and their identities, inconsistency between the electronically submitted copy and the hard copy and had illegible copies of identification documents, the Court of Appeal found that:

> " There is no dispute that article 137(1) of the Constitution and section 23 of the *Elections Act* expressly demand that to be qualified for nomination, a presidential candidate's bid must be supported by not fewer than 2,000 voters in a majority each of the 47 counties. It is absolutely clear to us that read together, the concern of article 137(1), section 23 and regulation 23, is not a mere list of names of supporting voters. In addition to the list of names of supporting voters, the list must contain their signatures, identity card or passport numbers, in both hard and electronic copies. The lists are also required to be serially numbered and accompanied by copies of the identification documents of the supporting voters...
>
> We are not persuaded that this argument has any merit. A reading of article 137(1), section 23 and regulation 18 leaves no doubt in our minds that the purpose of these provisions is to ensure that a presidential candidate is supported by the prescribed number of genuine and verifiable voters in the prescribed number of counties. The concern is not production of a mere numerical list of names, even if they are just ghost voters. The law seeks to avoid manufactured list of non-existent supporters and that is why it requires, in addition to names of the supporters, their signatures and copies of identification documents. ..."

61. On the issue of the appellant's running mate's nomination certificate, the appellate court held:

> " 76. Article 137(1)(c) is clear enough and does not require further elucidation. To qualify for nomination for election as President, and therefore as a running mate, the running mate must be nominated by a political party.

> 77. The second noteworthy feature about article 148 is that of the four qualifications set out in article 137(1), it exempts from application to the running mate only the requirement in article 137(1)(d) for nomination by not fewer than 2000 voters from each of a majority of the counties. The express exclusion of article 137(1)(d) means that to qualify for nomination by the presidential candidate as a running mate, the running mate must satisfy the other three requirements in article 137(1), namely, be a citizen by birth, be qualified to stand for election as a member of Parliament and be nominated by a political party or be an independent candidate."

62. Lastly, on the issue of bias, the Court of Appeal's finding was that the appellant's allegations relating to articles 88 and 249 of the *Constitution* on the functions and independence of the 2nd respondent was no more than a bland assertion unsupported by material evidence.

63. On our part, it is evident that the Court of Appeal addressed each of the appellant's grievances. The main grievance, in our view, is the qualification of the appellant based on section 22(2) of the *Elections Act* and as read with regulation 47(1) of the *Elections (General) Regulations*. The court also made reference to article 137(1), section 23 and regulation 23, regulation 18 ad article 148. While the said provisions and grievances by the appellant are underpinned on article 38 and 83(3) of the *Constitution*, the gravamen of the dispute in our view had nothing to do with the interpretation or application of the *Constitution* but rather a factual exercise by the superior courts below to evaluate the appellant's compliance. None of the provisions of statute are by themselves under challenge.

64. Although the appellant cites several provisions of the *Constitution*, he has not set out, to any extent and to our satisfaction, the manner in which the superior courts interpreted and applied the *Constitution* one way or the other. It cannot thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the *Constitution* to therefore warrant an appeal to this court under article 163(4)(a) of the *Constitution*. The appellant seems to be inviting us to reprise the evidence and be persuaded as to make a conclusion that resonates with his. This is an invitation that we must decline.

65. As we held in *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others*, [2017] eKLR, and Petition No 4 of 2015 and *Paul Mungai Kimani & 2 others v Kenya Airports Authority & 3 others* [2021] eKLR, it is not granted that whenever the Court of Appeal mentions a provision of the *Constitution* in its decision, the matter under consideration automatically invokes this court's appellate jurisdiction under article 163(4)(a) of the *Constitution*. In any event, the *Constitution* is the supreme law of the land and all

decisions have to abide by and follow it. Hence, a mention of the *Constitution* by the court when making a determination will not always clothe the matter with constitutional issues.

66. Echoing our position in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* SC Petition 2 of 2016 [2018] eKLR, the appellant having not sustained a case that raises any constitutional issues, their interpretation or application, the court is not vested with the jurisdiction to hear and determine the present appeal pursuant to the provisions of article 163(4)(a) of the *Constitution*.

67. Consequently, it serves no purpose to address ourselves to the remaining issues. Despite asking us to determine this matter for the sake of posterity, the appellant has not shown of the existence of any constitutional moment to be seized and the extent of such moment. The provisions of the *Constitution* not being in contention, qualifications and nomination of candidates will continue to be addressed as and when they arise based on peculiar circumstances obtaining.

68. On the issue of costs, we are not persuaded to make any order for costs against any of the parties in this matter, the matter in issue is of the nature of public interest.

69. We thank all counsel for their input, research and presentation in the course of this matter.

ii) Orders

69. In the end, we make the following orders:

    1. The 1st and 2nd respondents' preliminary objection dated August 2, 2022 is upheld.

    2. The petition of appeal dated July 29, 2022 and filed on August 1, 2022 is hereby struck out.

    3. Each party shall bear their own costs.

    It is so ordered.

Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (27 January 2023) (Judgment)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu & W Ouko, SCJJ

Neutral citation: [2023] KESC 3 (KLR)

Constitutional Law *- fundamental rights and freedoms - freedom from torture and cruel, inhuman or degrading treatment or punishment - nature of inhuman or degrading punishment or treatment - whether inhuman or degrading punishment or treatment had to be inflicted for a specific purpose for it to be established - whether it was mandatory to exhibit any physical injuries or medical reports to establish existence of psychological/traumatic effect in a claim of violation of fundamental rights and freedoms - Constitution (repealed), section 74(1).*

Constitutional Law *- fundamental rights and freedoms - timelines for filing claims of violation of fundamental rights and freedoms - claim that appellants did not file claims of violation of fundamental rights and freedoms in the early 1990s due to a lack of confidence in the Judiciary under the previous constitutional dispensation - nature and rationale of transitional justice - whether there was limitation of time in matters relating to violation of rights under the Constitution - whether the Constitution applied to claims of violation of rights and freedoms before it came into force.*

Evidence Law *- burden and standard of proof - burden and standard of proof in an alleged threat or violation of rights and freedoms - who bore the burden and what was the standard of proof in an alleged threat or violation of rights and freedoms - Evidence Act, cap 80, section 107.*

Civil Practice and Procedure *- appeals - appeals to the Supreme Court - appeals as of right in matters involving the interpretation or application of the Constitution - what were the factors to consider when determining the appellate jurisdiction of the Supreme Court as of right in a matter involving the interpretation or application of the Constitution - Constitution, article 163(4)(a).*

Brief facts

On February 28, 1992, a group of women, mostly relatives of political prisoners, gathered at Uhuru Park to participate in a hunger strike, demanding the release of those imprisoned for politically instigated offences. The appellants claimed they were among the demonstrators and alleged that on March 3, 1992, they were violently attacked by over 100 police and GSU officers. They continued their protest at All Saints Cathedral Church until January 19, 1993, when the last political prisoners were released. The appellants further alleged that between March 4, 1992, and January 19, 1993, they faced repeated assaults by police. The 1st appellant claimed that police had previously destroyed three of her houses between 1986 and 1988, with one parcel of land being re-allocated to a senior government official. They did not seek judicial redress at the time due to a lack of confidence in the judiciary but, following the 2010 Constitution, they filed petitions in the High Court, asserting that their rights to freedom from torture, arbitrary deprivation of liberty, and protection from violence were violated by police and GSU officers.

The High Court found that the appellants had not given any reasonable explanation or justification for the delay in filing their petitions and that they had not established their allegations of torture; and more so, since there were no medical records or treatment notes to substantiate their claim of being tortured over a long period. The court also held that the 1st appellant had not proved ownership of the properties she claimed had been demolished. Aggrieved, the appellants filed appeals in the Court of Appeal. The Court of Appeal dismissed the appeals and held that the appellants had not adduced any tangible evidence to support the allegations of torture or violation of the 1st appellant's right to property. Further aggrieved the appellants filed the instant consolidated appeals.

Issues

i. Whether there was a limitation of time in matters relating to violation of rights under the Constitution.
ii. What was the nature and rationale of transitional justice?
iii. Whether the Constitution of Kenya, 2010 applied to claims of violation of rights and freedoms before it came into force.
iv. What was the nature of inhuman or degrading punishment or treatment and whether it had to be inflicted for a specific purpose for it to be established?
v. Whether it was mandatory to exhibit any physical injuries or medical reports to establish the existence of psychological/traumatic effects in a claim of violation of fundamental rights and freedoms.
vi. Who bore the burden and what was the standard of proof in a claim of alleged threat or violation of rights and freedoms?
vii. What were the factors to consider when determining the appellate jurisdiction of the Supreme Court as of right in a matter involving the interpretation or application of the Constitution?

Held

1. The recognition, promotion, and protection of human rights were essential to a democratic state, as reflected in the Constitution, which embedded human rights within Kenya's national values and the Bill of Rights. However, the mere reference to article 163(4)(a) of the Constitution did not automatically grant jurisdiction to the court. A litigant had to show how the appeal involved the interpretation and application of the Constitution and that those issues were addressed in the lower courts. Where no specific constitutional provisions were identified, it was necessary to demonstrate that the Court of Appeal's reasoning and conclusions involved constitutional interpretation and application. The instant matter centred on the interpretation and application of the Bill of Rights.
2. The two superior courts below affirmed the position that the Limitation of Actions Act (cap 22) did not apply to causes founded on violation of rights and freedoms. There was no limitation of time in matters relating to violation of rights under the Constitution which were evaluated and decided on a case-by-case basis.

3. A court was entitled to consider whether there had been an inordinate delay in lodging a claim of violation of rights. It was on that basis that the two superior courts below held that claims of violation of human rights had to be filed in court within a reasonable time. Where there was a delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court.
4. The idea of transitional justice connoted the broad range of mechanisms, means or modes through which a society confronted the wrongdoings from its past. Its objective being to obtain truth and justice regarding the past so as to ensure the promotion and protection of the rule of law and durable peace going into the future.
5. The need to confront and silence the ghosts of past wrongs or historical injustices was relevant in the Kenyan context. That was in light of Kenya's history which was littered with incidences of gross violations of human rights and other atrocities that occurred during the colonial era and continued in the post-independence era. Further, victims of such abuses were never granted an opportunity to obtain redress and justice during that period.
6. The golden thread that connected the appellants' claims of violation of their rights was that they were alleged to have taken place during a period which had been recognized as repressive. In that, during that period, the State grossly abused the rights and freedoms of the critics of the Government of the day. By their nature, those claims were founded on alleged past wrongs that called upon the law and courts to provide a transformative response. The appellants' claims qualified as falling within the category of transitional justice claims.
7. Transitional justice claims were context-sensitive. Courts ought to be particularly sensitive to the reasons adduced for the delay. At the same time, courts should balance the reasons for delay with the likely prejudice a respondent could face in defending the claim in line with the right to fair trial. Such an approach emerged from the comparative lesson as could be gleaned from jurisprudence from Kenya's superior courts and other jurisdictions.
8. Transitional moments could be long-drawn and there were no clear-cut dates when a transition could be said to have run its full course. Especially, taking into account the tendency for re-irruptions in the form of renewed quests for justice. The late or recurring pursuit for justice were a distinctive motif of the quest for justice in transitional contexts. In other words, a renewed or late quest for accountability and justice after the initial burst of efforts for justice was a phenomenon that was inherent in transitions. The persistence of the appellants and other litigants to get justice after other claimants had lodged similar claims was not something unique to the appellants as it was a universal phenomenon that was evident in the quest for transitional justice and accountability.
9. The appellants' claim that they did not have faith in the pre-2010 Judiciary ought to be interrogated from the overarching context of the transition from the repressive to the post-2010 era. Courts during the repressive era were generally notorious for their abject failure to protect victims of human rights violations. Though the process of judicial reforms and making the Kenyan State human rights friendly began in 2003, that process was not

concluded until the constitutional reforms in 2010. That included the process of vetting judges and magistrates which was a transitional justice mechanism to make the Judiciary fit as a custodian of the rule of law, democracy and human rights. Indeed, that partly explained why the clamour for judicial reforms was part of the larger constitutional reform package.

10. The Constitution explicitly envisaged redress for historical injustices that occurred during the repressive era. In light of the dictate of article 27(1) of the Constitution on equal protection and equal benefit of the law, all victims of historical injustices had to be treated equally and afforded an equal opportunity for redress. That chimed with the demands for harmonious interpretation of the Constitution.

11. Based on the context of Kenya's democratic transition, the appellants' explanation for the delay to the extent that it was attributed to a lack of faith in the pre-2010 Judiciary was plausible. That was because the 2010 transition required the Kenyan State and society to undertake a great transformation, involving the creation of new institutions and anchoring them in a new set of values and principles, which were in total contrast to those that so far had prevailed.

12. The appellants' contention that they had no faith in the pre-2010 Judiciary to render justice regarding alleged violation of rights attributed to the State could not be faulted in light of the history. As for the additional explanation of impecuniosity, the court was unable to entertain the same since it was raised for the first time before the instant court and the superior courts below did not have an opportunity to address their minds on the same.

13. There was a public interest element in allowing victims of alleged past gross human rights violations to access courts; that was, serving justice was the most effective insurance against future repression. A judicial trial served to send a strong expression of formal disapproval of the gross abuse of human rights. It also functioned to re-commit State institutions and persuade the general citizenry of the importance of human rights in a polity.

14. Failure to ensure access to justice could send the wrong signal that judicial *imprimatur* had been given to the historical wrongs. Such a stance would encourage not deter potential violators of rights. It would also send the signal to the public that they could be complicit in the violation of rights without consequences attached to the perpetration of such atrocities. That was informed by the reality that failure to enforce freedoms and rights vitiated their authority, sapping their power to deter proscribed conduct.

15. Whether a claim for violation of rights had been instituted within a reasonable time was to be determined based on the peculiar circumstances of each case. The delay in filing the appellants' claims was understandable given the circumstances of the matter.

16. Constitutions, like other legal instruments, were generally prospective in application unless there was a clear textual marker indicating that retrospective application of a provision was contemplated. Consequently, since the events in issue were alleged to have taken place before the Constitution of Kenya, 2010 came into force, it was the repealed Constitution which was applicable. Moreover, the rights and freedoms alleged to have been infringed were

protected in both the repealed Constitution and the Constitution of Kenya, 2010 albeit with some minor variations in formulation.

17. Section 75 of the repealed Constitution protected from deprivation of property except where stipulated conditions for compulsory acquisition were satisfied. That constitutional provision embodied the fundamental principle that a person's property could not be expropriated or taken away arbitrarily.

18. A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned, erected, or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the Evidence Act on the burden of proof.

19. Aside from bare allegations, the 1st appellant did not adduce even an iota of evidence to back her claims. Even in situations where a respondent did not file or tender evidence to counter the petitioner's case, the petitioner bore the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard was met would depend on whether a court based on the evidence was satisfied that it was more probable that the allegation(s) in issue occurred. The 1st appellant's evidence or lack of it, for that matter, could not be the basis of a finding that it was more probable than not that her right not to be deprived of property was infringed.

20. The incident at the Freedom Corner on March 3, 1992, drew widespread press coverage nationally and internationally as well as condemnation across the globe. It was a matter that the court could comfortably take judicial notice of as a matter of general notoriety. The provisions of sections 59 and 60 of the Evidence Act stipulated circumstances in which courts could take judicial notice of facts requiring no proof.

21. The Freedom Corner incident took place. Nonetheless, the burden of proof lay with the appellants to prove on a balance of probabilities that they were not only at Freedom Corner but were also subjected to torture, inhuman and degrading treatment during the demonstrations. Weighing the evidence adduced before the High Court, the appellants' proved their participation in the subject protest/assembly at Freedom Corner to the requisite standard.

22. The court took the position that it should strive to interpret and develop constitutional concepts from an indigenous prism based on Kenya's historical experience. However, sight should not be lost of the fact that the court was interpreting prohibitions recognized in international human rights law and other comparable constitutions. Therefore, the court could draw valuable insight from their interpretation of the body of international human rights law and comparative jurisprudence.

23. The exact boundaries between torture and other forms of inhuman or degrading punishment or other treatment were often difficult to identify and could depend on

the particular circumstances of the case as well as the characteristics of the particular victim. Nonetheless, both terms covered mental and physical ill-treatment that had been intentionally inflicted by or with the consent or acquiescence of State authorities.

24. Inhuman or degrading punishment or treatment referred to ill-treatment which did not have to be inflicted for a specific purpose. However, an intention to expose individuals to conditions which amounted to or resulted in the ill-treatment had to exist. Exposing a person to conditions reasonably believed to constitute ill-treatment would entail responsibility for its infliction. Further, degrading treatment could involve less severe pain or suffering than torture; and would usually involve humiliation and debasement of the victim. The essential elements which constituted ill-treatment not amounting to torture would therefore be reduced to the intentional exposure to significant mental or physical pain or suffering.

25. There was an evidential gap which was not surmounted by the appellants regarding whether they were arrested and subjected to torture. However, taking into account the violent nature of the disruption of the subject protest/assembly, it was more likely than not that the whole episode had a psychologically traumatic effect on the appellants, who were at the *locus in quo*.

26. Although the appellants did not exhibit any physical injuries or medical reports, the whole incident had a psychological/traumatic effect on them. That could be equated to inhuman treatment which was a violation of section 74(1) of the repealed Constitution. That was because the respondent did not give any justifiable reason(s) whatsoever why it was necessary to violently disrupt and disband the protests by the appellants who were harmless. To that extent, the appellants' right to freedom of association and assembly was interfered with and due to the violent methods employed by the police, that amounted to a violation of their human rights which were duly protected under section 74(1).

27. Crafting of remedies in human rights adjudication went beyond the realm of compensating for loss as it was principally about vindicating rights. Though the appellants did not provide any evidence of the loss they could have suffered due to the violation of their rights and freedom from inhuman treatment, it was important for the court to vindicate and affirm the importance of the violated rights.

28. In awarding damages, courts exercised a very broad, open-ended remedial discretion taking into account what was just, fair and reasonable in the circumstances of the case. In the instant case, the damages the court awarded should not only serve to enhance the dignity of the appellants but also be public recognition of the wrong done to them given the historical context of the case.

29. The appellants' counsel alluded to the fact that the High Court exhibited bias or prejudice against the appellants. That issue was neither raised at the Court of Appeal nor did it form the grounds of appeal to the instant court. It was raised for the first time in counsel's oral submissions before the court. As such, the instant court was devoid of jurisdiction to entertain the same.

Consolidated appeals partly allowed.

Orders

i. *The judgments of the Court of Appeal dated June 28, 2019 and August 6, 2019 in Civil Appeal Nos 188, 189 and 190 of 2017 were set aside.*

ii. *The judgments of the High Court dated April 15, 2018 in HC Petition Nos 196, 197 and 209 of 2013 were set aside.*

iii. *A declaration was issued that the appellants' petitions in the High Court were lodged without inordinate delay due to the historical context under which the violations claimed occurred.*

iv. *A declaration was issued that the appellants rights and freedom from inhuman treatment as protected under section 74(1) of the repealed were violated by the Government of Kenya through the actions of its agents and/or servants (police officers and GSU officers).*

v. *The Government of Kenya was to pay damages assessed at Kshs 2,500,000.00 to each of the appellants in the consolidated appeal.*

vi. *Appellants awarded costs for the proceedings in the High Court, Court of Appeal as well as the Supreme Court.*

Citations

Cases

Kenya

1. *Gacheru, Irene Wangari & 6 others v Attorney General* Constitutional Petition 376 of 2014; [2017] eKLR - (Mentioned)
2. *Gichohi, Gerald Juma & 9 others v Attorney General* Petition 587 of 2012; [2015] eKLR - (Explained)
3. *Githiru, Njuguna v Attorney General* Civil Appeal 253 of 2017; [2020] KECA 929 (KLR) - (Mentioned)
4. *Gwer, Samson & 5 others v Kenya Medical Research Institute & 3 others* Petition 12 of 2019; [2020] eKLR - (Mentioned)
5. *Kinuthia, Kennedy & 3 others v Attorney General* Petition 375 of 2014; [2017] eKLR - (Mentioned)
6. *Kinuthia, Milka Wanjiku & 2 others v Attorney-General* Petition 281, 282, 283 & 337 of 2011; [2013] eKLR (Consolidated) - (Mentioned)
7. *Kioko, Wellington Nzioka v Attorney General* Civil Appeal 268 of 2016; [2018] KECA 858 (KLR) - (Mentioned)
8. *Koigi, Jane Nduta v Attorney General* Petition 115 of 2018; [2019] KEHC 1757 (KLR) - (Mentioned)
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 - (Mentioned)
10. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)

11. *Munya v Kithinji & 2 others* Petition 2B of 2014) [2014] KESC 38 (KLR); Petition 2B of 2014; [2014] 2 KLR 58 - (Mentioned)
12. *Muriithi, Deynes & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] eKLR - (Mentioned)
13. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR); [2013] 1 KLR 685- (Followed)
14. *Republic v Simon Wambugu Kimani & 20 others* Criminal Revision 1 of 2015; [2015] KEHC 5499 (KLR) - (Explained)
15. *Safepak Limited v Henry Wambega & 11 others* Civil Appeal 8 of 2019; [2019] KECA 510 (KLR) - (Followed)
16. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Explained)
17. *Seroney, Zipporah & 5 others v Attorney General* Constitutional Petition 500 of 2013; [2020] KEHC 7072 (KLR) - (Mentioned)
18. *Steyn, Hermanus Phillipus v Giovanni Gnecchi-Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)

United Kingdom

1. *A v Hoare* [2008] 1 AC 844 - (Explained)
2. *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 - (Explained)
3. *Miller v Minister of Pensions* [1947] 2 All ER 372 - (Explained)
4. *Mutua & others v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) - (Explained)

India

Laxmi Raj Shetty & another v State of Tamil Nadu 1988 AIR 1274; 1988 SCR (3) 706 - (Applied)

Canada

Vancouver (City) v Ward 2010 SCC 27; [2010] 2 SCR 28 - (Explained)

Regional Court

1. *Attorney General of the Republic of Uganda & another v Omar Awadh & 6 others* Appeal 2 of 2012; [2013] RC 7 (KLR) - (Mentioned)
2. *Barrios Altos v Peru* Ct HR (ser C) No 75, 2(a) (Mar 14, 2001) - (Explained)
3. *Ireland v United Kingdom* Application No 5310/71); Ser A, No 25 - (Explained)

Statutes

Kenya

1. Constitution of Kenya (Repealed) section 74(1); 75 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 15, 20 - (Interpreted)
3. Constitution of Kenya articles 23(3); 25(a); 27(1); 29(a) - (f); 39(3); 40(1)(a); 67(2)(e); 159(2)(d); 163(4)(a) - (Interpreted)

4. Evidence Act (cap 80) section 35, 59, 60(1)(o)(2); 107; 109 - (Interpreted)
5. Land Laws (Amendment) Act, 2016 (Act No 28 of 2016) In general - (Cited)
6. Limitation of Actions Act (cap 22) In general - (Cited)
7. National Land Commission Act (cap 281) section 15 - (Interpreted)
8. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)

Texts

1. Branch, D., (Ed) (2011), *Between Hope and Despair, 1963-2011* New Haven: Yale University Press p 189
2. Collins, C., (Ed) (2011), *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* Pennysylvania: Pennsylvania State University Press 1st Edn pp 21-22
3. Kanogo.T., (Ed) (2020), *Ohio Short Histories of Africa: Wangari Maathai* Athens: Ohio University Press pp 128 - 135
4. Murphy, C., (Ed) (2017), *The Conceptual Foundations of Transitional Justice* Cambridge: Cambridge University Press p 1
5. The Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission., (2003), *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* Nairobi: Government Printer p19
6. Webber, J., (Ed) (2012), *Forms of Transitional Justice* Baden - Baden: Nomos Vol 51 pp 98–128

Instruments

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 article 1(1); 16

Advocates

Mr. Gitau Mwara for the appellants
Ms. Deborah Robi for the respondent

January 27, 2023, the Court delivered the following Judgment:

A. Introduction

1. It is obvious to state that recognition, promotion and protection of human rights is an integral part of a democratic state. It is precisely for that reason that the 2010 *Constitution* not only proclaims that human rights constitute a fundamental cog in the country's system of national values and principles of governance, but also expressly decrees and entrenches the bill of rights. The crux of this consolidated appeal revolves around the bill of rights and more specifically, two broad issues; namely, whether there is time limitation for seeking redress for historical human rights violation and the requisite threshold for establishing a claim of violation of a right or fundamental freedom.

B. Background

i. Factual history

2. Kenya's pre-independence and post-independence history is littered with incidences of gross violation of human rights, most of which went without redress under the previous constitutional dispensation. Of significance to the matter at hand, is the period between the late 1980s and early 1990s that was characterized by agitation for political pluralism in the then one-party state. At that time, quite a number of persons were incarcerated for politically instigated offences ranging from treason, sedition, to being members of unlawful organisations. As a result, on February 28, 1992 a group of women, most of whom were related to persons incarcerated for those offences, referred to as "mothers of political prisoners" together with their supporters congregated and camped at a section of Uhuru Park, popularly dubbed "freedom corner". The mothers and their supporters participated in a demonstration by going on a hunger strike to urge for the release of the then political prisoners. All of the six appellants herein contended that they were amongst the said demonstrators.

3. According to the appellants, they alleged that, to their utter surprise on March 3, 1992 while still going on with their peaceful demonstration, they were brutally attacked and assaulted by over 100 police officers and General Service Unit (GSU) officers. They claimed that they were harassed, arrested, taken to various police stations and thereafter, ferried to their rural homes with a warning not to go back to Nairobi. The caution, as per the appellants, fell on deaf ears as the demonstrators were determined to see their cause through. About one to five days later, all the demonstrators found their way back in Nairobi. This time around, they continued with their demonstration at All Saints Cathedral Church where they were holed in a bunker, until January 19, 1993 when the last lot of the political prisoners were released. However, the appellants contended that from time to time between March 4, 1992 and January 19, 1993 police officers continued to brutally assault them.

4. As far as the appellants were concerned, the brutality unleashed upon them was unwarranted because firstly, prior to the demonstrations a petition had been presented to the Attorney General for the release of the political prisoners. Secondly, they were unarmed and remained peaceful throughout the demonstrations. Furthermore, the brutality resulted in serious physical and psychological injuries to the appellants.

5. In addition, the 1st appellant averred that prior to the aforementioned demonstrations, she had declined to accede to the then government's demand to persuade her son, Koigi Wa Wamwere, who had then sought political refuge in Sweden to return to Kenya. As a result, in June 1986, her house which was situated at Bahati forest settlement was razed to the

ground by police officers in the company of the then councillor of the area. Later, in October 1987, another house she had erected on her parcel of land described as Plot No 308 at Migogo Chonjo was also demolished and the parcel re-allocated to a senior government official. Likewise, in August 1988, her other house, situate on a parcel of land at Mboroni was similarly demolished.

ii. Litigation history

a. At the High Court

6. Though the appellants were convinced that their rights and fundamental freedoms had been violated, they opted not to seek judicial redress at the material time. This, they claimed, was because they lacked confidence in what they referred to as 'the old judiciary' under the previous constitutional dispensation. Consequently, after the promulgation of the current *Constitution* they filed constitutional petitions in the High Court being; Petition No 196 of 2013, at the instance of the 1st appellant; Petition No 197 of 2013 at the instance of the 2nd, 3rd and 4th appellants; and Petition No 209 of 2013 at the instance of the 5th and 6th appellants. All of the three petitions were dated April 15, 2013 and substantially identical in content and prayers sought.

7. The appellants contended that their fundamental right to freedom from torture and cruel, inhuman or degrading treatment or punishment (article 25(a)) as well as their right not to be, deprived of freedom arbitrarily or without just cause (article 29(a)) were violated. Equally, their right not to be subjected to any form of violence from either public or private sources (articles 29(c)), tortured in any manner whether physical or psychological (article 29(d)), and treated or punished in a cruel, inhuman or degrading manner (article 29(f)) were infringed by police and GSU officers. As for the 1st appellant she added that her right to own property in any part of Kenya (article 40(1)(a) and (b)) and to reside anywhere in Kenya (article 39(3)) was violated by government officers and/or agents. They further urged that the aforementioned rights and freedoms were previously protected under sections 74 and 75 of the repealed *Constitution*. In support of their claims, the appellants averred that they would rely on reports published in the "society magazine" of March 23, 1992, which covered what had transpired prior to and during the demonstrations.

8. Towards that end, the appellants in their respective petitions sought substantially similar orders, *inter alia*: -

   i. A declaration that the appellants fundamental rights and freedoms were contravened and grossly violated by police officers and GSU officers who were Kenyan government servants, agents and employees on diverse dates and time from March 3, 1992 up to January 19, 1993.

ii. A declaration that the appellants are entitled to payment of general damages, exemplary and moral damages and compensation for the violations and contravention of their fundamental rights and freedoms under article 23(3) of the *Constitution*.

iii. General damages, exemplary damages for the torture of each appellant.

In addition, the 1st appellant in her petition prayed for-

i. A declaration that her fundamental rights and freedoms were contravened and grossly violated by police officers and GSU officers who were Kenyan government servants, agents and employees on diverse dates and time when her houses were demolished and she was evicted from her plots in 1986, 1987 and 1988.

9. In response, the Attorney General filed a replying affidavit sworn by one Philip Ndolo, the then Deputy Director of Operations in the Kenya Police Service,in all of the three petitions. Similarly, all the affidavits, essentially denying the appellants allegations, were copied and pasted. It was deposed that since the *Constitution* did not apply retrospectively, the appellants could only rely on the repealed *Constitution*; that the appellants were neither taken into police custody nor did they disclose the identities of the police officers who allegedly contravened their rights; that the newspaper articles that the appellants relied on were not admissible; and that there was no evidence of the alleged torture. In any event, it was deposed that the Attorney General would be prejudiced in defending the petitions since the alleged events took place more than 20 years prior to filing of the petitions.

10. All three petitions were disposed of by way of affidavit and oral evidence as well as written submissions. It is useful to note, for reasons that will become clear in the subsequent portions of this judgment, that only the appellants tendered oral evidence while the Attorney General called no witnesses. Ultimately, the High Court, Lenaola, J, (as he then was) rendered three separate judgments, all of which were dated April 15, 2016, and dismissed the three petitions. In doing so, the High Court identified two key issues for determination; whether the appellants' fundamental rights and freedoms had been violated; and if so, what remedies were available. In addition, the High Court observed that there was a preliminary issue that had to be addressed; that is, whether the petitions were time barred having been lodged over 20 years after the alleged incident in question occurred.

11. Beginning with the preliminary issue, the learned judge observed that the general consensus in judicial pronouncements was that limitation of time cannot be imposed in matters where violation of rights has been alleged. The learned judge also took cognisance of the historical anomalies in addressing past human rights violation during the volatile period of one-party rule. However, the learned Judge expressed the view that it was imperative for a petitioner to demonstrate justification for any prolonged delays in filing a petition

seeking redress for past violations. Especially, in light of the fact that avenues and mechanisms for addressing such violations were already in existence as early as the year 2003 after the oppressive regime was removed from power. In that regard, the learned Judge found that none of the appellants gave any reasonable explanation or justification for the delay in filing their petitions. Nonetheless, the learned judge went on to hold that the newspaper articles the appellants relied on were inadmissible by virtue of section 35 of the *Evidence Act*, cap 80 Laws of Kenya. The appellants had not established their allegations of torture; and more so, since there were no medical records or treatment notes to substantiate their claim of being tortured over a long period of time. Equally, the 1st appellant had not proved ownership of the properties she claimed had been demolished.

b. At the Court of Appeal

12. Aggrieved with the High Court's decision, the appellants filed three appeals in the Court of Appeal, that is, Civil Appeal Nos 188, 189 and 190 of 2017. The three appeals were premised on the same 16 grounds of appeal. The grounds are frolic and repetitive. We therefore summarize them as follows: the learned Judge erred by, imposing time limitation in matters relating to violation of human rights and fundamental freedoms; finding that there was insufficient evidence to establish violation of the appellants' freedom from torture, inhuman and degrading treatment as well as the 1st appellant's right to property; and declining to award damages sought by the appellants.

13. The appellants argued that they had given a reasonable explanation for the delay in lodging their petitions. Besides, neither the repealed nor the current Constitution prescribes a time limitation for lodging claims seeking redress for violations of rights. As such, the appellants submitted, the High Court in imposing limitation acted contrary to the *Constitution* and International Human Rights Law. As far as the appellants were concerned, the fact that the Attorney General did not call any witness to contradict their affidavit or oral evidence and failed to cross examine them, rendered their evidence uncontroverted. They claimed that their evidence comprised of eye witness accounts corroborated by the reports in the society magazine, which had equally not been challenged or rebutted.

14. Furthermore, the appellants faulted the learned Judge for not taking guidance from similar decisions/precedents relating to the freedom corner incident. In that, courts therein had found that there were violations of human rights and awarded damages to the respective petitioners. The appellants cited one of the said precedents as *Milka Wanjiku Kinuthia & 2 others v Attorney-General*, HC Petition No 281 of 2011 as consolidated with Petition Nos 282, 283 and 337 of 2011; [2013] eKLR, which apparently had been determined by the same learned Judge.

15. In opposing the appeals, the Attorney General maintained his position as postulated in the High Court save to add that, the appellants had misinterpreted the learned judge's finding on the issue of limitation of time. According to the Attorney General, the learned judge categorically held that no limitation could be imposed in matters where violation of rights has been alleged. Rather, the learned judge expressed the view that determination of whether delay in lodging a claim for violation of rights is inordinate is on a case by case basis.

16. The three appeals were heard by the same bench of the Court of Appeal (Warsame, Kiage and Murgor, JJA) which delivered separate judgments in respect of each appeal. Upon considering the grounds of appeal, the arguments in support and opposition thereof, the Court of Appeal held that firstly, the appellants had misapprehended the learned judge's finding on the issue of limitation of time. Secondly, there was no justification for interfering with the learned judge's finding that no reasonable explanation had been given for the appellants delay in lodging their petitions. The Court of Appeal concluded that the learned Judge had properly addressed his mind regarding the requisite burden of proof in finding that the appellants had not adduced any tangible evidence to support the allegations of torture or violation of the 1st appellant's right to property. In the end, the Court of Appeal dismissed the three appeals.

c. At the Supreme Court

17. Unrelenting, the appellants filed Petition Nos 26, 34 and 35 of 2019 challenging the Court of Appeal's judgment. Invoking the court's appellate jurisdiction under article 163(4)(a) of the *Constitution* and section 15(2) of the *Supreme Court Act, 2011*, the appellants urged that their appeals involved interpretation and application of the *Constitution*. Subsequently, the three appeals were consolidated by a ruling of this court delivered on May 19, 2022

18. In the consolidated appeal the appellants sought the following reliefs: -

    i. Setting aside of the High Court and Court of Appeal judgments.

    ii. A declaration that the appellants fundamental rights and freedoms from torture under article 29(a), (b), (c), (d) and (e) of the *Constitution* were contravened and grossly violated by police officers and GSU officers who were kenyan government servants, agents and employees on diverse dates and times from March 3, 1992 up to January 19, 1993.

    iii. A declaration that the 1st appellant's fundamental rights and freedom under article 40(1)(a) and (b) of the *Constitution* were contravened and grossly violated by police officers and GSU officers who were Kenyan government servants, agents and

employees on diverse dates and times when her houses were demolished and she was evicted from her plots in 1986, 1987 and 1988.

iv. A declaration that the appellants are entitled to the payment of general, exemplary and moral damages for the violation and contravention of their fundamental rights and freedom from torture under article 23(3) of the *Constitution*.

v. General, exemplary and moral damages for torture, violence, cruel, inhuman and degrading treatment.

vi. Any further orders, writs, directions as the court may consider appropriate.

vii. Costs of the suit and interest.

19. In opposing the appeal, the Attorney General filed grounds of objection dated July 31, 2019. The effect of the objection was that the consolidated appeal did not meet the threshold of what constitutes matters of law as espoused in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Petition No 2B of 2014; [2014] eKLR. Moreover, that the consolidated appeal did not demonstrate substantive errors of fact and/or law by the Court of Appeal. All in all, in the Attorney General's view, the consolidated appeal was fatally defective and unmeritorious.

C. Parties Submissions

i. Appellants' submissions

20. All the appellants were represented by Mr Gitau Mwara. The appellants called upon the court to address its mind firstly, on whether there is time limitation for lodging claims for historical human rights violations. Secondly, whether claims alleging violations of rights could be dismissed by dint of article 159(2)(d) of the *Constitution* on unreasonable procedural technicalities and limitation of time, as had been done, in their opinion, in this matter. Further, the appellants urged that there were two competing schools of thought with regard to the aforementioned issues based on decisions which had been rendered by the two superior courts below. As such, there was need for the apex court to harmonise the divergent schools and give proper direction on the issues in dispute.

21. The two schools of thought alluded to were first, what the appellants referred to as, the minority technical justice judgments. In that regard, the appellants contended that the impugned decisions of the superior courts below fell under that category. The second was termed as the majority substantive justice judgments. It is noteworthy that out of the several cases listed by the appellants as falling under the second category, three of them were in respect of the events that took place at freedom corner and All Saints Cathedral namely:

a. *Milka Wanjiku Kinuthia & 2 others v Attorney General*

(*supra*).

b. *Irene Wangari Gacheru & 6 others v Attorney General*, HC Petition No 376 of 2014; [2017] eKLR.

c. *Kennedy Kinuthia & 3 others v Attorney General*, HC Petition No 375 of 2014; [2017] eKLR.

22. According to the appellants, the common thread that ran through the aforementioned majority substantive justice judgments was that-

a. There was no express limitation of time with respect to claims of gross human rights violations.

b. Torture in all its substantial forms, that is, physical or psychological can be proved by affidavit and oral evidence even in the absence of medical records or treatment notes.

c. Newspaper articles as independent historical records of events of past historical injustices can corroborate affidavit and oral evidence.

d. Uncontested or uncontroverted affidavit and oral evidence is sufficient to establish human rights violations on a balance of probabilities.

23. Consequently, the appellants claimed that the impugned superior courts' decisions contradicted the above-mentioned majority substantive justice decisions. Besides, the appellants were convinced that the impugned superior courts' decisions were discriminatory as they subjected them to a different standard of proof other than on a balance of probabilities.

24. Expounding further, Mr Mwara submitted that the pleadings in the consolidated appeal were almost a replica of the pleadings in the majority substantive justice judgments. Likewise, the evidence tendered by the appellants was similar to what was adduced in the majority substantive justice judgments. In addition, courts in the said majority substantive judgments, some of which were determined before the appellants' claims, found that there was torture at freedom corner; and awarded the petitioners therein compensation for violation of their rights. Learned counsel was emphatic that his own mother who is very advanced in age has been wondering why some of the victims were compensated while she has not. Therefore, in their own words, the appellants wondered if there were two court systems in Kenya based on the above divergent positions.

25. Counsel for the appellants went on to fault the superior courts below for finding that the appellants petitions were time barred. Stating that the appellants were not able to lodge their

claims at the material time because firstly, of the then oppressive regime. Secondly, due to their impecuniosity, they were not in a position to afford the services of a legal representative at the time. It is however instructive to note that, the justification based on impecuniosity was raised for the first time before this court.

26. In any event, the appellants submitted that there is no limitation of time for filing claims of violation of rights in the *Constitution*. In their view, the *Constitution* had envisaged this state of affairs when it introduced a period of transitional justice wherein past human rights violations which took place under the repealed Constitution could be redressed. In their view, the prescribed minimum transitional period was 5 years from the date the *Constitution* was promulgated. Therefore, they argued that as at the time they filed their claims in the High Court on April 15, 2013 the said transitional period had not lapsed. They went on to contend that some of the majority substantive justice judgments related to claims of violation of rights which had been filed after 19 to 38 years of the alleged violation. In that regard, they cited as examples, *Zipporah Seroney & 5 others v Attorney General*, HC Petition No 500 0f 2013; [2020] eKLR and *Jane Nduta Koigi v Attorney General*, HC Petition No 115 of 2018; [2019] eKLR.

27. As to what amounts to torture, the appellants relied on the definition given in the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. They urged that they had established their claim of torture to the required standard through their affidavit and oral evidence which was uncontroverted. To them, the absence of medical or treatment notes did not diminish their evidence of torture. Moreover, they urged that torture is not just physical but also psychological which usually is not visible. They submitted that the reports in the Society Magazine corroborated their eye witness accounts of what had transpired at freedom corner. To bolster this line of argument, they cited *Milka Wanjiku Kinuthia & 2 others v Attorney General* (*supra*), *Irene Wangari Gacheru & 6 others v Attorney General* (*supra*) and *Kennedy Kinuthia & 3 others v Attorney General*(*supra*).

28. The appellants submitted that victims of human rights violations should not be shut out from seeking redress on account of technicalities and time limitation. Otherwise, the effect would be that human rights litigation in the country would revert to the pre-2010 *Constitution* days when victims perceived that courts were hostile to such litigation. Consequently, they urged the court to set aside the impugned judgments of the superior courts below and substitute the same with judgments in their favour, which would be in consonance with the majority substantial justice judgments relating to the freedom corner incident.

29. We also understood the appellants' counsel to argue that the learned trial Judge's prejudice against his clients was evident in his judgments. Particularly, where the learned Judge faulted

the appellants for not filing their claims at the same time as the political prisoners they had agitated for their release and who included their advocate on record.

ii. Attorney General's submissions

30. Ms Deborah Robi appeared for the Attorney General. According to the Attorney General, contrary to the appellants' contention, the superior courts below did not dismiss their claims on account of being time barred but on merit. The Attorney General contended that the appellants' continued to misconstrue that the superior courts below imposed time limitation for filing claims of past human rights violations. Nonetheless, the Attorney General submitted that even in cases where there is no time limitation, a litigant should give a plausible explanation for the delay in commencing court proceedings before the same is admitted for hearing. In addition, the explanation should as of necessity be limited to the question of whether justice would be served. To buttress that position, reference was made to *Wellington Nzioka Kioko v Attorney General*, HC Petition 517 of 2013; [2016] eKLR and the East African Court of Justice decision in *Attorney General of the Republic of Uganda & another v Omar Awadh & 6 others*, EACJ Appeal No 2 of 2012; [2013] eKLR.

31. On the contention that the appellants' evidence was uncontroverted, the Attorney General argued that the record bore witness to the fact that not only were affidavits sworn by Philip Ndolo, the then Deputy Director of Operations in the Kenya Police Service, but also written submissions were filed in opposition to the appellants' petitions. Further, upon cross examination of the appellants, it became evident that their assertions of torture were not established.

32. Expounding further, the Attorney General submitted that firstly, even though medical reports would have sufficed to prove the appellants' allegations, none were produced at the trial. Secondly, in the Attorney General's opinion, the reading of sections 35, 107 and 109 of the *Evidence Act* together with rules 15 and 20 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* reveals that newspaper articles are inadmissible as evidence in law. This is because facts contained in newspaper articles are merely hearsay. In that regard, he relied on *Laxmi Raj Shetty & another v State of Tamil Nadu* 1988 AIR 1274, 1988 SCR (3) 706. Besides, he claimed that the newspaper articles that the appellant sought to rely on were irrelevant.

33. As for the claims relating to the freedom corner incident which were successful, the Attorney General asserted that they were determined on the basis of their own peculiarity and were distinguishable from the appellants' claims. More specifically, he reiterated that in the matter at hand, the Attorney General challenged the appellants' claims through filing affidavits in response as well as cross examination. Nevertheless, the Attorney General submitted that

even in cases where a respondent does not file a response, the petitioner still bears the burden to prove his/her case to the required standard.

34. Last but not least, the Attorney General argued that the appellants were not entitled to exemplary damages as the said damages represent an importation of a criminal law principle of punishment into civil law. Further, the Attorney General submitted that exemplary damages are only available where the offending party has had a propensity of repeating the same violations, which was not the case in the matter at hand. In that regard, reference was made to the Court of Appeal decision in *Njuguna Githiru v Attorney General*, Civil Appeal No 253 of 2017; [2020] eKLR.

D. Analysis

35. It is well settled that the mere invocation by a party that an appeal to this court is premised on article 163(4)(a) of the *Constitution* does not automatically clothe the court with jurisdiction to entertain the same. A litigant must demonstrate how such an appeal involves interpretation and application of the *Constitution*; and that the issue(s) relating to the interpretation and application was subject of adjudication before the superior courts below. At the very least, where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, a litigant must demonstrate that the Court of Appeal's reasoning and the conclusion(s) which led to the determination of the issue in dispute took a trajectory of constitutional interpretation and application. See *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, SC Petition No 2 of 2014; [2014] eKLR. Having appraised ourselves of the matter at hand, we are satisfied that the consolidated appeal does involve matters of constitutional interpretation and application. In other words, the consolidated appeal, as we stated in the opening paragraph, revolves around the interpretation and application of the bill of rights.

36. Upon deliberation on the consolidated appeal, it is our view, that its determination will turn on four issues namely:

i. Whether there is limitation of time in filing claims for human rights violation.

ii. Whether there was unexplained inordinate delay by the appellants in filing their petitions in the High Court.

iii. Whether the appellants proved on a balance of probabilities that their fundamental rights and freedoms were violated.

iv. If the answer to (iii) is in the affirmative, what is the appropriate remedy in the circumstances of the consolidated appeal?

We now turn to the determination of these issues.

i. Whether there is limitation of time for filing claims of human rights violations.

37. Perhaps, the starting point under this issue should be a consideration of whether the two superior courts below in their impugned decisions imposed limitation of time as alleged by the appellants. Having perused the decisions in question, we are satisfied that the two courts did not impose the limitation alluded to. In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the *Constitution* which are evaluated and decided on a case by case basis.

38. Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights. See the persuasive decision of the Court of Appeal *Safepak Limited v Henry Wambega & 11 others*, Civil Appeal No 8 of 2019; [2019] eKLR. It is on that basis that the two superior courts held that claims of violation of human rights must be filed in court within reasonable time. Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court. This takes us to the consideration of the next issue.

ii. Whether there was unexplained inordinate delay by the appellants in filing their petitions in the High Court

39. The appellants' urged that their claims related to questions of 'transitional justice'; and as such, the two superior courts should have found there was no unexplained delay in filing the petitions. The appellants were also troubled with what they perceived as an unequal protection and benefit of the law given that the High Court had adjudicated petitions by other similarly situate persons without raising concerns over undue delay in lodging the said petitions. Crucial to the determination of the framed issue, the appellants' explanation for the delay before the two superior courts was that they lacked confidence in what they referred to as the 'old judiciary' under the previous constitutional dispensation. The appellants also proffered an additional explanation of impecuniosity for the first time in this court.

40. The determination of this issue demands that we interrogate whether the subject claims are in the nature of "transitional justice" claims. Therefore, the appropriate starting point is to understand what is meant by transitional justice. The idea of transitional justice has been described in Jeremy Webber, '*Forms of Transitional Justice*' (2012) 51 Nomos 98 thus:

> " Transitional justice is about situations in which a society is moving from a state of injustice to justice, from oppressive government to government that respects the rule of law, from authoritarianism to democracy."

41. Similarly, Colleen Murphy in '*The Conceptual Foundations of Transitional Justice*' (Cambridge University Press, 2017) at page 1 notes as follows:

> " The term transitional justice is generally taken to refer to formal attempts by post-repressive or post-conflict societies to address past wrongdoing in their efforts to democratize."

42. What emerges from the foregoing is that the idea of transitional justice connotes the broad range of mechanisms, means or mode through which a society confronts the wrongdoings from its past. Its objective being to obtain truth and justice regarding the past so as to ensure promotion and protection of the rule of law and durable peace going into the future.

43. The need to confront and silence the ghosts of past wrongs or historical injustices is relevant in the Kenyan context. This is in light of Kenya's history which is littered with incidences of gross violations of human rights and other atrocities that occurred during the colonial era and continued in the post- independence era. Further, victims of such abuses were never granted an opportunity to obtain redress and justice during that period. In this regard, an official report of the Government of the Republic of Kenya, *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* (Government printer, 2003) at page 19 records as follows:

> " The political history and governance of the Kenyan state is a catalogue of gross human rights violations, the arrogance of power, and the commission of mind-boggling economic crimes. Constitutionalism and the rule of law, which are the central features of any political democracy that respects human rights, have been absent in Kenya's history... Since its creation by the British in 1895, the Kenyan state has largely been a predatory and illiberal instrumentality, an ogre defined by its proclivity for the commission of gross and massive human rights violations. Little need be said of the colonial state, which was specifically organized for the purposes of political repression to facilitate economic exploitation... The post-colonial state has engaged in the most abominable human rights violations and economic crimes known to humanity. Not even the re-introduction of multi-partyism in 1991, and the two general elections in 1992 and 1997, the first of their kind in decades, brought relief from state-directed human rights violations and the wanton and shameless theft of public coffers and property, evils that became the trademark of the Kenya government."

The report lists the incidences of gross abuse of human rights in the pre-2003 period to include torture, detention, and persecution of the critics of the government of the day, amongst others.

44. The golden thread that connects the appellants' claims of violation of their rights is that they are alleged to have taken place during a period which has been recognized as repressive. In that, during the period in question the state grossly abused the rights and freedoms of the critics of the government of the day. By their nature, these claims are founded on alleged past wrongs that call upon the law and courts to provide a transformative response. We therefore have no hesitation in finding that the appellants' claims qualify as falling within the category of transitional justice claims.

45. What then is the implication of transitional justice claims on the question of the delay of over twenty (20) years in filing the claims in court? We have taken note of the fact that the Court of Appeal endorsed the High Court's view that the appellants had not offered a reasonable explanation for the delay in filing their claims in court.

46. In considering whether the delay of twenty (20) years was inordinate, we are of the considered opinion that transitional justice claims are context sensitive. It follows that courts ought to be particularly sensitive to the reasons adduced for the delay. At the same time, courts should balance the reasons for delay with the likely prejudice a respondent may face in defending the claim in line with the right to fair trial. Such an approach emerges from the comparative lesson as can be gleaned from jurisprudence from Kenya's superior courts and other jurisdictions.

47. In *Mutua & others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), a group of elderly Kenyan victims of human rights abuses, including torture, inflicted by colonial administration on prisoners in Kenya between 1952 and 1960 filed a case before the High Court of Justice, Queen's Bench Division on June 23, 2009. The United Kingdom's government in objecting to the competency of the suit argued that the survivors' claims were time-barred under English law, and thus should be struck out. The other issues raised were whether a fair trial was still possible notwithstanding the unavailability of material witnesses; and whether there were compelling reasons for the court to exercise its discretion by allowing the claims to proceed for hearing and determination. In dismissing the objection to the suit, Justice McCombe held that the "public interest in the claims being tried out" and "what is fair" in the circumstances of the case are relevant considerations in the exercise of the court's discretion as to whether the subject claim should be heard on its merit. The court found that the claimants had established a proper case for the exercise of its discretion in their favour.

48. In another English decision, arising from allegations of historic sexual abuse perpetrated upon children in an institutional setting, the House of Lords in *A v Hoare* [2008] 1 AC 844, observed that the court ought to take into account the fact that the alleged abuse might

have contributed to the delay in pursuing justice. In particular, Baroness Hale of Richmond noted at para 60 of the judgment that:

> " Then the injustice to a claimant who may be deprived of his claim, perhaps as a result of the very injuries which gave rise to it, can be balanced against the injustice to a defendant who may be called upon to defend himself a long time after the event when important evidence may no longer be obtainable. I fully support the more generous approach to the exercise of discretion which is adopted in particular by Lord Hoffmann. The reasons for the delay are highly relevant to that exercise, as of course are the prospects of a fair trial. A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the particular case." [Emphasis added]

49. With respect to the consolidated appeal, the decisions of the two superior courts largely turned on the failure by the appellants to file their claims immediately after two critical transitional moments in Kenya's recent democratization history. This being after the 2002 transition when President Moi left office or immediately after the 2010 transition to a new constitutional dispensation. The two superior courts observed that as a matter of fact many other similarly situate victims of past abuses filed their claims in court immediately after these transitional moments. This leads us to pose the question; given the nature of transitional justice claims, was it fatal for the appellants to have filed their claims in 2013?

50. It has been recognized that transitional moments can be long-drawn and there are no clear-cut dates when a transition can be said to have run its full course. Especially, taking into account the tendency for re-irruptions in the form of renewed quests for justice. This is poignantly brought out in Cath Collins, '*Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*', (The Pennsylvania State University Press, 2010) at pages 21 and 22 as follows:

> " ... the persistence of the justice question into the post- transitional period, or periodic "re-irruptions" of it in the form of renewed accountability pressure, can be viewed as positive signs of democratic institutional health rather than as crises or breakdowns of transition. It is not only conceivable but logical to expect that private actors and even future democratic governments might pursue accountability more vigorously than transitional administrations ... certain dimensions of post-transition polities can be expected to particularly affect the emergence of post-transitional justice activity. One is the quality and depth of subsequent democratization, particularly progress toward rule of law. The health and vigor of civil society organization in general and its ability to access the justice

> system, in particular, will also be relevant... The passage of time is a factor that can have varied and sometimes counter-intuitive effects. It may seem set to eventually consign the memory of victims and the concerns of survivors to irrelevance or even oblivion, but a look at the currently observable cases of post- transitional justice change suggests that other outcomes are also possible. The passage of time can serve to make the addressing of accountability more possible, perhaps less politically costly, even as it sometimes reduces both the personal (victim/survivor) and institutional (social) benefits." [Emphasis added]

51. What we deduce from the above is that late or recurring pursuit for justice are a distinctive motif of the quest for justice in transitional contexts. In other words, renewed or late quest for accountability and justice after the initial burst of efforts for justice is a phenomenon that is inherent in transitions. It follows that the persistence of the appellants and other litigants to get justice after other claimants had lodged similar claims is not something that is unique to the appellants herein as it is a universal phenomenon that is evident in the quest for transitional justice and accountability.

52. The appellants claim that they did not have faith in the pre-2010 judiciary, ought to be interrogated from the overarching context of the transition from the repressive to the post-2010 era. It is important to take into account the fact that courts during the repressive era were generally notorious for their abject failure to provide protection to victims of human rights violations. Though the process of judicial reforms and making the Kenyan state human rights friendly began in 2003, this process was not concluded until the constitutional reforms in 2010. This included the process of vetting of Judges and Magistrates which was a transitional justice mechanism to make the Judiciary fit as a custodian of the rule of law, democracy and human rights. Indeed, this partly explains why the clamour for judicial reforms was part of the larger constitutional reform package.

53. An additional factor to take into account is the fact that the *Constitution* explicitly envisages redress for historical injustices that occurred during the repressive era. For instance, article 67(2)(e) vests the National Land Commission with functions that include

> " to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress".

Section 15 of the *National Land Commission Act* No 5 of 2012, as amended *vide* the *Land Laws (amendment) Act* No 28 of 2016, operationalized the above constitutional directive for redress for historical land injustices. It gave the National Land Commission the mandate to admit, investigate and recommend appropriate redress for historical land injustice complaints received within a five-year timeline/period. In light of the dictate of article 27(1) of the *Constitution* on equal protection and equal benefit of the law, we are

inclined to the view that all victims of historical injustices must be treated equally and afforded an equal opportunity for redress. This chimes with the demands for harmonious interpretation of the *Constitution* as already endorsed by this court in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, SC Appl No 4 of 2012; [2013] eKLR where we held at para 33 that:

> " ... One of the fundamental rights under the *Constitution* is access to justice for all, and non-discrimination. Consequently, all litigants are to be accorded equal right of access to the court."

54. In that regard, Lenaola, J, as he then was, held the following persuasive view in *Gerald Juma Gichohi & 9 others v Attorney General*, HC Petition 587 of 2012; [2015] eKLR at paras 94-95:

> " The history of this country would lead a reasonable man to state that it was almost impossible a few years ago to sue the regime and get away with it especially on matters of human rights. In that regard, the recent public apology by President Uhuru Kenyatta for violations of human rights by past regimes is an affirmation of that fact. In the same breath, it was also the petitioners' claim that the Judiciary has affirmed that it is vindicating past violations of fundamental rights and freedoms in order to secure the country's future...
>
> [It] is true that the State today in a reconfigured Kenya, cannot shut its eyes from the failings of the past neither can it claim innocence for the excess of past regimes. It must pay, the price for its historical faults and I must also agree with the petitioners submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under the *Constitution 2010*. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the courts for doing justice, albeit belatedly because delayed justice is indeed justice denied."

55. Based on the context of Kenya's democratic transition, we find, unlike the two superior courts below, that the appellants' explanation for the delay to the extent that it was attributed to lack of faith in the pre-2010 judiciary plausible. This is because the 2010 transition required the Kenyan state and society to undertake a great transformation, involving the creation of new institutions and anchoring them in a new set of values and principles, which were in total contrast to those that so far had prevailed. The scope of this transformation, including with respect to institutional reforms, was arguably deepened due to the fact that the earlier transition in 2002 to a new government was largely seen as not 'deep and far

reaching' enough. Indeed, with respect to the Judiciary, the institution had to undergo a transitional justice process in the form of the vetting of Judges and Magistrates, to restore public confidence in its ability to act as a custodian of the rule of law and human rights. Therefore, the appellants' contention that they had no faith in the pre-2010 judiciary to render justice regarding alleged violation of rights attributed to the state cannot be faulted in light of this history. As for the additional explanation of impecuniosity, we are unable to entertain the same since it was raised for the first time before this court and the superior courts below did not have an opportunity to address their minds on the same.

56. In our view, there is also a public interest element in allowing victims of alleged past gross human rights violations to access courts; that is, serving justice is the most effective insurance against future repression. To us, a judicial trial serves to send strong expression of formal disapproval of gross abuse of human rights. It also functions to re-commit state institutions and persuade the general citizenry of the importance of human rights in a polity. On the other hand, failure to ensure access to justice could send the wrong signal that judicial imprimatur has been given to these historical wrongs. Such a stance will encourage not deter potential violators of rights. It would also send the signal to the public that they can be complicit in violation of rights without consequences attaching to the perpetration of such atrocities. This is informed by the reality that failure of enforcement of freedoms and rights vitiates their authority, sapping their power to deter proscribed conduct.

57. We find support for the above approach in the persuasive jurisprudence by the Inter-American Court of Human Rights in the case of *Barrios Altos v Peru*, Merits, Judgment, Inter-Am Ct HR (ser C) No 75, (Mar 14, 2001). The case was about the infamous Barrios Altos massacre of fifteen civilians during one single incident by members of the Peruvian army; and the subsequent attempt by the Fujimori regime to enact amnesty laws to shield the perpetrators from prosecution. In emphasizing the need to allow victims of gross human rights abuses to access justice, the Inter-American Court of Human Rights held that all amnesty laws and provisions designed to prevent the identification, investigation, and punishment for human rights abuses violate non-derogable human rights. This is because they obstruct victims' access to justice, prevent victims from knowing the truth, and block victims' access to adequate reparations.

58. Before concluding on this issue, we must also address another limb of argument by the appellants relating to unequal protection and benefit of the law. Their claim is to the effect that other similarly situate claimants who filed their claims after more than twenty (20) years were granted their day in court. In particular, they made reference to *Milka Wanjiku Kinuthia & 2 others v Attorney General* (*supra*), *Irene Wangari Gacheru & 6 others v Attorney General* (*supra*) and *Kennedy Kinuthia & 3 others v Attorney General* (*supra*) relating to the freedom corner incident.

59. Save for *Milka Wanjiku Kinuthia & 2 others v Attorney General* (*supra*), in the other two cases, the Attorney General, who was the respondent therein, urged that there had been inordinate delay in lodging the same. Both cases had been filed 22 years after the alleged violation. Our reading of the High Court's decisions reveals that the court was alive to the fact that there is no time limitation for filing claims for violation of human rights. Nevertheless, the High Court in the said cases appreciated that it was required to look into whether there was unreasonable delay in lodging the cases in question. Equally, the High Court properly addressed its mind by holding that whether or not there is inordinate delay is dependent on considerations such as, the explanation proffered and whether justice will be served in entertaining such a claim. In both cases, the High Court was convinced with the explanation advanced and took into account the dictates of transitional justice in finding that there wasn't inordinate delay in lodging the same.

60. The position taken by the High Court in the above-mentioned cases is what has generally been adopted by the courts of this country and which we approve as the correct position in law. It follows therefore that whether a claim for violation of rights has been instituted within a reasonable time is to be determination based on the peculiar circumstances of each case.

61. In the end, we find that the delay in filing the appellants' claims was understandable given the circumstances of the matter as discussed above.

iii. Whether the appellants proved on a balance of probabilities that their fundamental rights and freedoms were violated.

62. The issue as framed gives rise to a number of sub-issues, being:

    a. Which Constitution is applicable to the circumstances of the consolidated appeal?

    b. Whether violation of the 1st appellant's right not to be arbitrary deprived of property was proved.

    c. Whether violation of the appellants' rights and freedom from torture, and inhuman and degrading treatment was proved.

a. Which Constitution is applicable to the circumstances of the consolidated appeal?

63. It is noteworthy that the appellants in contending violation of their fundamental rights and freedoms cited both the current and repealed *Constitution*. In particular, they urged violation of their rights and freedom not to be subjected to torture, inhuman and degrading treatment, and arbitrary deprivation of property under articles 25(a), 29(a), (c), (d), (f), 40(1)(a) and (b); and that the said rights were also protected under sections 74 and 75 of the repealed *Constitution*. Equally, it is important to point out that the allegations in the

consolidated appeal relate to events that are said to have occurred in 1986, 1987, 1988 with regard to the 1st appellant; and between March 3, 1992, and January 19, 1993 with regard to all the appellants.

64. Constitutions, like other legal instruments, are generally prospective in application unless there is a clear textual marker indicating that retrospective application of a provision is contemplated. See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Appl No 2 of 2011; [2012] eKLR. Consequently, since the events in issue are alleged to have taken place before the current *Constitution* came into force, we find that it is the repealed *Constitution* which is applicable. Moreover, the rights and freedoms alleged to have been infringed are protected in both the repealed and current *Constitution* albeit with some minor variations in formulation. It follows that we will proceed to determine the question as to whether the appellants proved violation of their fundamental rights and freedoms to the requisite standard based on the repealed *Constitution*.

b. Whether violation of the 1st appellant's right not to be arbitrary deprived of property was proved

65. Section 75 of the repealed *Constitution* provided protection from deprivation of property except where stipulated conditions for compulsory acquisition were satisfied. This constitutional provision embodied the fundamental principle that a person's property could not be expropriated or taken away arbitrarily. In addition, as we held in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*, SC Petition No 3 of 2018; [2021] KESC 34 (KLR) the right to property also extends to protection of the structures erected in land regardless of the ownership status of the land.

66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR.

67. In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act* on the burden of proof. The provision stipulates:

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

In addition, section 109 of the *Evidence Act* elaborates on the onus of proof by stipulating that:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

68. Unfortunately, aside from bare allegations, the 1st appellant did not adduce even an iota of evidence to back her claims. We particularly agree with the observation by the High Court that this limb of the 1st appellant's claim was pursued in a context of an "evidential vacuum". The trial court aptly observed thus:

> " Regarding the allegation that various parcels of land belonging to the petitioner were taken by the state, no evidence was produced pertaining to her ownership of the said parcels of land. In fact, nothing was placed before this court to indicate that she indeed owned or had claim to the alleged parcels of land. How then can ... the petition be interrogated in such a [sic] evidential vacuum."

69. It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others*, SC Petition No 12 of 2019; [2020] eKLR.

70. All in all, the 1st appellant's evidence or lack of it, for that matter, could not be the basis of a finding that it was more probable than not that her right not to be deprived of property was infringed. To put it differently, in the words of Lord Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 –

> " Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide

> one way or the other which evidence to accept, ... the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

We therefore see no reason to interfere with the superior courts' findings on this issue.

c. Whether violation of the appellants' rights and freedom from torture, and inhuman and degrading treatment was proved

71. On this issue, we begin our consideration from the premise of uncontested historical facts. On February 28, 1992 mothers of political prisoners, who had been detained by the then regime, together with their supporters convened at freedom corner. They went on a hunger strike protesting the incarceration and seeking the release of the political prisoners. It is common ground that on March 3, 1992 police officers stormed freedom corner and dispersed the demonstrators. This incident drew widespread press coverage nationally and internationally as well as condemnation across the globe. It is a matter that we can comfortably take judicial notice of as a matter of general notoriety.

72. For instance, the distinguished historian, Prof Tabitha Kanogo of the Department of History of the University of California Berkeley, in her book '*Wangari Maathai*', (Ohio University Press, 2020) at pages 128 – 135 captures the material events at freedom corner elaborately. We quote her at length:

> " Maathai adopted novel methods to deal with the concerns raised by the mothers of political prisoners. Significantly, a segment of Uhuru Park dubbed "freedom corner"
>
> became the site for anti-government rallies demanding the release of the fifty-two detainees and imprisoned political dissenters. The struggle lasted for close to one year, from February 28, 1992, to early 1993. Maathai's ideas and strategies for moving forward included the use of a hunger strike ...
>
> The hunger strikers drew large crowds of supporters but did not change official thinking. On the fourth day of the strike, March 3, 1992, the government moved to break the strike, unleashing a violent assault on the strikers and their supporters ...
>
> Smoked out of the freedom corner, the protestors moved to the basement of a church adjacent to Uhuru Park the All Saints Cathedral of the Anglican Church of Kenya where they remained holed up and were joined by many supporters from all walks of life, ..."

See also Daniel Branch, Kenya: *Between Hope and Despair, 1963- 2011* (Yale University Press, 2011) at page 189.

73. In taking the above approach, we are fortified by the provisions of sections 59 and 60 of the *Evidence Act* which stipulate circumstances in which courts can take judicial notice of facts requiring no proof. Section 60(1)(o) of the *Evidence Act* stipulates that:

> " The courts shall take judicial notice of the following facts–
>
> ...
>
> (o) all matters of general or local notoriety."
>
> [Emphasis added]

Section 60(2) of the *Evidence Act* proceeds to stipulate that:

> " In all cases within subsection (1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference."

74. Further, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Petition 23 of 2014; [2015] eKLR this Court observed at paras. 71-75:

> " The Oxford Dictionary of Law (Ed Jonathan Law and Elizabeth A Martin), 7th Ed (Oxford University Press, 2009) (at page 306) thus defines "judicial notice":
>
> > 'The means by which the court may take as proven certain facts without hearing evidence. Notorious facts...may be judicially noticed without inquiry.'

Judicial notice is important to the effective discharge of the judicial mandate, as contemplated by the *Constitution* of Kenya, 2010. Vindication of this perception is crystal-clear, from the case-law experience worldwide.

In *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at p 210, Lord Sumner in the English House of Lords thus observed:

> " Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

...

There are many cases in which judicial notice has commended itself to Kenya's courts. Here is a typical example. In *Republic v Simon Wambugu Kimani & 20 others*, HC Criminal Revision No [2015] eKLR, the learned Judge observed:

> "In my view, the court was fully entitled to take judicial notice of notorious prevailing facts in the public domain, even where the same were not formally brought to the attention of the court by either the prosecution or the defence."

75. Based on the foregoing historical accounts, there is no doubt that the freedom corner incident took place. A fact which in no way was disputed by the two superior courts. Nonetheless, the burden of proof still lay with the appellants to prove on a balance of probabilities that they were not only at freedom corner but were also subjected to torture, inhuman and degrading treatment during the demonstrations.

76. Looking at the evidence before the trial court, the record shows that the 1st appellant adopted her affidavit as her evidence in chief. During cross- examination by learned counsel, Mr Moimbo, she maintained that she was at freedom corner on the material day. It is noteworthy that the Attorney General closed his case without calling any witness. Indeed, the trial court in its judgment found that "there is no doubt from the evidence before me that she was at freedom corner on that day".

77. Similarly, the 2nd, 3rd and 4th appellants adopted the contents of their affidavits as their evidence in chief. What stands out from their cross- examination is that it focused on three concerns: whether they had permission to hold the subject protest/assembly; whether they had records of their arrest; and whether they had medical records for their alleged injuries. In all these areas of focus, the appellants conceded that they did not have permission to hold the subject meeting; they did not have records of their arrest (the 2nd appellant indicated that she was not arrested); and they did not have medical records proving the injuries they allegedly sustained. Yet again, the Attorney General did not call any witness and proceeded to close his case.

78. Lastly, the 5th and 6th appellants on cross-examination by learned counsel, Mr Obura, were adamant that they participated in the demonstrations at freedom corner. Despite alleging, they had suffered injuries they conceded that they did not have any medical documents to that effect. Like in the other matters, the Attorney General did not call any witness.

79. Having painstakingly gone through the record of the proceedings before the trial court, we note that the appellants' evidence of having been at freedom corner was not displaced during cross-examination. In addition, the Attorney General did not call any witness(es) to challenge the evidence of their participation in the subject protest/assembly. Consequently, weighing the evidence adduced before the trial court, we come to the conclusion that the

appellants' proved their participation in the subject protest/assembly at freedom corner to the requisite standard. See *Miller v Minister of Pensions* (*supra*)

80. Section 74(1) of the repealed *Constitution* provided as follows:

> "No person shall be subject to torture or to inhuman or degrading punishment or other treatment."

As a starting point, the court has to interrogate the normative content and the obligation that the provision imposed on duty bearers. This entails construing the meaning of the concepts of "torture" and "inhuman or degrading punishment or other treatment".

81. It has been the position of this court that we should strive to interpret and develop constitutional concepts from an indigenous prism based on our country's historical experience. However, sight cannot be lost of the fact that we are interpreting prohibitions recognized in international human rights law and other comparable constitutions. Therefore, we can draw valuable insight from their interpretation in the body of international human rights law and comparative jurisprudence.

82. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT"), offers the following authoritative definition of the concept of "torture" at article 1(1):

> "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Therefore, the 'essential elements' of what constitutes torture as can be identified from article 1 of "*CAT*" include: a) the infliction of severe mental or physical pain or suffering; and b) for a specific purpose, such as gaining information, punishment or intimidation.

83. Likewise, article 16 of "*CAT*" is relevant in determining the contours of 'prohibition against inhuman or degrading punishment or other treatment'. It provides:

> " Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

84. It is evident that the exact boundaries between 'torture' and other forms of 'inhuman or degrading punishment or other treatment' are often difficult to identify; and may depend on the particular circumstances of the case as well as the characteristics of the particular victim. Nonetheless, both terms cover mental and physical ill-treatment that has been intentionally inflicted by or with the consent or acquiescence of state authorities.

85. The European Court of Human Rights (ECHR) has in the *Ireland v United Kingdom*, judgment of January 18, 1978, Ser A, No 25 held that the intensity of the pain or suffering inflicted upon the victim is the decisive criterion in distinguishing torture from cruel, inhumane, and degrading treatment. It was that court's opinion that cruel, inhuman or degrading treatment or punishment requires a lower threshold than severe pain or suffering.

86. We find that "inhuman or degrading punishment or treatment" refers to ill- treatment which does not have to be inflicted for a specific purpose. However, an intention to expose individuals to conditions which amount to or result in the ill- treatment has to exist. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Further, degrading treatment may involve less severe pain or suffering than torture; and will usually involve humiliation and debasement of the victim. The essential elements which constitute ill-treatment not amounting to torture would therefore be reduced to the intentional exposure to significant mental or physical pain or suffering.

87. Having fleshed out the normative requirements of section 74(1) of the repealed *Constitution*, did the appellants establish that they were subjected to either severe or significant mental or physical pain or suffering?

88. The determination of the above question by the two superior courts below largely turned on evidential assessment. In particular, the two superior courts' position was that the appellants neither produced any medical reports proving physical or psychological torture nor records for their arrest. Moreover, the appellants seemed to be in good health when they appeared before the High Court. In addition, the two superior courts found that the reports in the society magazine which they sought to rely on were inadmissible.

89. On our part, we agree with the two superior courts below to the extent that there was an evidential gap which was not surmounted by the appellants regarding whether they were arrested and subjected to torture.

90. However, taking into account the violent nature of the disruption of the subject protest/assembly, it is more likely than not that the whole episode had a psychological traumatic effect on the appellants, who we have held were at the *locus in quo*. Although the appellants did not exhibit any physical injuries or medical reports, we are persuaded that the whole incident had a psychological/traumatic effect on them. This in our view can be equated to inhuman treatment which was a violation section 74(1) of the repealed *Constitution*. This is because the respondent did not give any justifiable reason(s) whatsoever why it was necessary to violently disrupt and disband the protests by the appellants who were harmless. To that extent and unlike the two superior courts below, we find that the appellants' right to freedom of association and assembly was interfered with and due to the violent methods employed by the police, this amounted to a violation of their human rights which were duly protected under section 74(1) of the repealed *Constitution*.

iv. What is the appropriate remedy in the circumstances of the present appeal?

91. Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights. Though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it is important for the court to vindicate and affirm the importance of the violated rights.

92. The foregoing rational is buttressed by the reasoning of the Supreme Court of Canada in *City of Vancouver v Ward* [2010] 2 SCR 28. In that matter, the court held that damages may be awarded if at least one of three objects is served: individual compensation; vindication, in the sense of addressing harm to 'society as a whole'; and deterrence, in the sense of 'influencing government behaviour in order to secure state compliance with the charter in the future', which would promote 'good governance'. At para 30 the court recognized that:

> "... the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award."

93. In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case. In the present case, we are of the view that the damages we award should not only serve to enhance the dignity of the appellants but also be a public recognition of the wrong done to them given the historical context of this case. We have considered comparable awards previously awarded

in the cases we cited in the opening paragraphs of this judgment involving other persons who were at the freedom corner, which awards were made several years ago ranging from Kshs 750,000 to 3,000,000. We have also taken into account the circumstances of each case bearing in mind the violations that were proven in those cases and our findings in this matter and the fact that counsel for the appellant urged us to award Kshs 3,000,000/= to each of the appellants. In our considered view, we assess damages of kenya shillings two million, five hundred thousand (Kshs 2,500,000/-) payable to each of the appellants as an appropriate remedy.

94. Before we conclude, the appellants' counsel alluded to the fact that the learned trial Judge exhibited bias or prejudice against the appellants. We cannot help but note that this issue was neither raised at the Court of Appeal nor did it form the grounds of appeal to this court. It was raised for the first time in counsel's oral submissions before the court. As such, this court is devoid of jurisdiction to entertain the same.

E. Conclusion

95. Based on the foregoing, the consolidated appeal succeeds in part to the extent that we find that firstly, the appellants adequately explained the delay in instituting the petitions in the High Court. Secondly, the appellants' freedom from inhuman treatment as protected by section 74(1) of the repealed *Constitution* were violated. Thirdly, the appellants are entitled to damages of Kshs 2,500,000 each for violation of their freedom from inhuman treatment.

F. Costs

96. Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others;* SC Petition 4 of 2012; [2013] eKLR, we see no reason to depart from the general position that costs ought to follow the event. Consequently, we award the appellants costs for the proceedings in the High Court, Court of Appeal as well as before this court.

G. Orders

97. In the premise, the consolidated appeal is allowed to the following extent:

    a. The judgments of the Court of Appeal dated June 28, 2019 and August 6, 2019 in Civil Appeal Nos 188, 189 and 190 of 2017 are hereby set aside.

    b. The judgments of the High Court dated April 15, 2018 in HC Petition Nos 196, 197 and 209 of 2013 are hereby set aside.

c. A declaration hereby do issue that the appellants' petitions in the High Court were lodged without inordinate delay due to the historical context under which the violations claimed occurred.

d. A declaration hereby do issue that the appellants rights and freedom from inhuman treatment as protected under section 74(1) of the repealed *Constitution* were violated by the Government of Kenya through the actions of its agents and/or servants (police officers and GSU officers).

e. The Government of Kenya shall pay damages assessed at Kshs 2,500,000.00/- to each of the appellants in this consolidated appeal.

f. The Government of Kenya shall bear the costs in the High Court, Court of Appeal and this court.

It is so ordered

Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment)

Supreme Court of Kenya

MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 6 (KLR)

Administrative Law *– judicial review – character and scope of judicial review – evolution of judicial review pre and post the Constitution of Kenya, 2010 - whether the High Court as a judicial review court could go through the merits and demerits of the decision challenged in judicial review - between the process only approach to judicial review and the merit review approach in appropriate cases, which school of thought was applicable in judicial review in Kenya – Constitution, article 47; Law Reform Act, cap 26, sections 8 and 9; Civil Procedure Rules, cap 21 Sub Leg, order 53.*

Constitutional Law *– Office of the Director of Public Prosecutions – decision to charge - administrative Law – judicial review– review of decision of the Director of Public Prosecutions (DPP)to charge – considerations - what were the circumstances in which a judicial review court could interfere with the decision of the DPP to charge an accused person - whether a challenge on the interpretation of the provisions used to charge an accused was an issue of propriety or otherwise of the decision by the DPP to charge an accused warrant consideration by a judicial review court – Constitution articles 10, 25(c), 27, 28, 29, 41 and 50 ; Law Reform Act, cap 26, sections 8 and 9; Civil Procedure Rules, cap 21 Sub Leg, order 53.*

Words and Phrases *– judicial review – definition – court's power to review the actions of other branches of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional - constitutional doctrine providing for this power - court's review of a lower court's or an administrative body's factual or legal findings- Black's Law Dictionary, 9th Edition' Pg. 924.*

Brief facts

The appellants were employees of Geothermal Development Company (GDC). GDC was fully owned by the Government of the Republic of Kenya as a state corporation carrying on the business of geothermal exploration. GDC issued an advertisement for tender No. REF. GDC/HSQ/086/2011-12 (tender) for the provision of rig move services for the Menengai Geothermal Project. The tender was awarded to Bonafide Clearing and Forwarding Company Limited (hereinafter referred to as the "BCFCL") for Kshs. 42,746,000 per rig move. The appellants were members of GDC's Tender Committee that procured the provision of the rig move services.

The Ethics and Anti-Corruption Commission (EACC/2nd respondent) asserted that it received a complaint regarding the failure of GDC's Tender Committee to comply with procurement law in the procurement of rig move services tender. The complaints were based on the conduct of the appellants in their capacity as members of the GDC Tender Committee for the acquisition of rig moves in tender No. Ref. GDC/HQS/086/2011-2012. More specifically the difference in the procurement of the rig-move services for the year 2011/2012 at a cost of Kshs 42,746,000/= from BCFCL while the previous year the same services were tendered at a cost of Kshs 19,550,000/= to

the same company, BCFCL, at a cost of per rig move. The difference in price in the procurement of the rig-move services was considerably higher than comparable similar rig-move services by the same provider, BCFCL, by other government institutions more specifically KenGen for rig-move services at Olkaria and Eburru Geothermal fields vide tender no. KGN-OLK-179-2012 resulted in an agreement dated February 5, 2014, at a cost ranging between Kshs. 13,565,040 and Kshs. 24,429,600.

Due to that, DPP on the recommendation of EACC, elected to charge the appellants with various offences including wilful failure to comply with the law relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act and inappropriate influence on evaluation contrary to section 38(1)(b) as read with 38(2)(a) of Public Procurement and Disposal Act and abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act.

Before the said criminal case could be heard and determined, the 1st appellant, pursuant to leave of the court filed judicial review proceedings which *inter alia* sought an order of *certiorari* to quash EACC's decision recommending her prosecution for the aforesaid anti-corruption offences; and DPP's decision directing her prosecution. The High Court granted an order of prohibition barring the DPP from prosecuting. Aggrieved the respondents appealed and the Court of Appeal held that the judicial review application did not merit the exercise of the High Court's discretion and found that the High Court misdirected itself in deciding to issue orders of *certiorari* and prohibition.

Aggrieved, the appellants filed two appeals which were consolidated. Their grievances were distinctively similar. They both contended that the charges preferred against them were non-existent and that the DPP failed to holistically interpret and understand the repealed Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.

Issues

i. Whether judicial review courts had the power to interrogate both the process and the merit of an impugned decision.

ii. What were the circumstances in which a judicial review court could interfere with the decision of the Office of the Director of Public Prosecutions (DPP) to charge an accused person?

iii. Whether a challenge on the interpretation of the provisions used to charge an accused person was an issue concerning the propriety or otherwise of the decision by the DPP to charge an accused warranty consideration by a judicial review court.

iv. Whether the Court of Appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the Constitution.

Held

1. Judicial review established the court's authority to hold the government as well as the subordinate courts and bodies exercising quasi-judicial authority accountable to the law. Judicial review was the court's way of enforcing the rule of law; ensuring that public

authorities functions were undertaken according to the law and that they were accountable to the law.

2. Before the Constitution in 2010, judicial review was governed by the principles of common law largely borrowed from the United Kingdom. The jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The basis of judicial review in Kenya was derived from the Law Reform Act and order 53 of the Civil Procedure Rules, 2010. Sections 8 and 9 of the Law Reform Act provided the substantive basis while Order 53 provided the procedural basis. The remedies in judicial review were *certiorari*, prohibition and *mandamus*. The grounds upon which one could base an application for judicial review were the heads of illegality, irrationality, procedural impropriety and proportionality.

3. Post-2010, judicial review was no longer a common law prerogative but was entrenched in the Constitution to safeguard the constitutional principles, values and purposes. In particular, article 23 (3)(f) provided for the orders of judicial review as one of the available remedies concerning the enforcement of the Bill of Rights. Article 47(1) of the Constitution guaranteed every person the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) granted the High Court supervisory jurisdiction over the subordinate courts and any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court. In 2015, Parliament in adherence to article 47 of the Constitution enacted the Fair Administrative Action Act, cap 7L, Laws of Kenya (FAA Act).

4. Due to the codification of the law on judicial review, two schools of thought emerged. The first believed that since the promulgation of the Constitution, judicial review had shifted from the process-only approach to merit review in appropriate cases. The second school of thought maintained the traditional approach that believed that judicial review proceedings involved a process-only approach limited to the interrogation of the process and not the merits of the decision being challenged.

5. The FAAA provided the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affected the legal rights or interests of an aggrieved person. The judicial review court examined various aspects of an act, omission or decision including whether the body or authority whose decision was being challenged had done something which it had no lawful authority to do. It could have abused or misused the authority which it had. It could have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it could be found to be perverse, or irrational, or grossly disproportionate to what was required. The parameters were set out extensively in section 7 of the FAAA.

6. The framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure

that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engage with public bodies in whatever capacity, or any body, person or authority that exercises quasi-judicial functions. That approach was consistent with realizing the right of access to justice because justice could be obtained in other places besides a courtroom.

7. For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say that the court should embark on merit review of all the evidence. It should be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge.

8. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process, only led to intolerable superficiality. That would be against article 259 of the Constitution which required the courts to interpret it in a manner that *inter alia* advanced the rule of law, permitted the development of the law and contributed to good governance.

9. The intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court.

10. The nature of evidence in judicial review proceedings was based on affidavit evidence. That could not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions were better placed to do so. The courts were limited in the nature of reliefs that they could grant to those set out in section 11(1) and (2) of the FAAA. The court could not substitute the decision it was reviewing with one of its own. The court could not set about forming its own preferred view of the evidence, rather it could only quash an impugned decision(section 11(1)(e) and (h) of the FAAA).

11. The merits of a case were best analysed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. In matters involving the exercise of judgment and discretion, a public officer or public agency could only be directed to take action; it could not be directed in the manner or the particular way the discretion was to be exercised.

12. Article 157(6) of the Constitution empowered the Director of Public Prosecutions (DPP) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) safeguarded that independence by decreeing that the DPP was not to require the consent of any person or authority before the commencement of

proceedings, neither was the DPP under the direction or control of any person. That was not to say that that power was absolute. Article 157(11) required the DPP in the exercise of his duties to have regard for public interest, interests of the administration of justice and to prevent or avoid abuse of the legal process.

13. Whenever it seemed that the DPP was utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which was clearly not otherwise prosecutable, then the court could intervene.

14. Although the DPP was not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it was shown that the expectations of article 157(11) of the Constitution had not been met, then the High Court under article 165(3)(d)(ii) could properly interrogate any question arising and make appropriate orders. The following guidelines read alongside article 157 (11) of the Constitution were a good gauge in the interrogation of alleged abuse of prosecutorial powers:

    1. where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
    2. where it manifestly appeared that there was a legal bar against the institution or continuance of the said proceedings, eg, want of sanction;
    3. where the allegations in the first Information report or the complaint take at their face value and accepted in their entirety, did not constitute the offence alleged;
    4. where the allegations constituted an offence but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge.

15. In matters that involved exercise of judgment and discretion, a public officer or public agency could only be directed to take action; it could not be directed in the manner or the particular way the discretion was to be exercised. The only exception where a court could compel a public agency to implement a recommendation was where there was a gross abuse of discretion, manifest injustice or palpable excess of authority equivalent to denial of a settled right which the petitioner was entitled, and there was no other plain, speedy and accurate remedy.

16. Issues on the interpretation or misrepresentation of the provisions one was charged with by the DPP in a criminal court were not issues concerning the propriety or otherwise of the decision by the DPP to charge them. Those were contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. It was not for the High Court as a constitutional court to go through the merits and demerits of the case as that was the duty of the trial court. It was not for a judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

17. The High Court, whether sitting as a constitutional court or a judicial review, could only interfere where it was shown that under article 157(11) of the Constitution, criminal proceedings had been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process.
18. A distinction of the applicable procurement laws and whether the appellants participated in the tender process hence liable to prosecution was a determination best arrived at upon consideration of *viva voce* evidence and through cross-examination of witnesses. The High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the Constitution.
19. The right to a fair hearing was broad and included the concept of the right to a fair trial as it dealt with any dispute whether it arose in a judicial or an administrative context. By refusing to submit to the jurisdiction of the trial court where their innocence may be upheld or their guilt established, the appellants removed themselves from the protections of article 50(1) of the Constitution. Whatever the case, the criminal justice system was required to protect against the abuses claimed by the appellants, which the trial court was competent to resolve when challenged by an accused person, properly, during the trial.
20. The claim for constitutional rights violations fell by the wayside. It would be pragmatic that the appellants let the trial commence and conclude, during which trial they may raise all the issues they had against the law under which they were charged.

Appeal dismissed.

Orders

i. *The 1st appellant's petition of appeal dated October 25, 2019 and lodged on even date and the 2nd to 8th appellant's petition of appeal dated October 25, 2019, and lodged on October 29, 2019, were dismissed.*
ii. *Anti-Corruption Case No. 20 of 2015 before the Chief Magistrates' Court in Milimani was to proceed and be heard on a priority basis.*
iii. *Each party was to bear its own costs.*

Citations

Cases

Kenya

1. *Child Welfare Society of Kenya v. Republic & 2 others Ex-parte Child in Family Focus Kenya* Civil Appeal 20 of 2015; [2017] KECA 175 (KLR) - (Mentioned)
2. *Commissioner of Lands v Kunste Hotel Limited* Civil Appeal 234 of 1995; [1997] KECA 335 (KLR) - (Explained)
3. *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others* Civil Appeal 56 of 2012; [2013] KECA 182 (KLR) - (Mentioned)

4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14 A, 14 B & 14 C of 2014; [2014] eKLR (Consolidated) - (Explained)
5. *Guantai, Joram Mwenda v Chief Magistrate, Nairobi* Civil Appeal 228 of 2003; [2004] eKLR - (Mentioned)
6. *Jirongo v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] KESC 32 (KLR) - (Explained)
7. *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
8. *Judicial Service Commission & another v Njora* Civil Appeal 486 of 2019; [2021] KECA 366 (KLR) - (Applied)
9. *Kenya Commercial Bank & 2 others v Commissioner of Police & another* Petition 218 of 2011; [2011] eKLR - (Mentioned)
10. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* Civil Appeal 266 of 1996; [1997] KECA 58 (KLR) - (Mentioned)
11. *Kenya Revenue Authority & 2 others v Darasa Investments Limited* Civil Appeal 24 of 2018; [2018] KECA 358 (KLR) - (Mentioned)
12. *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* Petition 42 of 2019; [2021] KESC 35 (KLR) - (Explained)
13. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Misc Civ Appli 743 of 2006; [2006] eKLR - (Mentioned)
14. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* PetitionS 18 & 20 of 2014; [2014] KESC 11 (KLR) (Consolidated) - (Mentioned)
15. *Kiplagat, Josephat v Michael Bartenge* Civil Appeal 357 of 2013; [2016] KECA 346 (KLR) - (Mentioned)
16. *Lalji, Diamond Hasham & another v Attorney General & 4 others* Civil Appeal 274 of 2014; [2018] KECA 856 (KLR) - (Explained)
17. *Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohamad & 3 others* Petition 7 of 2018; [2018] KESC 26 (KLR) - (Mentioned)
18. *Masinde, Charles v Augustine Juma & 8 others* Civil Appeal 1 of 2014; [2016] KECA 96 (KLR) - (Mentioned)
19. *Mutua, Joshua Sembei v Attorney General & 2 others* Civil Appeal 93 of 2015; [2019] KECA 227 (KLR) - (Mentioned)
20. *Mwangi, Douglas Maina v Kenya Revenue Authority & another* Constitutional Petition No 528 of 2013; [2013] eKLR - (Mentioned)
21. *Mwangi, Thuita & 2 others v Ethics & Anti-Corruption Commission & 3 others* Petitions 153 & 369 of 2013; [2013] eKLR (Consolidated) - (Mentioned)
22. *Mwilu, Philomena Mbete v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party); International Commission of Jurists Kenya Chapter (amicus curiae)* Petition 295 of 2018; [2018] eKLR - (Explained)

23. *Njuguna, S Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* Civil Appeal 333 of 2014; [2018] KECA 47 (KLR) - (Mentioned)
24. *Nyaga, Paul Ng'ang'a & 2 others v Attorney General & 3 others* Petition 518 of 2012; [2012] eKLR - (Mentioned)
25. *Peter Ayodo Omenda & 6 others v Director of Public Prosecutions & 2 others.* Petition 40 of 2019; [2020] KESC 70 (KLR) - (Mentioned)
26. *Rai & 3 others v Rai & 4 others* [2013] 1 KLR 685 - (Explained)
27. *Ransa Company Ltd v Manca Francesco & 2 others* Civil Appeal 216 of 2009; [2015] KECA 139 (KLR) - (Mentioned)
28. *Republic v Director of Public Prosecutions & 2 others ex parte Praxidis Namoni Saisi* Miscellaneous Civil Application 502 of 2015; [2016] KEHC 5698 (KLR) - (Explained)
29. *Republic v Chairman Amagoro Land Disputes Tribunal & another ex-parte Paul Mafwabi Wanyama* Civil Appeal 41 of 2013; [2014] KECA 190 (KLR) - (Mentioned)
30. *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (interested party); ex parte James M Kahumbura* Judicial Review 298 of 2018; [2019] KEHC 8824 (KLR) - (Mentioned)
31. *SGS Kenya Limited v Energy Regulatory Commission & 2 others* Petition 2 of 2019; [2020] KESC 64 (KLR) - (Explained)
32. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Mentioned)
33. *Super Nova Properties Limited & another v District Land Registrar Mombasa & 5 others* Civil Appeal 98 of 2016; [2018] KECA 17 (KLR) - (Mentioned)
34. *Uwe Meixner & another v Attorney General* [2005] 2 KLR 189 - (Mentioned)

United Kingdom

1. *North Wales Police v Evans* [1982] 1 WLR 1155; [1982] UKHL 10; [1982] 3 All ER 141 - (Explained)
2. *R v Manning* [2000] EWHC J0517-4; [2001] QB 330 - (Explained)
3. *Re Gibson (Deceased)* [1949] All ER 90 - (Explained)

India

Bhagwan Dass Jagdish Chander v Delhi Administration 1975 AIR 1309; 1975 SCR 30 - (Explained)

Jamaica

Patrick Genius v The Coroners Act Suit No M 35 of 2002 - (Mentioned)

Statutes

1. Anti-Corruption and Economic Crimes Act (cap 65) sections 45(2)(b); 46; 48(1)(a) - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53- (Interpreted)
3. Companies Act (cap 86) section 38- (Interpreted)

4. Constitution of Kenya articles 10(1)(2); 19; 20; 21; 22; 23; 25(c); 27(1)(2); 28; 29; 41; 47(1)(2); 50(2)(a)(4); 94(5); 157(6)(10); 159; 165(3)(d)(ii)(iii); 201(d); 227; 249(1)(2); 259 - (Interpreted)
5. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 29(1)- (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 7, 11(1)(2)(e)(h)- (Interpreted)
7. Law Reform Act (cap 26) sections 8, 9 - (Interpreted)
8. Public Procurement and Asset Disposal Act (cap 412C) sections 27(3); 30(3); 38(1)(b)(2)(a); 52; 66(2) - (Interpreted)
9. Public Procurement and Asset Disposal Regulations, 2020 (cap 412C Sub Leg) regulations 7(c); 10(2)(a)(e); 11(1) - (Interpreted)

Texts

1. Fordham, M., (Ed) (2012), *Judicial Review Handbook* London: Hart Publishing, 6th Edn
2. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 924

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Mr. Ben Murei (Instructed by the Office of the Ethics & Anti-Corruption Commission) for the 2nd respondent

January 27, 2023, the Court delivered the following Judgment:

A. Introduction

1. Two appeals were filed before the Supreme Court. The first, Petition 39 of 2019 dated October 25, 2019 filed on even date, is by the 1st appellant. The second, Petition 40 of 2019 dated October 25, 2019 and filed on October 29, 2019, is by the 2nd to 8th appellants. Subsequently, on September 4, 2020, the court consolidated the two appeals.

2. The appellants herein are aggrieved by two judgments of the Court of Appeal (Warsame, Makhandia & Murgor, JJA) which were delivered on September 20, 2019. The appeals are filed as of right pursuant to article 163(4)(a) of the *Constitution*.

B. Background

3. The appellants, at the material time, were employees of Geothermal Development Company (hereinafter referred to as "GDC"), a company incorporated under the *Companies Act*, cap 486, Laws of Kenya (repealed). GDC is fully owned by the Government of the Republic of Kenya as a state corporation carrying on the business of geothermal exploration, assessment, extraction, utilization and development of natural resources including geothermal heat, steam water and other resources commonly or conveniently used by persons carrying on the business of geothermal resource development.

4. On July 2, 2012and July 4, 2012, GDC issued an advertisement for tender No Ref GDC/HSQ/086/2011-12 (hereinafter referred to as the "tender") in the Daily Nation and Standard Newspapers respectively for the provision of rig move services for the Menengai Geothermal Project. The tender was awarded to Bonafide Clearing and Forwarding Company Limited (hereinafter referred to as the "BCFCL") for Kshs. 42,746,000 per rig move. The appellants were members of GDC's Tender Committee that procured the provision of the rig move services. For purposes of contextualising the tender, rig move entails dismantling of drilling rigs into smaller loads for ease of transport, then transporting the loads from one drill site to another and assembling the rig components at the new drill site.

5. The Ethics and Anti-Corruption Commission (hereinafter referred to as "EACC"), the 2nd respondent herein, asserted that it received a complaint regarding the failure of GDC's Tender Committee to comply with procurement law in the procurement of rig move services tender no. GDC/HQS/OT/086/2011- 2012. EACC contended that the allegations were within its mandate to investigate and resolved to carry out investigations on the alleged procurement anomalies in the tender process. From its investigations, EACC concluded that the offer price by BCFCL for the services in the financial year 2011/2012 was a 100% increase compared to the previous financial year, which was pegged at Kshs 19,550,000/- per move. EACC further concluded that the contract price for the tender was unjustifiably inflated above the normal market rates in comparison to similar rig move services undertaken by other government institutions during the same period by the same provider. EACC in particular cited the examples of KenGen procurement for rig move services at Olkaria and Eburru Geothermal fields vide Tender No KGN-OLK-179-2012 resulted in an agreement dated February 5, 2014 at a cost ranging between Kshs 13,565,040 and Kshs 24,429,600.

6. Consequently, EACC recommended to the Director of Public Prosecutions (hereinafter referred to as "DPP"), the 1st respondent herein, that the then Managing Director of GDC, Silas Masinde Simiyu, the General Manager Michael Maingi Mbevi (6th appellant) and the members of the Tender Committee including Praxidis Namoni Saisi (1st appellant),

Dr Peter Ayodo Omenda (2nd appellant), Nicholas Karume Weke (3rd appellant), Caleb Indiatsi Mbaye (4th appellant), Abraham Kipchirchir Saat (5th appellant), Godwin Mwagae Mwawongo (7th appellant) and Bruno Mugambi Linyuri (8th appellant) be charged with various anti-corruption offences. On November 13, 2015, the DPP issued a press statement published on its website stating that it had made decisions on the files submitted by the EACC. The DPP then implemented EACC's recommendation by filing Anti-Corruption Case No 20 of 2015 before the Chief Magistrates' Court in Milimani Law Courts against the appellants herein alongside other suspects. The 1st to 8th appellants were charged as follows:

> "Count I: Wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003.
>
> Particulars
>
> Abraham Kipchirchir, Nicholas Weke, Peter Ayodo Omenda, Godwin Mwagae, Praxidis Namoni Saisi, Caleb Indiatsi Mbayi and Bruno Mugambi Linyiru
>
> On or about August 29, 2012, at Geothermal Development Company Headquarters in Taj Towers in Nairobi County within the Republic of Kenya, being members of the Tender Award Committee, persons whose functions concerned procurement in Geothermal Development Company wilfully failed to comply with the law relating to procurement, to wit, Regulation 10(2)(e) of the Public Procurement and Disposal Regulations, 2006 by confirming an Award of Tender No Ref GDC/HSQ/086/2011- 2012 to Bonafide Clearing and Forwarding Company Ltd without ensuring that the procurement entity did not pay in excess of prevailing market prices.
>
> Count II: Inappropriate influence on evaluation contrary to section 38(1)(b) as read with 38(2)(a) of *Public Procurement and Disposal Act*.
>
> Particulars
>
> Abraham Kipchirchir Saat, Godwin Mwagae Mwawongo, Bruno Mugambi Linyiru, Silas Masinde Simiyu, Michael Maingi Mbevi
>
> On or about August 28, 2012 at Geothermal Development Company offices in Taj Towers in Nairobi County within the Republic of Kenya, being persons whose functions concerned the management of the said company and who were not entrusted

with evaluation and comparison of Tender No Ref GDC/HQS/086/2011-12 in the said company, jointly and inappropriately influenced the Geothermal Development Company evaluation committee members in their evaluation and comparison of the Tender No Ref GDC/HQS/086/2011-2012.

Count III: Wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with ssection 48(1)(a) of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003.

Particulars

Praxidis Namoni Saisi

On or about October 2, 2012, within the Republic of Kenya, being the Company Secretary and therefore an employee of Geothermal Development Company failed to comply with the law relating to procurement, to wit, section 27(3) of the Public Procurement and Disposal Regulations, 2006 by signing a contract of Tender No REF GDC/HSQ/086/2011-12 with Bonafide Clearing and Forwarding Company Ltd, a contract which contained a price of Kshs 42,746,000 per rig move which was in excess of prevailing market prices.

Count IV: Abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003

Particulars

Praxidis Namoni Saisi

On or about October 2, 2012, within the Republic of Kenya, being the Company Secretary, whose functions concerned corporate governance, legal and regulatory matters of Geothermal Development Company, used your office to improperly confer benefit to Bonafide Clearing and Forwarding Company Ltd to wit a contract Agreement for Tender No Ref GDC/HSQ/086/2011-2012 to in respect of rig move services at a cost of Kshs 42,746,000 per Rig Move, a price that was in excess of prevailing market prices."

C. Litigation History

(i) Judicial review in the High Court

7. Before the said criminal case could be heard and determined, the 1st appellant, pursuant to leave of the court filed Judicial Review proceedings Miscellaneous Civil Application No 502 of 2015,Republic v Director of Public Prosecutions & 2 others ex-parte Praxidis Namoni Saisishe sought, inter alia, for an order of certiorari to quash EACC's decision recommending her prosecution for the aforesaid anti-corruption offences; and DPP's decision directing her prosecution as was contained in the press statement dated November 13, 2015 and in the Charge Sheet in Anti-corruption case No 20 of 2015. She also sought an order of prohibition to bar the DPP from prosecuting and proceeding with the charges in Anti-Corruption Case No 20 of 2015 or instituting other charges against her over the award of the tender and the resulting contract between GDC and BCFCL.

8. She contended inter alia that the DPP's decision to prefer charges against her was reached without proper direction or logical connection to the relevant law; that the charges against her did not entitle her to know the case against her or have an opportunity to defend herself; and that the decision to charge her was incomprehensible, irrational and without basis. Naturally, the application was opposed by the 1st and 2nd respondents.

9. On April 19, 2016, the learned judge, Odunga J (as he then was), having considered the application, concluded that the charges levelled against the 1st appellant as contained in Counts I, III and IV, were far-fetched and proceeded to grant the orders sought.

10. Similarly, the 2nd to 8th appellants filed Miscellaneous Civil Application No 198 of 2016, *Peter Ayodo Omenda & 6 others v Director of Public Prosecutions & 2 others*. They sought inter alia an order ofcertiorarito quash the decision of EACC recommending their prosecution for various anti- corruption offences to the DPP; to quash the decision of the DPP to direct their prosecution; and an order prohibiting the DPP from prosecuting and proceeding with the charges in Anti-corruption Case No 20 of 2015 or instituting other charges against them over the award of the tender and the resulting contract between GDC and BCFCL.

11. On the strength of the earlier Judgment in the 1st appellant's case, on December 20, 2016, the learned judge, Odunga, J (as he then was) partially allowed the 2nd to 8th appellants' application to the extent that he found that the consideration used as a basis for the criminal charges under count I was not a criterion provided for in the tender document. Consequently, he granted an order of prohibition barring the DPP from prosecuting Anti-Corruption Case No 20 of 2015 as far as it related to the 2nd to 8th appellants in count I.

(ii) Proceedings at the Court of Appeal

12. Aggrieved by the High Court's decisions, three separate appeals were preferred to the Court of Appeal as follows: pertaining Miscellaneous Civil Application No 502 of 2016 by the 1st Appellant, the DPP filed Civil Appeal No 2 of 2016; EACC filed Civil Appeal No 184 of 2016 wherein the DPP filed a cross-appeal. As against Miscellaneous Civil Application No 198 of 2016 by the 2nd to 8th appellants, EACC filed Civil Appeal No 313 of 2017.

13. Subsequently, Civil Appeals Nos 2 of 2016 and No 184 of 2016 were consolidated and heard as one alongside Civil Appeal No 313 of 2017.

(a) Civil Appeal No 2 of 2016 as consolidated with Civil Appeal No 184 of 2016

14. At the Court of Appeal, the DPP's main contention was that the learned judge of the High Court erred in interrogating, interfering with and quashing its decision to prosecute the 1st appellant by delving into evidence and the examination of facts.

15. EACC's case on the other hand was that the intended prosecution had a proper factual foundation and could not be said to have been unreasonable. In its opinion, there was no justification for the large sum awarded in the tender. It was contended that the absence of a Market Price Index by the Public Procurement Oversight Authority (PPOA) did not discharge the Tender Committee from its duty under regulation 10(2)(e) of the *Public Procurement and Disposal Regulations, 2006* to ensure that the procuring entity does not pay in excess of prevailing market prices. It also submitted that the Committee could have obtained outside advise or directed the procurement unit to carry out a market survey. They concluded that a prerogative order should only be granted where there is an abuse of the process of the law, which has the effect of stopping the prosecution already commenced. As far as the EACC was concerned, the 1st appellant had not adduced any evidence of malice or abuse of the court process.

16. The 1st appellant on her part, opposed the appeal and invited the court to review the Market Price Index and the contract document which she stated were the most crucial documents in the appeal. She maintained that the High Court did not make any error of law and that the DPP's appeal was predicated on a complete misapprehension of the matters framed for determination as well as the findings of the High Court. She also submitted that the High Court's decision was arrived at upon a correct interpretation and application of judicial review principles. Further, that her case at the appellate court was also misconstrued by the Respondents who purported to elevate regulation 10(2)(e) of the *Public Procurement and Disposal Regulations, 2006* above the provisions of sections 66(2), 30(3) and 52 of the repealed Public Procurement and Disposal Act, 2005 (PPDA).

17. The Court of Appeal framed a single issue for determination, that is, whether or not the learned Judge was entitled to grant the orders sought. The Court of Appeal overturned the decision of the High Court on several grounds beginning with the finding that the function of the High Court sitting in judicial review proceedings is not to consider the merits of the decision by a public body but rather undertake a consideration of how the decision was made. The superior court found that the 1st appellant's application did not merit the exercise of the court's discretion and it was not necessary for the learned Judge to delve into such an elaborate analysis at that stage. The superior court also found that the High court Judge misdirected himself in deciding to issue orders of certiorari and prohibition.

(b) Civil Appeal No 313 of 2017

18. In this appeal, the DPP and EACC reiterated their position in the consolidated appeals. The 2nd to 8th appellants logically opposed the appeal.

19. The Court of Appeal similarly found that there was only one issue for determination, that is, whether the High Court in exercise of its discretion ought to have granted the judicial review order of prohibition as sought? In this regard, the Court of Appeal disagreed with the finding of the learned Judge that the decision to prefer anti-corruption charges captured in count I was irrational and an express violation of the law. In the appellate judges' view, the analysis and finding of the learned Judge was aimed at investigating the correctness of the decision of the EACC and DPP which is not the essence of judicial review; that in this manner, the Judge delved into matters which he ought not to have looked into; and further, that it was not within the powers of the learned Judge to quash count I of the charge sheet while sustaining other counts relating to the same transaction. Ultimately, the Court of Appeal held that the learned judge improperly exercised his discretion and allowed the appeal.

(iii) Proceedings at the Supreme Court

i. Petition 39 of 2019

20. The 1st appellant, aggrieved by the decision of the Court of Appeal in Civil Appeal No 2 of 2017 as consolidated with Civil Appeal No 184 of 2016 preferred this appeal. Her Petition of Appeal was anchored on articles 25(c), 27(1) & (2), 28, 29, 41 and 157(6) of the *Constitution*. She set out 12 grounds of appeal summarized as the learned Judges of the Court of Appeal erred:

    (a) By failing to interpret the central question of whether or not the decision of the DPP to prosecute the 1st appellant on offences that are non-existent in law was predicated on irrationality and procedural impropriety;

(b) By underpinning their interpretation of the conceptual framework of the function of the High Court in Judicial Review proceedings on the common law and jurisprudence before the *Constitution of Kenya 2010* rather than deriving the conceptual framework from the *Constitution 2010* itself and its trajectory;

(c) By presaging their appellate consideration of the appeal with the primer that "if this rule was not limited in this way, there would be a floodgate of applications before the High Court by every person accused of an offence seeking to put a stop to further proceedings as often as they desire in the course of the trial" thereby predetermining the trajectory of the outcome of the appeal and violating the letter and spirit of the *Constitution* on access to courts;

(d) In their interpretation of the analysis made by the High Court as having being predicated on the Judge delving into sufficiency and quality of evidence gathered by the DPP and EACC while the Judge addressed the question of legality, rationality and propriety in the decision making of the DPP in arriving at the charges;

(e) By failing to determine the issue on the legality, rationality and propriety of the charges preferred against her and delegating that task to the trial court that does not have the jurisdiction invoked when she moved the High Court under articles 22, 23 and 165(3)(d)(ii) & (iii) of the *Constitution*;

(f) In finding that the question of legality of criminal charges against the 1st appellant was not a matter for judicial review but for the trial court, which vitiated and negated the provisions of article 165(3)(a),(d)(ii),

(e) and 23 of the *Constitution* and was a claw back on the progressive outlook of articles 19, 20, 21, 22, 23, 159 and 259 of the *Constitution*;

(g) In their interpretation and application of the rationality test to the case pleaded by the 1st appellant and the admissions made on oath by the DPP in setting aside the Judgment of the High Court;

(h) By failing to find that the DPP through the replying affidavit of Ruby Okoth sworn on March 9, 2016had admitted on oath that the 1st appellant was not a signatory of the material contract as purported in the charge sheet and that the 1st appellant was an attester;

(i) By failing to re-consider and re-evaluate the entire case as presented by the 1st appellant before the High Court so as to arrive at independent findings and conclusions as enjoined by rule 29(1) of the *Court of Appeal Rules*;

(j) In finding that the question of whether or not a person could be prosecuted, subjected to a trial on charges whose legality, rationality, propriety are contested should be resolved by the High Court "making a bare reading of the statement of facts of the case and charge sheet without elaborate argument" thereby negating the constitutional premises of judicial review and lowering the supremacy of the *Constitution* in safeguarding the fundamental rights and freedoms in the Bill of Rights;

(k) By improperly exercising their jurisdiction resulting in the violation of the 1st appellant's right to equal protection and benefit of the law and a fair hearing; and

(l) By interfering with the decision of the High Court from the shackles of the common law strictures of judicial review rather than a constitutional interpretation predicated on the *Constitution 2010*.

21. The 1st appellant sought the following reliefs:

(a) That the judgment and order of the Court of Appeal (Warsame, Makhandia & Murgor, JJA) allowing Civil Appeal No 2 of 2017 as consolidated with Civil Appeal No 184 of 2016 be set aside and the Judgment and Decree of the High Court (Odunga, J) in Miscellaneous Application No 502 of 2015 delivered on April 19, 2016 be reinstated and affirmed;

(b) The costs of this appeal and the costs of proceedings in the Court of Appeal and High Court be awarded to her; and

(c) Such consequential and appropriate relief, as this Honourable Court may deem fit to grant.

ii. Petition 40 of 2019

22. The 2nd to 8th appellants aggrieved by the decision of the Court of Appeal in Civil Appeal No 313 of 2017 preferred this appeal. It was anchored on the interpretation and application of articles 10(1) & (2), 19(2) & (3), 22(1), 25(c), 27(1) & (2), 47 (1) & (2), 50(2)(a), 50(4), 94(5), 157(11), 227, 249(1) and 249 (2) of the *Constitution*. Their appeal was premised on the following four grounds of appeal, that the learned judges of the Court of Appeal erred:

(a) By failing to consider the fact that the DPP had abused its prosecutorial discretion with the decision to charge the appellants being tainted with irrationality and unreasonableness;

(b) In considering but not applying its previous decision in the case of Prof *Njuguna S Ndungu v EACC & 3 others*, Civil Appeal No 333 of 2014 (2018) eKLR, in which

the court held that the basic criterion for allowing a prosecution to proceed is the existence of "sufficient evidence to prove a realistic prospect of conviction" and further that there would be a clear and apparent error on record in which there is a disclosed "failing to scrutinize the charges and the relevant documents ... [to] reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction".

(c) By failing to appreciate and uphold that the 2nd to 8th appellants had established a clear and intended infringement of their constitutional rights by the respondents in breach of articles 10, 27, 28, 48, 50 and 157 of the *Constitution*; and

(d) By failing to apply constitutional standards of justice, fairness, equity and/or dignity of the 2nd to 8th appellants to address what was clearly a threatened violation of their rights.

23. The 2nd to 8th appellants sought the following reliefs:

(a) That the judgment of the Court of Appeal delivered on September 20, 2019 in Civil Appeal No 313 of 2017 be set aside and the Judgment and orders of the High Court (Odunga, J) in Miscellaneous Application No 198 of 2016 delivered on 20th December 2016 be reaffirmed;

(b) The costs of this appeal and costs of the proceedings in the Court of Appeal and in the High Court be awarded to the 2nd to 8th appellants herein; and

(c) Any other orders that this court may deem fit in the circumstances.

C. Parties' Respective Cases

24. When the matter came up before us for hearing learned counsel Mr Cyprian Wekesa together with Mr Edmond Wesonga appeared for the 1st appellant, Mr Okweh Achiando appeared for the 2nd to 8th appellants. While Ms Fredah Mwanza together Ms Magdalene Ngalyuka appeared for the DPP and Mr Ben Murei appeared for EACC.

i. 1st Appellant's submissions

25. The 1st appellant's submissions dated December 2, 2021 were lodged on June 8, 2022. She abridged her twelve (12) grounds of appeal into four (4) and submitted on them as hereinbelow.

26. On whether the decision to charge the 1st appellant was illegal, irrational and an abuse of prosecutorial powers and in violation of her constitutional rights, she submitted in the affirmative and heavily relied on the guidelines of prosecutorial powers set by this court in

the case of *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others*, SC Petition No 38 of 2019; [2021] eKLR. It was her position that count i constituted a non- existent offence; that in crafting the charge under count I, the DPP failed to consider that the tender document did not provide for a criteria of comparison of market prices as the rig move services are not standard services and works within known market price; that counts III and IV were grounded on the execution of the contract whereas she merely witnessed the signature of the accounting officer; and by merely attesting the signature she did not confer a benefit to anyone. To buttress this proposition, she relied on the English case of *Re Gibson (deceased)* (1949) All ER 90. For those reasons, she maintained that the criminal trial was grounded on non-existent offences and was therefore an egregious violation of her right to equal protection and benefit of law under article 27(1) and right to a fair trial under article 50 as read with 25(c) of the *Constitution*.

27. On whether the issues raised were for judicial review application, she posited that the prosecutorial powers of the DPP are not absolute, rather they are limited by article 157(11) of the *Constitution*; that the Court of Appeal interpreted her case from the shackles of common law doctrines rather than constitutional imperatives; and that the judicial review application not only required a consideration of the decision making process of the DPP but also an application and interpretation of the *Constitution* especially the equilibrium between her rights to fair hearing and the DPP's prosecutorial power under article 157(6) and (11) of the *Constitution*. She submitted that this court in the case of *Communication Commission of Kenya v Royal Media Services & 5 others*; SC Petition 14 consolidated with Nos 14A, 14B & 14C of 2014; [2014] eKLR recognized the elevation of judicial review to a pedestal that transcends the technicalities of common law. As such, it was her view that judicial review is entrenched in article 23 of the *Constitution* and is no longer under the common law prerogative jurisprudence and strictures. She therefore urged the court to find that her case before the High Court was abundantly within the confines of the judicial review jurisdiction under the Constitution}}.

28. She observed that the Court of Appeal set aside the High Court judgment on the basis that the latter had delved into the question of sufficiency of evidence. In this regard, she submitted that she only enclosed the charge sheet and the Market Price Index published by the PPOA forming the particulars of count I and that she did not exhibit any evidence, let alone a single witness statement; that the Court of Appeal did not point out which evidence was analysed; and that a bare reading of the charge sheet and the applicable provisions of the PPDA and the regulations therein cannot be considered as delving into the evidence. She faulted the Court of Appeal for failing to apply the dicta in the case of *Prof Njuguna S Ndungu v EACC & 3 other* [*supra*] where the appellate court found that the High Court erred in failing to scrutinize the relevant documents including the decisions of the Evaluation

Committee, Tender Committee and Review Board to reach a conclusive and objective decision on whether the charges had any legal foundation.

29. Lastly, on whether the Court of Appeal failed to undertake its judicial function, she faulted the appellate court for failing to re-evaluate her case. She contended that had the appellate court re-appraised itself on the factual foundation of her case, it would have addressed the nexus between section 30(3) of the PPDA and Regulation 10(2)(e); and the admission by the DPP that she was not a signatory but a witness to the procurement contract and found the irrationality of the DPP in charging her as a signatory.

ii. 2nd to 8th appellant's submissions

30. The 2nd to 8th appellants relied on their submissions dated September 6, 2021 and filed on September 4, 2021. Therein they addressed three issues as framed in their petition.

31. The first was whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP contrary to the *Constitution*. On this issue, the appellants contended that this court in the case of *Cyrus Shakhalanga Khwa Jirongo v. Soy Developers Ltd & 9 others*, SC Petition No 38 of 2019 [supra] pronounced itself on the ingredients to be satisfied in interfering with the prosecutorial mandate of the DPP. Citing the cases of,Republic v Director of Public Prosecutions & 2 others ex- parte Praxidis Namoni SaisiMiscellaneous Civil Application No 502 of 2015; *Joram Mwenda Guantai v. The Chief Magistrate, Nairobi*, Civil Appeal 228 of 2003; [2007] eKLR; *Uwe Meixner & another v. Attorney General* [2005] 2 KLR 189 and *Prof Njuguna S Ndungu v EACC & 3 others*, Civil Appeal 333 of 2014 [*supra*] eKLR they submitted that the Court of Appeal erred in holding that the High Court looked into matters that it ought not to have looked into by embarking on analysing the sufficiency and quality of evidence gathered by the Respondents.

32. In their view, the charges against them were largely dependent on documentary evidence and most of the facts were not in controversy as the charges were based on a non- existent provision of the law. It was their position that the High Court was called upon to find out whether or not the omissions allegedly committed, prima facie constituted the alleged criminal offences under the procurement law, which decision could not have been made without scrutinizing the documents. As such, they maintained that the learned Judge of the High Court was well within his mandate under article 165(3)(d) as read with article 157(11) of the *Constitution* to curtail their prosecution.

33. On whether the respondents' abused their prosecutorial discretion in their decision to charge the 2nd to 8th appellants, relying on the case of *Diamond Hasham Lalji & Another v Attorney General & 4 others*, Civil Appeal No 274 of 2014 [2018] eKLR, the appellants posited that the exercise of the prosecutorial discretion by the DPP enjoys some measure of judicial

deference. In that regard, they maintained that the consideration used by the DPP for the commencement of criminal charges under count I of the charge sheet was predicated on illegality, irrationality and procedural impropriety; and the DPP had without jurisdiction, faulted them for failing in their duty to comply with a non- existent provision of law related to procurement.

34. Elaborating on their position, they submitted that the procurement process of the tender was undertaken pursuant to the PPDA and the *Public Procurement and Disposal Regulations, 2006*. They asserted that section 30(3) of the PPDA stipulated that standard goods, services and works with known market prices shall be procured at the prevailing real market price. They urged that although the Public Procurement Oversight Authority (PPOA) publishes a Market Price Index, the procurement by GDC was not for a service that is published in the PPOA Market Price Index. Consequently, they argued that it could not be said that the Tender Committee had failed to comply with regulation 10(2)(e) to ensure that the procuring entity did not pay in excess of prevailing market prices. They further submit that no pricing criterion was provided for in the tender document. As such, the Tender Committee could not be expected to make a comparison for market prices not contemplated under section 30(3) of the PPDA. Such a comparison, in their opinion, would have been ultra vires.

35. The appellants faulted the Court of Appeal for holding that the High Court was not within its powers to quash count I of the charge sheet while sustaining the other counts which relate to the same transaction. Relying on the Indian Supreme Court decision of *Bhagwan Dass Jagdish Chander v Delhi Administration* 1975 AIR 1309, SCR 309 they submitted that in *Bhagwan Dass* [*supra*] the court in defining the same transaction noted that. "... it is however, not necessary that every one of these elements should co- exist for a transaction to be regarded as the same." On that basis, they asserted that this was not a case of the same transaction for the reason that in procurement, there are different processes, and as such, do not form part of the same transaction.

36. Citing the case of *Republic v. DPP & 2 others; Evanson Muriuki Kariuki (interested party); Ex parte James M Kahumbura* Judicial Review Division Case No 298 of 2018 [2019] eKLR they contended that the charges preferred against them were an abuse of the court process, and therefore the Court of Appeal's decision should be set aside.

37. Lastly, on whether their rights were violated, they urged that the Court of Appeal failed to appreciate that their prosecution was vitiated by numerous illegalities in terms of the PPDA which were administratively arbitrary, flawed, procedurally unfair, unreasonable and violated their rights to fair trial under article 50 of the *Constitution*. They added that the provisions of the *Constitution* conferring powers upon the High Court to grant such remedies as certiorari, prohibition,mandamusor permanent stay of proceedings are a device

to advance justice and not to frustrate it. Consequently, they urged that in the exercise of this wholesome power, the High Court was entitled to quash a proceeding when it concluded that allowing the process to continue would be an abuse of the court process.

38. They posited that the Court of Appeal did not consider whether setting aside of the High Court's decision would adversely affect their constitutional rights. They submitted that they had established aprima faciecase of violation of their constitutional rights by the respondents based on the findings of the High Court. However, they submit, the Court of Appeal had failed to appreciate that, they would suffer irreparable loss if their freedoms as guaranteed by the *Constitution* were not protected through the orders sought.

39. Finally, they contended that the Court of Appeal ought to have applied constitutional standards of justice, fairness, equity and dignity to address what was clearly a violation of their rights as guaranteed by articles 27, 28, 47 and 50(1) of the *Constitution*. In view of the foregoing, they urged this court to allow their appeal.

iii. DPP's submissions

40. The DPP relied on their submission dated November 11, 2021 and filed on November 2, 2021 in response to Petition 40 of 2019.

41. Counsel addressed the issue of whether the learned Judges of Appeal erred in failing to consider that the DPP had abused its prosecutorial discretion with the decision to charge the Appellants which was tainted with irrationality and unreasonableness. It was submitted that the High Court failed to appreciate that judicial review is about the decision-making processes and not the decision itself. Further, that an order of prohibition cannot quash a decision that has already been made, it can only prevent the making of a contemplated decision. For this proposition, the DPP relied on the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others*, Civil Appeal 266 of 1996 [1997] eKLR.

42. The DPP submitted that he acted well within his powers under article 157(10) and (11) of *the Constitution* and that in making the decision to charge the Appellants, he was guided by the sufficiency of evidence only. Further, that there was nothing to demonstrate that the decision so made was *ultra vires*, unreasonable or illegal. To buttress this point, he cited the cases of *Douglas Maina Mwangi v. Kenya Revenue Authority & another*, HC Constitutional Petition No 528 of 2013; (2013) eKLR and; the decision of the Supreme Court of Jamaica in *Patrick Genius v. The Coroners Act*, Suit No M 35 of 2002. He affirmed that the issue of whether the tender was pursuant to the PPDA and the *Public Procurement and Disposal Regulations 2006* was a matter of evidence which was not within the mandate of the High Court in judicial review proceedings.

43. On whether the Court of Appeal erred in considering but not applying its own decision in *Prof Njuguna S. Ndungu v. EACC & 3 other* [supra] where it was held that the basic criterion for allowing a prosecution is the existence of "sufficient evidence to prove a realistic prospect of conviction", the DPP posited that the applicable test was laid down in the English case of *R v Manning* [2001] QB 330 where it was stated that 'a real prospect of conviction' is an objective test to consider whether the evidence can be used or is reliable. Therefore, it was his submission that whereas the test of sufficiency of evidence must be employed by the prosecutor before deciding to charge an accused person, the standard is not the same as how a court faced with the same set of facts would scrutinize them during trial before a conviction. Hence the need for the facts to be weighed by a trial court and not otherwise.

44. The DPP maintained that there were no reasonable grounds laid to warrant the grant of judicial review orders by the High Court and the same should only have been done if there were reasonable grounds to do so as was enunciated in the case of *Philomena Mbete Mwilu v DPP & 3 others; Stanley Muluvi Kiima (interested party); International Commission of Jurists Kenya Chapter (amicus curiae)*, HC Petition No 295 of 2018 [2019].

45. On whether the appellants' rights were violated, relying on the decisions in *Kenya Commercial Bank & 2 others v. Commissioner of Police & anor*, HC Petition No 2018 of 2011; [2013] eKLR; *Paul Nganga Nyaga v AG & 3 others*, HC No 518 of 2012; [2013] eKLR and *Philomena Mbete Mwilu v DPP & 3 others* [supra] the DPP submitted that the Appellants failed to demonstrate with precision the alleged breach of their right to fair hearing and neither had they demonstrated the manner in which the courts or the DPP were in breach. Counsel argued that the right to fair hearing enshrined in article 50 of the *Constitution* does not involve the decision of the DPP, but rather exists to safeguard the entire trial process. He urged that the courts are equipped to ensure that the right to fair trial is guaranteed to every accused person. It was therefore his argument that the right to fair trial remained intact, notwithstanding the impugned charges, as the criminal trial had not taken off. For these reasons the DPP urged that the appeal be dismissed with costs

iv. EACC's submissions

46. EACC relied on its submissions dated December 21, 2021 and filed on even date which were in response to Petition 39 of 2019 and addressed two issues.

47. On whether section 66(2) of the PPDA, bound the Tender Committee to award a contract even if it was in excess of the market price, EACC submitted that whereas that Section guides the technical evaluation process undertaken by the Technical Evaluation Committee, it does not fetter the discretion of the Tender Committee to reject a recommendation by the former.

48. It pointed out that the appellants were not charged for any offence relating to the technical evaluation as they did not undertake such exercise, their charges emanated from failure to ensure that GDC did not pay in excess of prevailing market prices for rig move services by BCFCL; that in accepting or rejecting a recommendation to award a tender, a Tender Committee is not undertaking a technical evaluation function, but exercising its powers under the *Constitution*, the PPDA and regulations.

49. EACC highlighted the powers of the Tender Committee under the regulations as follows: to approve or reject a submission by the evaluation committee (regulation 11(1)); to ensure that the process had been carried out in accordance with the PPDA and regulations therein (regulation 10(2)) as read with section 27(3) of the PPDA); and to ensure that the procuring entity does not pay in excess of prevailing market rates (regulation 10(2)(e)). Over and above the Act and Regulations, EACC asserted that the *Constitution* under article 227(1) provides the minimum threshold that any public procurement must meet; including the fact that the process must be fair, equitable, transparent and cost- effective. Further, that article 201(d) of the *Constitution* requires that all aspects of public finance shall be guided by the principle inter alia that public money shall be used prudently and responsibly.

50. Guided by those principles, EACC posited that the Tender Committee has the power to reject a recommendation to award a contract, even if the evaluation was undertaken regularly and in accordance with the law, if the price is above the prevailing market value or beyond the budget of the procuring entity or for some other lawful reason. It is further submitted that the role of the Tender Committee, was not to merely rubber stamp the recommendation of the Evaluation Committee. In EACC's view, it was for this reason, that a procuring entity has the authority, to terminate a procurement without incurring any liability at any time before a contract is entered into.

51. It contended that the absence of a Market Price Index by the PPOA did not discharge the Tender Committee from its duty under regulation 10(2)(a) and (e) and regulation 11(1); that in any event, the Tender Committee did not require a market survey to establish comparable costs for similar services since it already had tentative costing from the previous contracts awarded by the same Tender Committee to BCFCL; that the appellants knew that the cost of the service in 2011 was Kshs 19,550,000 per rig move, therefore they knew or ought to have known that to award a contract for the same services at Kshs 42,746,000 which is more than double the 2011 price, was grossly exaggerated as such they had a case to answer in the criminal court.

52. EACC urged the court to take judicial notice of the fact that over pricing is at the heart of procurement scandals that have caused uproar and consternation in the country, such as the recent Covid -19 related procurements. Thus, to limit liability only to those cases in which a

Market Price Index had been undertaken by the PPOA as argued by the appellants, was to fail to give effect to articles 227(1) and 201(d) of the *Constitution*, which would have resultant damage against public interest.

53. EACC submitted that the duty of comparison of the prices and contracts should have been left to the trial magistrate to determine. According to EACC, there is no way a Judge sitting in a judicial review court can look at the affidavit and submissions by the ex parte applicant (appellants herein) and conclusively resolve the evidentiary issues in contention, namely, whether the contract was overpriced. Consequently, there was a reasonable basis for preferring charges against the 1st appellant, the Chief Executive Officer and other members of the Tender Committee. Relying on the decisions in *Thuita Mwangi v EACC & 6 others*, Civil Appeal No 285 of 2014 and *Uwe Meixner & another v AG* Civil Appeal No 131 of 2002 [supra], EACC maintained that evaluating the sufficiency of evidence is a function of a trial court and not a judicial review court.

54. On whether the 1st appellant being the Company Secretary of GDC was a mere witness to the contract, and therefore ought not to have been charged with failing to follow applicable laws and conferring benefit to BCFCL, EACC submitted that apart from the Directors, a Company Secretary is a key officer recognized under the *Companies Act*. It was added that section 38 of the *Companies Act* provides that a document requiring authentication may be signed by the Director, Company Secretary or any other authorized officer and; that as the General Manager, Legal Services and Company Secretary the 1st appellant was the Chief Legal Adviser of the GDC responsible for inter alia, drafting contracts. It was therefore logical to presume that in the ordinary course of business, her office drafted or reviewed the contract in question.

55. In view of the foregoing, EACC submitted that the 1st appellant was not a mere witness, since she had an obligation to ensure that the *Constitution* and applicable laws were followed; the fact that she was a member of the Tender Committee that approved the award, brought her squarely into the bracket of those to be charged for acting contrary to section 45(2)(b), and conferring a benefit contrary to section 46 of ACECA.

56. In conclusion, it was submitted that the DPP preferred charges upon the recommendation of the EACC; that the respondents have demonstrated that there was good cause for the action taken; that whether or not the appellants were guilty of the offences charged was for the criminal court to determine; and that no dishonesty, bad faith, abuse of process or some other ulterior motive had been demonstrated against the respondents to justify termination of the criminal case. In the premises, they urged that the Petitions of Appeal be dismissed with costs.

D. Issues for Determination

57. EACC and DPP each raised preliminary objections both dated December 3, 2009contending that the petitions of appeal were not rightly before this court. More specifically, DPP sought the striking out of the appeal on two grounds namely: that the matter does not concern the interpretation or application of the *Constitution* and that no leave was obtained prior to instituting the appeal. EACC equally sought striking out of the appeal based on similar grounds.

58. This court in its two rulings delivered on April 30, 2020 and September 4, 2020 respectively, dismissed the objections finding that it has jurisdiction to hear and determine the appeals.

59. The following issues cross-cutting in the consolidated appeals emerge for this court's determination:

    i. Whether the character and scope of judicial review has evolved/changed post Constitution 2010? And if so, in what way?

    ii. Whether the Court of appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the *Constitution*

    iii. Whether the DPP violated the appellants' rights and fundamental freedoms under articles 10, 25(c), 27, 28, 29, 41 and 50 of the *Constitution* in preferring the charges contested by the appellant?

    iv. Who shall bear the costs of the appeal?

C. Analysis and Determination

i. Whether the character and scope of the judicial review has evolved/changed post Constitution 2010? And if so, in what way?

60. The 1st appellant submitted that the Court of Appeal interpreted her case from the shackles of common law doctrine rather than constitutional imperatives. She contended that the judicial review application not only required a consideration of the decision-making process of the DPP but also an application and interpretation of the *Constitution* especially the equilibrium between her rights to fair hearing and the DPP's prosecutorial power under article 157(6) and (11) of the *Constitution*. She submitted that this court in the case of *Communication Commission of Kenya v Royal Media Services & 5 others;* SC Petition 14 consolidated with Nos. 14A, 14B & 14C of 2014; [supra] recognized the elevation of judicial review to a pedestal that transcends the technicalities of common law. As such, it was her

view that judicial review is entrenched in article 23 of the *Constitution* and is no longer under the common law prerogative jurisprudence and strictures. She therefore urged the court to find that her case before the High Court was squarely within the confines of the judicial review jurisdiction under the *Constitution*.

61. The 2nd to 8th appellants submitted that the Court of Appeal erred in holding that the High Court looked into matters that it ought not to have looked into by embarking on analysing the sufficiency and quality of evidence gathered by the respondents. In their view, the charges against them were largely dependent on documentary evidence and most of the facts were not in controversy as the charges were based on a non- existent provision of the law. It was their position that the High Court was called upon to find out whether or not the omissions allegedly committed, prima facie constituted the alleged criminal offences under the procurement law, which decision could not have been made without embarking on a scrutiny of the documents. As such, they maintained that the learned Judge of the High Court was well within his mandate under article 165(3)(d) as read with article 157(11) of the *Constitution* to curtail their prosecution.

62. DPP submitted that the High Court failed to appreciate that judicial review is about the decision-making processes and not the decision itself. Further, that an order of prohibition cannot quash a decision that has already been made, it can only prevent the making of a contemplated decision.

63. Judicial review establishes the court's authority to hold the government as well as the subordinate courts and bodies exercising quasi-judicial authority accountable to the law. Michael Fordham in his book *Judicial Review Handbook, 6th edition, Hart Publishing,* 2012, defines judicial review as "…. The court's way of enforcing the rule of law: ensuring that public authorities functions are undertaken according to law and that they are accountable to law. Ensuring, in other words that public bodies are not 'above the law'"

Black's Law Dictionary, 9th Edition, pg 924 defines judicial review as; 1. A court's power to review the actions of other branches of government; esp, the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power 3. A court's review of a lower court's or an administrative body's factual or legal findings".

64. Before the promulgation of the *Constitution* 2010, judicial review was governed by the principles of common law largely borrowed from the United Kingdom. The jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The basis of judicial review in Kenya was derived from the *Law Reform Act* (cap 26) Laws of Kenya and order 53 of the *Civil Procedure Rules*, 2010 as better developed by case law on the area. Section 8 and 9 of the *Law Reform Act* provided the substantive basis while order 53

provided the procedural basis. The remedies in judicial review were three, namely; certiorari, prohibition and mandamus. The grounds upon which one could base an application for judicial review were under the heads of illegality, irrationality, procedural impropriety and proportionality.

65. The law in this regard was fairly settled as the High Court in *Keroche Industries Limited v Kenya Revenue Authority & 5 others*, Misc Civ Appli 743 of 2006; (2007) eKLR had set out what a party needed to demonstrate in order to prove illegality, irrationality, procedural impropriety and proportionality. The Court of Appeal in the case of *Commissioner of Lands v Kunste Hotel Limited, Civil Appeal No 234 of 1995*; [1997] eKLR had settled that judicial review was only concerned with the decision-making process. In doing so, the court was paying homage to the words of Lord Hailsham of St Marylebone in Chief Constable of the N*orth Wales Police v. Evans* (1982) 1WLR 1155:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

66. All appeared to be in order until the Kenyan Constitution arrived. Judicial Review was no longer a common law prerogative, but was now entrenched in the *Constitution* to safeguard the constitutional principles, values and purposes. In particular, article 23 (3)(f) provides for the orders of judicial review as one of the available remedies concerning the enforcement of the bill of rights. Article 47(1) of the *Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. In 2015, Parliament in adherence to article 47 of the *Constitution* enacted the *Fair Administrative Action Act*, No 4 of 2014, Laws of Kenya (FAA Act).

67. Also instructive to the application of judicial review, is that article 10 of the *Constitution* sets out the national values and principles of governance, key among them being the rule of law. These values and principles bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

68. Due to this codification of the law on judicial review, two schools of thought have emerged. The first believes that since the promulgation of the *Constitution 2010* 2010, judicial review has shifted from the "process only approach" to merit review in appropriate cases. This is evident in decisions from the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR; *Child Welfare Society of Kenya v*

Republic & 2 others ex-parte Child in Family Focus Kenya, Civil Appeal 20 of 2015; [2017] eKLR; *Joshua Sembei Mutua v Attorney General & 2 others*, Civil Appeal 93 of 2015; [2019] eKLR, *Super Nova Properties Limited & another v District Land Registrar Mombasa & 5 others*, Civil Appeal No 98 of 2016; [2018] eKLR; *Josephat Kiplagat v Michael Bartenge*, Civil Appeal 357 of 2013; [2016] eKLR to name a few.

69. The second school of thought has maintained the traditional approach that believes that judicial review proceedings involve a "process only approach" limited to the interrogation of the process and not the merits of the decision being challenged. This is evident in the case by the Court of Appeal in *Kenya Revenue Authority & 2 others v Darasa Investments Limited*, Civil Appeal No 24 of 2018; [2018] eKLR; C*aptain (Rtd) Charles Masinde v Augustine Juma & 8 others*, Civil Appeal No 1 of 2014; [2016] eKLR; *Ransa Company Ltd v Manca Francesco & 2 others* [2015] eKLR; and *Republic v Chairman Amagoro Land Disputes Tribunal & another ex-parte Paul Mafwabi Wanyama*, Civil Appeal No 41 of 2013 [2014] eKLR.

70. This court in its previous decisions has touched on judicial review. The ones pertinent to the issue before the court are as follows. In the case of *Communication Commission of Kenya v. Royal Media Services & 5 others*; SC Petition 14 consolidated with Nos 14A, 14B & 14C of 2014; [supra] the Court observed that following the promulgation of *the Constitution* and upon the enactment of the *Fair Administrative Action Act*, there has been a shift from the traditional approach to the scope of judicial review. The court however did not say more on the shift. It held as follows:

> " [355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the *Constitution of 2010* has elevated the process of judicial review to a pedestal that transcends the technicalities of common law...."

71. In *SGS Kenya Limited v Energy Regulatory Commission & 2 others*, SC Petition No 2 of 2019; [2020] eKLR this court held that judicial review is limited to the interrogation of the process and not the merits of the decision being challenged. The court held as follows:

> " [45] ...We have, however, observed that the appellate court was right in its finding that the <u>High Court should not have gone to the merits of the Review Board decision as if it was an appeal,</u> nor granted the order of Mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner." [Emphasis Added]

72. In *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others*, SC Petition 17 of 2015; [2021] eKLR in rendering a determination

pertaining tores judicata, the court compared the scope of determination of judicial review juxtaposed against constitutional petitions. However, while analyzing the case of *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [supra] this court made a determination on the considerations to be made in judicial review when it held as follows;

> "102. Despite the shift from common law to codification in the *Constitution* and the Fair Administrative Actions Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision." [Emphasis added].

73. The present case offers the court an opportunity to render itself on the issue more authoritatively. The *Fair Administrative Actions* Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. These parameters are better set out extensively in section 7 of the *Fair Administrative Actions Act* (FAAA). We quote it verbatim as follows:

> "(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–
>
> a. the person who made the decision–
>
> i. was not authorized to do so by the empowering provision;
>
> ii. acted in excess of jurisdiction or power conferred under any written law;

iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. was biased or may reasonably be suspected of bias; or

v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c. the action or decision was procedurally unfair;

d. the action or decision was materially influenced by an error of law;

e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

f. the administrator failed to take into account relevant considerations;

g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

h. the administrative action or decision was made in bad faith;

i. the administrative action or decision is not rationally connected to–

i. the purpose for which it was taken;

ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k. the administrative action or decision is unreasonable;

l. the administrative action or decision is not proportionate to the interests or rights affected;

m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n. the administrative action or decision is unfair; or

o. the administrative action or decision is taken or made in abuse of power.

74. It is our considered opinion that the framers of the *Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi-judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom.

75. In order for the court to get through this extensive examination ofsection 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting

some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of the *Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah,* SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

77. For the avoidance of doubt, we see no reason to depart from our findings in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* [supra] and *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [supra].

ii. Whether the Court of appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in *the Constitution*.

78. The appellants' grievances are distinctively similar. They both contended that the charges preferred against them were non-existent and that the DPP failed to holistically interpret and understand the *Public Procurement and Disposal Act* (2005) and the Public Procurement and Disposal Regulation 2006. They also argued that the DPP's prosecutorial discretion is not absolute, but rather it is limited by article 157(11) of the *Constitution* which specifies the mandatory considerations that underlie the exercise of its discretion. The Appellants

particularly fault the Court of Appeal's finding that the High Court only needed to have a bare reading of the charge sheet without analysing the factual foundation presented before him.

79. The learned judge in his Judgement in Misc Civil Application No 502 of 2015 and Miscellaneous Civil Application No 198 of 2016 found that the charges facing the appellants were untenable. The learned Judge held that the DPP owes the court a duty of placing before it material upon which the court can feel that the DPP justified in mounting the prosecution; that based on the admitted factual scenario the charges leveled against the appellants were far-fetched it would not be permissible for the court to permit the Appellants face the charges simply because they would have had an opportunity of defending themselves.

80. The Court of Appeal in finding that the learned Judge misdirected himself in arriving at the decisions to issue the orders of certiorari and prohibition held that the trial court must be accorded an opportunity to thoroughly interrogate the material before it through viva voce evidence and through cross-examination of witnesses so as to determine issues such as which procurement laws, as argued by the parties, supersede the other; the interpretation and consequence of the phrase 'market price' where the Market Price Index does not provide for specific goods or services; and on the general and specific obligations of the tendering committee but in relation to Tender No Ref GDC/HSQ/086/2011-12.

81. Article 157(6) of the *Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) of the *Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings, neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157(11) requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process.

82. Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene. These decisions include *Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya Commercial Bank Ltd & 4 others*, Civil Appeal No 56 of 2012 (2013) e KLR by the Court of Appeal. It also includes the case of *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 other*s, SC Petition No 38 of 2019; (2021) eKLR where this court held that although the DPP is not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have

not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising and make appropriate orders. The court found the following guidelines read alongside article 157(11) of the *Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:

i. Where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction;

iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or

iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

83. We are also minded of this court's decision in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others,* SC Petition No 42 of 2019; (2021) eKLR where the court upheld the High Court's position to the effect that in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Further that the only exception where a court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy.

84. The following facts of the present Appeals are not contested. The appellants charges are hinged on their conduct in their capacity as members of the GDC Tender Committee for the acquisition of rig moves in tender No Ref GDC/HQS/086/2011-2012. More specifically the difference in the procurement of the rig-move services for the year 2011/2012 at a cost of Kshs 42,746,000/= from BCFCL while the previous year the same services were tendered at a cost of Kshs 19,550,000/= to the same company, BCFCL, at a cost of per rig move. It is also not controverted that the price was considered higher than comparable similar rig move services by the same provider, BCFCL, by other government institutions more specifically KenGen for rig move services at Olkaria and Eburru Geothermal fields vide tender no. KGN-OLK-179-2012 resulted in an agreement dated 5th February 2014 at a cost ranging between Kshs 13,565,040 and Kshs 24,429,600.

85. Due to this, DPP on the recommendation of EACC, elected to charge the appellants with various offences including wilful failure to comply with the law relating to procurement

contrary tosection 45(2)(b) as read withsection 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003 and Inappropriate influence on evaluation contrary to section 38(1)(b) as read with 38(2)(a) of *Public Procurement and Disposal Act* and Abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003.

86. The 1st appellant's defence against the charges preferred against her in count III and IV consists of contentions that she merely witnessed the signature of the accounting officer on whom section 27(3) of the *Public Procurement and disposal Act* 2005 and regulation 7(c) of the *Public Procurement and Regulations* 2006 places the duty to sign the contract.

87. The 2nd to 8th appellants contend that count II was premised on a non- existent law. It is a well-known tenet of the *Constitution* pursuant to article 50 (2)(n) of the *Constitution*, that a person cannot be convicted of an offence unless it is an offence in Kenya. However, that is not the case here. For clarity, their contention is not that the offence does not exist in statute, but rather it is an issue of interpretation. They argue that the respondents wrongly interpreted the provisions related to an open tender specifically section 30(3) of the *Public Procurement and Disposal Act* and regulation 10(2)(e) which they submit would not apply to an open tender. That from a reading of section 52(3)(i) of the Public Procurement and Disposal Act, 2005 (repealed) the tender set out the procedures and the evaluation criteria. They also argue that by section 66(2) of the Act the evaluation and comparison shall be done using the procedures and criteria set out in the tender document and no other criteria shall be used. They submit that the rig-moving services are not standard services and works within the known market prices. It was not a function of the Tender Committee to make comparisons for a service not contemplated by section 30(3) of the Public Procurement and Disposal Act 2005 (repealed). It is on this ambit that they submitted that Count I was premised on a non-existent law.

88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. InHussein Khalid and 16 others v Attorney General & 2 others, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of the *Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal

law or otherwise abuse of the court process. We reproduce the words of this court inHussein Khalid and 16 others v Attorney General & 2 others[supra] as follows;

> " [105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount." [Emphasis added]

90. From the circumstances of this case, we agree with the determination of the Court of Appeal that a distinction of the applicable procurement laws and whether the appellants participated in the tender process hence liable to prosecution is a determination best arrived at upon consideration of viva voce evidence and through cross examination of witnesses. We therefore come to the conclusion that the Court of Appeal did not err in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in *the Constitution*.

iii. Whether the DPP violated the Appellant's rights and fundamental freedoms under Articles 10, 25(c), 27, 28, 29, 41 and 50 of *the Constitution* in preferring the charges contested by the Appellant.

91. Article 10 of the *Constitution* relates to national values and principles. article 27 is on equality and freedom from discrimination. Article 25(c) and 50 related to the right to fair trial, article 29 is on freedom and security of the person while article 41 relates to labour relations. The appellants submit that a criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would open a door to an unfair trial.

92. The right to fair hearing is broad and includes the concept of the right to fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. See; *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR, *Mohamed Abdi*

Mahamud v Ahmed Abdullahi Mohamad & 3 others, SC Petition 7 of 2018 consolidated with Petition 9 of 2018; [2018] eKLR; *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others*, SC Petition 17 of 2015; [supra].

93. As we have found hereinabove, judicial review looks at the decision-making process. The court in judicial review cannot adequately canvass issues of controverted facts and whether those facts satisfy the ingredients of offences under which the accused are charged. More so, before a trial has taken off. As we stated in the case ofHussein Khalid and 16 others v Attorney General & 2 others[supra] theappellants put the wagon before the horse by asserting that their right to a fair trial was violated at the time of their arraignment in court. By refusing to submit to the jurisdiction of the trial court where their innocence may be upheld or their guilt established, the appellants removed themselves from the protections of article 50(1). Whatever the case, the criminal justice system is required to protect against the abuses claimed by the appellants, which the trial court is competent to resolve when challenged by an accused person, properly, during the trial.

94. This court having already demonstrated that there was nothing untoward in relation to the charges levelled against the appellants; the allegations of malice and discrimination having not being properly canvassed/demonstrated by the appellant, it follows that the claim for constitutional rights violations equally falls by the wayside. It is our considered opinion that it would be pragmatic that the appellants let the trial commence and conclude, during which trial they may raise all the issues they have as against the law under which they are charged. If successful, it is only then that they will pursue their rights on appeal.

95. For the foretasted reasons we find no merit in the consolidated appeals and dismiss the same.

iv. Who shall bear the costs of the appeal?

96. This court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, made the following determination on the award of costs;

> " It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation." [Emphasis added]

97. We have taken into account the industry of the parties, the purpose and intent of the appellants and the issues canvassed in the appeal. We have also considered that the issues raised by the appellant are issues that had to be seriously interrogated by the superior courts in their interpretation. We are cognizant of the fact that, the criminal charges have been in abeyance since institution of these proceedings. It is also not lost on us that various stay orders have been issued by this court and the superior courts in relation to these proceedings.

98. We find it just in the circumstances that each party bears its own costs.

Orders

99. Consequent upon our conclusion above, we finally order that;

    a. The 1st appellant's petition of appeal dated October 25, 2019 and lodged on even date and the 2nd to 8th appellants' petition of appeal dated October 25, 2019 and lodged on October 29, 2019 are hereby dismissed.

    b. Anti-Corruption Case No 20 of 2015 before the Chief Magistrates' Court in Milimani to proceed and be heard on priority basis.

    c. Each party to bear its own costs.

    Orders accordingly.

JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2023] KESC 4 (KLR)

Constitutional Law *- interpretation of the Constitution - interpretation of article 45(3) of the Constitution - where article 45(3) of the Constitution provided that parties to a marriage were entitled to equal rights at the time of marriage, during marriage, and at the dissolution of marriage - whether spouses were automatically entitled to a 50% share of proprietary rights after the dissolution of marriage - whether article 45(3) applied retrospectively - Constitution, article 45(3).*

Family Law *- matrimonial property - distribution of matrimonial property upon the dissolution of a marriage - contribution of spouses towards the acquisition of matrimonial property - whether spouses were automatically entitled to a 50% share of proprietary rights after the dissolution of marriage - Constitution, article 45(3).*

Statutes *– application of statutes – application of the Matrimonial Property Act No 49 of 2013 - retrospective application of the Matrimonial Property Act - whether the Matrimonial Property Act No 49 of 2013 could be applied retrospectively to claims filed before the commencement of the Act - Matrimonial Property Act, cap 152.*

Words and Phrases *- retrospective - definition of retrospective - a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred - Black's Law Dictionary (6th Edition)*

Brief facts

The appellant and respondent's union was formalized under the repealed Marriage Act. The appellant and the respondent later moved into their matrimonial home located at Tassia Estate within Embakasi in Nairobi. The respondent claimed that the appellant and herself proceeded to construct rental units on the property. The respondent added that during the construction of the rental units, she successfully applied for a loan of Kshs 200,000 which she gave to the appellant to enable him to complete the construction of the units. The respondent further claimed that, during the subsistence of their marriage, the appellant proceeded to acquire more assets.

In 2008, the marriage irrevocably broke down and the appellant applied for its dissolution. A decree absolute was subsequently issued on October 15, 2015. It was the irrevocable breakdown of the marriage that led to the respondent commencing the division of matrimonial property proceedings at the High Court. The court found that the only property that amounted to matrimonial property was the matrimonial property located at Tassia Estate. The court also held that the respondent had failed to prove her case on the claim that she directly contributed to the acquisition of that property

which was registered in the appellant's name. The court however recognized that the respondent made an indirect non-monetary contribution towards the family's welfare in the form of upkeep and welfare. The court for that reason proceeded to award the respondent 30% of the share in the matrimonial property and a 20% share of the rental units constructed within that property.

Aggrieved by the decision of the High Court, the respondent filed an appeal at the Court of Appeal while the appellant filed a cross-appeal. The Court of Appeal found that the respondent, having been married to the appellant for 18 years, 15 years of which were spent in gainful employment, constantly took loans and helped acquire the matrimonial home jointly with the appellant. The court also found that the respondent thus acquired a beneficial interest in the matrimonial property and further that, the High Court erred in awarding the respondent a 30% share of the house and a 20% share in the rental units. The Court of Appeal proceeded to set aside the High Court's findings and ordered that the matrimonial property and the rental units built were to be shared equally between the appellant and respondent at the ratio of 50:50.

Dissatisfied by the Court of Appeal judgment, the appellant filed the instant appeal.

Issues

i. Whether spouses were automatically entitled to a 50% share of proprietary rights after dissolution of marriage.

ii. Whether the Matrimonial Property Act, cap 152, could be applied retrospectively to claims filed before the commencement of the Act.

iii. Whether article 45(3) of the Constitution which provided that parties to a marriage were entitled to equal rights at the time of marriage, during marriage, and at the dissolution of marriage applied retrospectively.

Held

1. The appeal was certified as one involving a matter or matters of general public importance. The Matrimonial Property Act, cap 152, came into being in 2013, with the Act giving its date of commencement as January 16, 2014, while the instant matter was filed in 2010, four years before the commencement of the Act. For legislation to have retrospective effect, the intention had to be unambiguous from the words of such statute or legislation. There was no retrospective application of the Matrimonial Property Act and the applicable law to claims filed before the commencement of that Act was the repealed Married Women Property Act, 1882.

2. Article 45(3) of the Constitution provided that parties to a marriage were entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage. The language used in the article by itself resolved the question of retrospectivity. The right to equality was one of the fundamental rights and freedoms that were protected by the Constitution, a right that was inherent and indefeasible to all human beings. Only the language of the Constitution could act as a guide as to whether a provision in the Constitution applied retrospectively or not.

3. The language of article 45(3) of the Constitution did not connote that it could not be applied retrospectively. The language provided for the right to equality to all parties of a marriage during the subsistence of such marriage, as well as at the dissolution of such a marriage. The Constitution could not be subjected to the same principles of interpretation applied to statutes on retrospective application of the law. Therefore, a reading of article 45(3) could only lead to the conclusion that there was nothing that barred its provisions from being applied retrospectively.
4. The principles in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR (*Echaria*) were good law and remained the basis within which matrimonial property should be distributed for matters filed before the commencement of the Matrimonial Property Act, 2013. The finding in *Echaria* was essentially that a spouse did not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution had to be ascertained to entitle such a spouse to a specific share of the property.
5. The position taken by Kenyan courts following *Echaria* case was that as much as section 17 of the Married Women Property Act. 1882 gave courts discretion to do what was just and fair under the varying circumstances before them, it did not entitle a court to make an order which was contrary to any well-established principle of law on proprietary interests or ownership of property. The court in *Echaria* also noted that for one to be entitled to a share of the property, the court should consider the circumstances of each arising case independently in assessing contribution further noting that what amounted to contribution could either be direct and monetary and indirect and non-monetary.
6. The equality provision in article 45(3) of the Constitution did not entitle any court to vary existing proprietary rights of parties and take away what belonged to one spouse and award half of it to another spouse that had contributed nothing to its acquisition merely because they were married to each other. To do so would mean that article 40(1) and (2) of the Constitution which protected the right to property would have no meaning which would not have been the intention of the drafters.
7. Article 45(3) of the Constitution acted as a means of providing for equality as at the time of dissolution of marriage but such equality could only mean that each party was entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution was there any suggestion that a marriage between parties automatically resulted in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed to enable the court to pass property rights from one spouse to another by fact of marriage only.
8. The guiding principle should be that apportionment and division of matrimonial property could only be done where parties fulfilled their obligation of proving what they were entitled to by way of contribution. The respondent provided evidence to prove direct financial contribution during the subsistence of the marriage and that aligned with the finding that a party had to prove contribution to enable a court determine the percentage available

to it at distribution and safeguarded against a blanket expectation that the principle of equality would be applied generally in the division of matrimonial property irrespective of contribution. The test to be applied to determine the extent of contribution was ultimately one on a case-to-case basis.

9. Equality of parties to a marriage had largely been interpreted and construed in two ways. On the one hand, an interpretation of article 45(3) of the Constitution had been construed to mean a division of matrimonial property down the middle through the literal application of the 50:50 division ratio. Proponents of that argument largely opined that since non-monetary contribution could not be quantified but was equally important, a split right in the middle would be more appropriate. The second approach was that 'equal' as provided for under article 45(3), meant that a party obtained an equivalent of what one contributed, monetarily or otherwise.

10. Article 45(3) of the Constitution underscored the concept of equality as one that ensured that there was equality and fairness for both spouses. Equality and fairness were therefore one and intertwined. Equality also underscored the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, each party's contribution to the acquisition of matrimonial property could not have been done on an equal basis as a party could have significantly contributed more in acquiring property financially as opposed to the other party.

11. Equity denoted that the other party, though having not contributed more resources to acquiring the property, could have nonetheless, in one way or another, through their actions or deeds, provided an environment that enabled the other party to have more resources to acquire the property. That was what amounted to an indirect contribution. Equity therefore advocated for such a party who could seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

12. Equity was an important principle when it came to matrimonial property since what was fair as it related to equity was not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to the acquisition of matrimonial property, even though such contribution was indirect, but had in one way or another, enabled the acquisition of such property amounted to a significant contribution. Such direct or indirect acts included:

    a. Paying part of the purchase price of the matrimonial property.
    b. Contributing regularly to the monthly payments in the acquisition of such property.
    c. Making a substantial financial contribution to the family expenses to enable the mortgage installments to be paid.
    d. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.

e. Caring for children and the family at large as the other spouse worked to earn money to pay for the property.

13. While article 45(3) of the Constitution dealt with equality of the fundamental rights of spouses during and after the dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.

14. The stated equality under article 45(3) of the Constitution meant that the courts were to ensure that at the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution. That was best done by considering the respective contribution of each party to ensure no party was unfairly denied what they deserved as well as ensuring that no party was unfairly given more than what he or she contributed.

15. In a marriage, the general assumption was that both spouses shared everything and on the face of it, both parties contributed towards the home or family in one way or another, to whichever extent, however big or small. Both spouses could also work and earn income, which inevitably, in most instances, always ended up being spent on the family unit. It could be the whole income or a substantial part of it, but ultimately, a percentage of it went into the family. That was the essence of section 14 of the Matrimonial Property Act.

16. If a marriage broke down, the function of any court was to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of the Constitution. To hold that article 45(3) had the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages. Noting the changing times and the norms in society, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the matrimonial property. That could not have been the intention of Kenya's law on the subject.

17. The respondent took out loans and contributed substantially to the purchase of the matrimonial property and rental units. The 50-50 division was therefore reasonable in the specific circumstances of the instant case.

Appeal dismissed.

Orders

Appellant to bear the respondents' costs.

Citations

Cases

Kenya

1. *AKM v NNN* Civil Case 2 of 2015; [2019] KEHC 7687 (KLR) - (Followed)

2. *CMN v AWM* Environmental & Land Case 208 of 2012 [2013] eKLR - (Followed)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) (Consolidated) - (Followed)
4. *Echaria v Echaria* Civil Appeal 75 of 2001; [2007] eKLR; [2007] 1 KLR 469 - (Applied)
5. *EGM v BMM* Civil Appeal 231 of 2018; [2020] KECA 188 (KLR) - (Followed)
6. *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* Petition 164B of 2016; [2018] KEHC 7130 (KLR) - (Followed)
7. *Ibren, Nasra Ibrahim v Independent Electoral & Boundaries Commission & 2 others* Election Appeal 9 of 2018; [2018] KECA 500 (KLR) - (Followed)
8. *JAO v NA* Civil Suit 86 of 2012; [2013] eKLR - (Applied)
9. *Macharia & another v Kenya Commercial Bank & 2 others* Application No 2 of 2011; [[2012] eKLR; [2012] 3 KLR 199 - (Followed)
10. *MEK v GLM* Civil Appeal 66 of 2015 ; [2018] eKLR - (Followed)
11. *Njiroine v Maroro* Motion No 5 of 2013; [2014] eKLR - (Followed)
12. *Njoroge v Njoroge* Civil Case 2125 of 2000; [2008] KEHC 918 (KLR) - (Followed)
13. *PNN v ZWN* Civil Appeal 128 of 2014; [2017] eKLR - (Followed)
14. *Rai & 3 others v Rai, Estate of & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Applied)
15. *RMM v BAM* Civil Appeal 267 of 2011; [2015] eKLR - (Followed)
16. *RMM v TSM* Civil Appeal 7 of 2013; [2015] eKLR - (Followed)
17. *UMM v IMM* Civil Suit 39 of 2012; [2014] eKLR - (Followed)
18. *William, Agnes Nanjala v Jacob Petrus Nicolas Vander Goes* Civil Appeal No 127 of 2011 - (Applied)

Uganda

Rwabinumi v Bahimbisomwe Civil Appeal 10 of 2009; [2013] UGSC 5 (20 March 2013) - (Followed)

Malawi

1. *Kishindo v Kishindo* Civil No 397 of 2013 [2015] MWHC 447 - (Followed)
2. *Tewesa v Tewesa* Matrimonial Cause Number 9 of 2012; [2020] MWHC 28 - (Followed)

Zambia

1. *Mambwe v Mambwe* Appeal 222 of 2015); [2018] ZMSC 317 - (Followed)
2. *Mathews Chishimba Nkata v Ester Dolly Mwenda Nkata* SCZ Appeal No 60/2015 - (Followed)

United Kingdom

1. *Burns v Burns* [1984] 1 All ER 244 - (Followed)
2. *Gissing v Gissing* [1971] AC 886 - (Followed)
3. *Pettitt v Pettitt* [1970] AC 777 - (Followed)
4. *White v White* [2001] 1 AC 596 - (Followed)

Canada

1. *Hardwood v Thomas* [1981] NSCA 4167 - (Followed)
2. *MacLean v MacLean* [2005] NSSC 284 - (Followed)
3. *R v Turpin* [1989] 1 SCR 129 - (Followed)

Hong Kong

1. *Hong Kong Secretary for Justice v Yau Yuk Lung Zigo and Another* FACC No 12 of 2006 [2007] 3 HKLRD 903 - (Explained)

Statutes

Kenya

1. Constitution of Kenya, articles 2(5); 2(6); 10; 27(1)(4); 40(2)(a)(b); 45(1)(3); 60(1)(a)(b)(f); 159; 163(4)(b); Fifth Schedule - (Interpreted)
2. Interpretation and General Provisions Act (cap 2) section 23(3) - (Interpreted)
3. Marriage Act (cap 150) In general - (Cited)
4. Married Women's Property Act, 1882 (Repealed) section 17 - (Interpreted)
5. Matrimonial Property Act (cap 152) section 4, 6, 9, 13, 14, 19 - (Interpreted)

Uganda

Constitution of Uganda, 1995 article 26(1) - (Interpreted)

Malawi

Constitution of the Republic of Malawi, 2014 section 24 - (Interpreted)

United States

California Family Code, 2021 section 2550 - (Interpreted)

Texts

1. Black, HC., (Ed) (1991), ***Black's Law Dictionary*** St Paul Minnesota: West Group 6th Edn
2. Hogg, QM, (Lord Hailsham) *et al* (Eds) (1993), ***Halsbury's Law of England*** London: Butterworths Ltd 4th Edn Re - Issue Vol 44(i) para 1433

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. Convention on Elimination of All Forms of Discrimination against Women, (CEDAW), 1979
3. International Covenant on Civil and Political Rights (ICCPR), 1966
4. Universal Declaration of Human Rights (UDHR), 1948

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January 27, 2023, the Court delivered the following Judgment:

A. Introduction

1. This petition of appeal dated and lodged on July 3, 2020 is before us upon certification by the Court of Appeal (Ouko (P) (as he then was), Warsame & Sichale JJA) in Civil Application Sup No 6 of 2018 in its ruling delivered on June 19, 2020 as one involving a matter of general public importance under article 163(4)(b). The appellant is challenging the entire judgment and orders of the Court of Appeal (Visram, Karanja & Koome, JJA) in Civil Appeal No 81 of 2017 delivered on February 23, 2018.

2. The petition, in summary, concerns the mode of distribution of property acquired during a marriage and the applicable law where a suit was filed before the promulgation of the *Constitution*, 2010 and under the *Married Womens Property Act of 1882* (now repealed).

B. Background

3. The appellant and respondent entered into a marriage under Abagusii customary law in 1990 and subsequently, began cohabiting as man and wife. On August 30, 1995 their union was formalized under the *Marriage Act* cap 150 (now repealed) at the Office of the Registrar of Marriages in Nairobi and a marriage certificate issued. They were then blessed with two children during the subsistence of their marriage.

4. The appellant and the respondent later moved into their matrimonial home on land reference No Nairobi/Block xxxx (matrimonial property) located at Tassia Estate within Embakasi in Nairobi. The respondent has also claimed that the appellant and herself proceeded to construct rental units on the property. The respondent added that during construction of the rental units, she successfully applied for a loan of Kshs 200,000/- which she gave to the appellant to enable him complete construction of the said units. The appellant denies this contention.

5. The respondent furthermore claims that, during the subsistence of their marriage, the appellant proceeded to acquire more assets in the form of properties situated in Ngong, House No xxxx at Hillcrest Estate House in Athi River, Eagle Apartment House No xxxx) as well as a motor vehicle registration No KAL xxxx.

6. In 2008, the marriage irrevocably broke down and the appellant applied for its dissolution. A decree absolute was subsequently issued on October 15, 2015. It was the irrevocable

breakdown of the marriage that led to the respondent commencing division of matrimonial property proceedings.

i. At the High Court

7. The respondent filed an originating summons before the High Court- civil case No 18 of 2010 (OS)- under section 17 of the *Married Womens Property Act of 1882*. The respondent sought among other orders:

   i. A declaration that the listed immovable properties, set out as, Nairobi/Block xxxx in Tassia Estate Embakasi which served as the matrimonial home; two properties in Ngong; Hillcrest Estate House Athi River; Eagle Apartment House No xxxx; Motor Vehicle registration no KAL xxxx; and registered in the appellant's name, are joint ventures of both parties;

   ii. That the honourable court be pleased to grant possession and title of land parcel Nairobi xxxx; and

   iii. The rental income from units therein be shared equally with the appellant, and logbook of a motor vehicle registration No KAL xxxx, to the plaintiff;

   iv. That the honourable court order disclosure of a comprehensive list of all properties, shares and bank accounts held and all the proceeds thereto acquired during coverture and that the same be shared equally.

8. The respondent, in seeking the said orders, claimed that the properties were acquired through the joint effort of both the appellant and respondent but were solely registered in the appellant's name, despite the respondent having contributed to the acquisition of the properties.

9. In its judgment delivered on February 2, 2017, the trial court (Ougo, J) identified three issues for determination; what constituted matrimonial property; whether the respondent contributed to the acquisition of the alleged matrimonial property and if so, to what extent and; the respondent's share in the matrimonial property.

10. The trial court in that context found that the only property that amounted to matrimonial property was land reference No Nairobi/Block xxxx where the appellant and respondent had constructed their matrimonial home as well as rental units. The court, guided by the principles set out in *Echaria v Echaria* [2007] eKLR also held that the respondent had failed to prove her case on the claim that she directly contributed to the acquisition of that property which was registered in the appellant's name. The court however recognized that the respondent did make indirect non- monetary contribution towards the family's welfare in the form of upkeep and welfare. The court for that reason proceeded to award

the respondent 30% of the share in Nairobi/Block xxxx and a 20% share of the rental units constructed within the said property.

ii. At the Court of Appeal

11. Aggrieved by the decision of the learned judge of the High Court, the respondent filed civil appeal No 81 of 2017. The appeal was premised on nine grounds of appeal with the respondent claiming *inter alia* that the learned judge erred in law in (a) finding that the respondent had not shown any monetary contribution in the acquisition of the matrimonial property; (b)in applying the decisions in *Echaria v Echaria* and *Francis Njoroge v Virginia Wanjiku Njoroge* Nairobi civil appeal No 179 of 2009 which are no longer good law having been effectively set aside by the provisions of article 45(3) of the *Constitution*; and (c) awarding a lesser proportion of the rental properties which were part of the matrimonial property.

12. The appellant, also aggrieved by the High Court judgment, filed a cross appeal claiming that the learned judge erred in (i) awarding the respondent 30% share of the matrimonial property despite finding that the respondent had not made any monetary contribution; (ii) awarding the appellant 20% share of the rental units on the matrimonial property while no evidence of monetary or non-monetary contribution had been provided and; (iii) making the award of 30% share which was inordinately high as the respondent had made no direct contribution to its acquisition and development.

13. On considering the appeal and the cross appeal, the Court of Appeal identified two issues for determination; whether the learned Judge erred by awarding the appellant 30% share of the matrimonial home and 20% of the rental income and; whether the cross-appeal should be allowed by substituting the said awards with lesser percentages or by dismissing the suit filed at the High Court altogether.

14. The Court of Appeal in its judgment was cognizant of the developments in family law being the enactment of article 45 (1) and (3) of the *Constitution* as well as the provisions of the *Matrimonial Property Act, 2013* despite the suit before the High Court having been filed before the two laws came into effect.

15. The learned judges in that regard found that the respondent, having been married to the appellant for 18 years, 15 years of which were spent in gainful employment, constantly took loans and helped acquire the matrimonial home jointly with the appellant. The court also found that, the respondent thus acquired beneficial interest in the matrimonial property and further that, the trial court erred in awarding the respondent a 30% share of the house and 20% share in the rental units. The court on its part and for the above reasons proceeded to set aside the trial court's findings and ordered that the matrimonial property and the rental

units built thereon- Nairobi/Block 97/564- be shared equally between the appellant and respondent at the ratio of 50:50.

ii. At the Supreme Court

16. Dissatisfied by the Court of Appeal judgment, the appellant has now moved this court, citing 13 grounds in support of his appeal claiming that the learned judges of appeal erred in law and fact in:

i. Misapprehending the law on applicability 0f relevant statutes in making reference to and relying on the provisions of the *Matrimonial Properties Act of 2013* which came into force after the suit was lodged at the High Court;

ii. Interpreting equality of spouses during and after marriage as provided for under article 45(3) to mean 50-50 sharing of properties upon dissolution of marriage regardless of the contribution of each party.

iii. Basing the 50:50 apportionment of the property on article 45(3) of the *Constitution* which provides for general rights but does not define the formula for distribution of matrimonial property.

iv. Assuming that an employed spouse automatically makes contribution towards the acquisition and development of property

v. Disregarding the provisions of the Married Womens Property Act, 1882 (repealed) under which the suit was lodged.

vi. Not enforcing the rights of the parties that had accrued under the provisions of the *Married Womens Property Act of 1882* which was the statute in force when the suit was lodged.

vii. Finding that the respondent made a contribution to and is entitled to an equal share of Nairobi/97/564 and rental units that are constructed thereon.

viii. Awarding the respondent a 50% share of Nairobi Block xxxx and the rental units that are constructed thereon when there was no evidence of her contribution, directly or indirectly.

ix. Awarding the respondent a 50% share of Nairobi Block xxxx and the rental units constructed thereon yet the property was acquired and developed by the appellant long before marriage;

x. Failing to assess the contribution made by the respondent toward acquisition and/or development of the property and basing its decision instead on the period the respondent lived on it;

xi. Awarding the respondent an inordinately high share of the property Nairobi Block xxxx and the rental units that are constructed thereon yet it was evident that the respondent's contribution was not monetary and was in fact barely discernible;

xii. Ignoring the case law that elaborately established the principles of distribution of property between ex-spouses under the *Married Womens Property Act,* 1882 (repealed).

xiii. In dismissing the appellant's cross appeal.

17. Consequently, the appellant seeks the following reliefs from the court:

a. An order setting aside the decision/order of the Court of Appeal and substituting the said decision/order with one allowing the appeal.

b. An order declaring that the law to be considered in determination of a dispute is the law that was in force at the date the suit was lodged and not when the suit was heard.

c. An order awarding the respondent 10% share of Nairobi/ Block 97/564 and 10% share of rental units that are constructed thereon.

d. An order awarding the costs of this appeal and the proceedings before the Court of Appeal and the High Court to the appellant; and

e. Any other order or further relief as this court may deem fit to grant.

C. Parties' Respective Cases

i. The appellant's

18. The appellant's written submissions are dated August 4, 2020 and filed on December 10, 2020. Therein, the appellant has identified four issues for determination:

(a) Whether the Court of Appeal erred in relying on the *Matrimonial Property Act, 2013* and not the *Married Womens Property Act,* 1882 in reaching its decision;

(b) Whether equality of parties during and after marriage as provided for under article 45(3) of the *Constitution* of Kenya mean 50:50 sharing of property or to each party according to his or her contribution to the acquisition of the property in contest;

(c) What were the governing legal principles that the Court of Appeal should have considered? and;

(d) What are the fair and just percentages of the properties to award each party in light of the circumstances?.

19. With regard to the issue of the Court of Appeal relying on the *Matrimonial Property Act, 2013*, the appellant submits that the court erred in law by failing to apply the *Married Womens Property Act* 1882 (repealed) which was the applicable law in force at the time the suit was lodged as that is when rights, duties and remedies accrued between the parties. He also argues that the law on prospective and retrospective application of statues was determined by this court in *Samuel Kamau Macharia & another v KCB & 2 others*, SC Application No 2 of 2011; [2012] eKLR ('the *Samuel Kamau Macharia* case') where the court found that all statutes are prospective and retrospective application should not be made unless by express words or necessary implication, it appears that this was the intention of the legislature.

20. The appellant further urges that the *Matrimonial Property Act* 2013, could not be applied retrospectively, as it impaired the obligation of parties to a contract of marriage and divests already vested rights over property bought and developed by a spouse; that the repealed *Married Womens Property Act* of 1882 and the *Matrimonial Property Act, 2013* are legislations that affect substantive rights of parties and reliance on one or another may have the consequence of depriving a party of his/her property rights 'without due process of law' and; that Parliament did not expressly or impliedly permit retrospective enforcement of the *Matrimonial Property Act*. In this context he has cited the decision in *RMM v BAM [2015] eKLR* where the Court of Appeal applied the provisions of the *Married Womens Property Act, 1882* where pleadings had been filed under the said act as was done in the present case.

21. To this end, the appellant urges that retrospective application of statutes on substantive issues such as those that affect the property rights of parties, leads to a breach of a party's equal protection and benefit of law in force contrary to article 27(1) of the *Constitution*. He thus submits that application of the *Matrimonial Property Act* has had the effect of conferring a benefit on the respondent while taking it away from the appellant contrary to what the appellant legitimately expected when the dispute crystalized. And that in so far as the *Matrimonial Property Act* provides for non-monetary contribution, the act affects past acts disadvantageously and is therefore unjust.

22. On the issue of whether equality of parties during and after marriage as provided for under article 45(3) of the *Constitution* means 50:50 sharing by parties or to each party according to his or her contribution, the appellant submits that equality of parties to marriage during and after the marriage does not mean the mathematical division of assets into two equal halves.

That, instead, it requires first, judicial assessment of what each party has brought to the table before any proper mathematical figures can be determined. In that regard, the appellant has cited the Court of Appeal decisions in *PNN v ZWN* [2017] eKLR where the court held that division and distribution of matrimonial property must proceed on the basis of fairness and conscience and *AW v MVCMAWM* [2018] eKLR which was cited with authority in *AKM v NNN* [2019] eKLR where the court held that each case must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each such case.

23. On the issue of the governing principles, the appellant submits that the appellate court erred in finding that the respondent had made contribution to the acquisition of the matrimonial property only for the reason that she was in occupation of the same for a considerable period of time. That in finding so, the Court of Appeal disregarded the admission by the respondent that the house was constructed in 1995 and not 1996 when she took a loan to purchase a plot. Similarly, in finding that the respondent paid school fees for their children because she was in employment and applied for school fees loans, the court did not properly asses the evidence before it. He therefore submits that the court did not properly assess the contribution of each party toward the development of the property in question and consequently, fell into error.

24. The appellant in addition maintains that the correct principles to be applied in the division of such property were set out in *Echaria v Echaria* where it was held that a wife's non-monetary contribution cannot be considered in determining the amount of contribution towards the acquisition of matrimonial property neither would performance of domestic duties be considered.

25. The appellant furthermore faults the appellate court for failing to consider that the appellant made financial sacrifice to empower the respondent after she lost her job. And that she thus lacked the means to contribute towards the acquisition of Nairobi/Block 97/564. That in any event, the loans she took in 1993 and 1996 were used to purchase plots whose particulars have not been revealed and remain unknown to him and the said loans were not connected to the matrimonial property at all.

26. The appellant in that context argues that, to the contrary, the appellate court failed to take all these facts into consideration noting that the concept of fairness demands that the court ought to have looked into all the material facts ranging from the sources of the monies spent, the actual expenses by each party towards the well-being of the family including sacrifices and investments in the poorer spouse by the spouse that was doing well, financially. The appellant adds that it would be fundamentally unfair that a party which gave all his money to the family including for domestic expenses should be awarded the same proportion of the property as a party which contributed nothing and in fact siphoned the money out.

27. The appellant further finds fault in the appellate court's finding of subjecting the matrimonial property to a 50:50 share claiming that the party that contributed more over a longer period of time to the development of the property was unfairly subjected to the same share as a party that contributed nothing significant. In support of this submission, the decision in *RMM v TSM* [2015] eKLR was relied on where the court held that each party's contribution ought to be assessed and the same ought to form the basis for division.

28. In conclusion, the appellant submits that this court should allow his appeal with a fairer portion of 10% share of both the matrimonial property and rental units aforesaid being awarded to the respondent.

ii. Respondent's Submissions

29. The respondent's written submissions are dated August 21, 2020 and filed on August 31, 2020. In the submissions, she identifies the main issues for determination in regard to the certification granted by the Court of Appeal as being;

    (a) Whether the appeal as framed is in consonance with the leave granted to appeal;

    (b) Whether in a second appeal, this court should re-evaluate factual issues;

    (c) Whether a matrimonial property cause filed prior to the promulgation of the *Constitution* should be determined under section 17 of the *Married Womens Property Act, 1882* of England and in accordance with the principles espoused in *Echaria v Echaria* or whether the courts should follow the new regime as at the time of determination by applying the provisions of article 45(3) of the *Constitution* and the provisions of the *Matrimonial Property Act 2013*;

    (d) whether article 45(3) of *Constitution* can be used as a distribution matrix of matrimonial property and in what ratio and;

    (e) whether the determination by the Court of Appeal was fair and just in the circumstances.

30. The respondent firstly submits that the appeal as framed is not in consonance with the leave granted to appeal. That the issues as framed during certification of the intended appeal as a matter of general public importance laid the four corners within which the appeal should be prosecuted and determined and no party should add to nor deviate from them.

31. In the above context, the respondent argues that the jurisdiction of this court in determining appeals (and issues therein) from the Court of Appeal is extremely limited by article 163(4)(b) of the *Constitution* and it can only deal with issues of interpretation of the *Constitution* or issues of general public importance. Citing the case of *Nasra Ibrahim Ibren v Independent*

*Electoral and Boundaries Commission & 2 others;*Petition No 19 of 2018 [2018] eKLR the respondent submits that it was not open for the appellant to sneak in all his misgivings about the Court of Appeal judgment in the present appeal and which misgivings are outside the certified category of issues available for determination. She thus urges that, the extent of her contribution in the acquisition and development of the matrimonial property is not among the issues that received certification for purposes of appeal, nor is the extent of her so called "indirect" contribution thereof.

32. On the issue of the applicable law, the respondent submits that the Court of Appeal did not apply the law retrospectively, but only recognised that the body of family law had developed exponentially since the promulgation of the *Constitution*, 2010 with the appellate court noting that the *Matrimonial Property Act* had augmented the provisions of the *Constitution*. Further to this, she argues that the Court of Appeal did not apply the *Matrimonial Property Act* retrospectively but only went on to recite the development of the law on division of matrimonial property and its applicability in Kenya at present.

33. The respondent furthermore argues that by reciting such history, the Court of Appeal noted that, whether under the old regime or after the promulgation of the *Constitution* in 2010 and the *Matrimonial Property Act* in 2013, monetary and non-monetary contribution or direct and non- direct contribution had to be taken into account in distributing matrimonial property. That the Court of Appeal also and only took cognisance of the fact that whichever law was applicable, the trial court was erroneous in its judgment, after which the appellate court proceeded in its analysis and reached its own decision without mentioning either article 45(3) of the *Constitution* or provisions of the *Matrimonial Property Act*.

34. The respondent has also argued that, after the promulgation of the 2010 Constitution, there was a tectonic shift in the law on division of matrimonial property which dictated that from that date forward, and irrespective of whether a claim had commenced before or after that Constitution, all persons and entities, including courts, had to ensure that the rights recognised under the *Constitution* such as article 45(3) and all the principles espoused therein particularly under articles 10 & 159 had to be given full and unqualified effect.

35. In addition, the respondent argues that retrospectivity of the *Constitution* is permissible in appropriate circumstances and relies on the Court of Appeal decision in *Agnes Nanjala William v Jacob Petrus Nicholas Vander Goes*, Mombasa CA Civil Appeal No 126 of 2011, where the court found the right to equality to be inherent and indefeasible to all human beings despite the cause of action accruing before the 2010 Constitution.

36. Further to this and in addition, the respondent submits that the *Matrimonial Property Act* is also exempted from the general rule on its prospective application noting that it was one of the laws that were required to be passed under schedule 5 of the *Constitution*

furthermore arguing that the act was meant to give effect to article 45(3) of the *Constitution*. The respondent thus submits that the *Married Womens Property Act,1882* ceased operating upon the commencement of the *Matrimonial Property Act*. In support of this, the respondent contends that section 19 of the *Matrimonial Property Act* provides that 'the Married Womens Property Act shall cease to extend to or apply in Kenya' the argument made being that this transitional clause acts to show that the *Married Womens Property Act* ceased to apply upon commencement of the *Matrimonial Property Act* and no court could thereafter use it in determining disputes including those filed before its repeal.

37. In light of the above submission, the respondent argues that article 45(3) can be used as a distribution matrix of matrimonial property and submits that, under article 45(3), 'equal' means a party obtaining an equivalent of what he/she has contributed monetarily or otherwise. While also affirming the decision by the Court of Appeal, the respondent maintains that the Court of Appeal was fair in its determination and urges this court not to interfere with the discretion exercised by the said court.

38. The respondent has also maintained that the High Court erroneously ignored evidence that proved direct monetary contribution on her part, noting that the court heavily relied on *Echaria v Echaria* and *Francis Njoroge v Virginia Njoroge* (*supra*), which action she claims was erroneous.

39. In conclusion, the respondent submits that having proved contribution, the Court of Appeal was right in its finding and asks the court to uphold the appellate court's finding.

iii. 1st amicus curiae (FIDA)

40. The submissions by FIDA are dated January 19, 2022 and filed on May 12, 2022. They submit that the term 'equal rights' in article 45(3) should be given context as it relates to the entire *Constitution* and should not be limited to that provision alone. In that context, it is their submission that constitutional interpretation is guided by these considerations; text and structure of the *Constitution*, intention of drafters and the ratifying body as well as prior precedents. Thus, an examination of article 45(3) through the scope of these guides should allow for a clearer interpretation of the article. In addition, it is their argument that any other interpretation would offend the entirety and spirit of the *Constitution*, particularly, that several provisions including but not limited to articles 27(1)(4), 40(2)(a) and (b) and 60(1)(a), (b) and (f) of the *Constitution* would be in conflict with each other and would not serve the integrated and wholesome nature of equality as envisaged by the *Constitution*.

41. It is their further submission that, following the promulgation of the *Constitution* and before the commencement of the *Matrimonial Property Act*, courts in Kenya were in agreement on their interpretation of article 45(3) that, equal rights as provided for under the said article can only mean a 50:50 division in rights, duties and liabilities within marriage as this was the only

interpretation that promoted the principle of equality as enshrined in the *Constitution*. The cases cited in this regard include the Court of Appeal decision in *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*, Mombasa Civil Appeal No 127 of 2011 and the High Court cases of *JAO v NA [2013] eKLR* and *CMN v AWM [2013] eKLR*.

42. FIDA furthermore submits that, by dint of article 2(5) and 2(6) of the *Constitution*, international law is considered part of Kenyan law, adding that Kenya is a signatory to the *Universal Declaration of Human Rights* (UDHR), *Convention on the Elimination of All Forms of Discrimination against Womens* (CEDAW), *International Covenant on Civil and Political Rights* (CCPR) and *African Charter on Human People's Rights* (ACHPR) which all espouse an established international principle of equal right of parties in a marriage. FIDA thus urges that, all these treaties and conventions have similar import to article 45(3) of the *Constitution* that promotes equal rights of parties in marriage. That for that reason, this court ought to interpret article 45(3) of the *Constitution* in the same manner.

43. FIDA has also made reference to comparative jurisprudence where other courts have interpreted the principle of equality citing the Supreme Court of Canada's decision in *R v Turpin [1989] 1 SCR 129* where the court held that the guarantee of equality before the law is designed to advance the value that all people be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. FIDA also cited the case of *Hong Kong Secretary for Justice v Yau Yuk Lung Zigo & another FACC No 12 of 2006 [2007] 3 HKLRD 903* to argue that equality at its basic, universal form means parity of treatment under parity of conditions and therefore, equality among parties in a marriage denotes all parties to a marriage possessing equal rights and sharing equal burdens. Similarly, the Malawian High Court case of *Tewesa v Tewesa* , (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 was cited where it was held that the petitioner had a 50% beneficial interest in the defendant's educational qualification defined as property under section 24 of the *Constitution of the Republic of Malawi* which provides that women have the right to full and equal protection of the law, and have the right not to be discriminated against on the basis of their gender or marital status. This position, according to FIDA, is echoed in South Africa's *Matrimonial Property* Act No 88 of 1984 which, in section 14, highlights the equality in division of matrimonial property which position also obtains in the United States of America, where the State of California applies the community property approach in the distribution of matrimonial property and grants equal shares to spouses under s 2550 of the *California Family Code*.

44. For these reasons, they submit that the position that the court should take in this appeal is one that promotes the principle of equality of parties as envisaged by article 45(3) of the *Constitution*.

iv. 2nd Amicus Curiae (LSK)

45. LSK, the 2nd *amicus curiae*, relies on its brief dated November 24, 2020 and filed on May 10, 2022. While addressing the import of article 45(3) as regards apportionment and division of matrimonial property, it is their submission that article 45(3) of the *Constitution* as read with sections 4, 13 and 14 of the *Matrimonial Property Act* should be the basis for the apportionment of matrimonial property upon dissolution of a marriage with a 50:50 split being a starting presumption capable of being rebutted by evidence showing contribution by either party or intention to identify beneficial interests. They argue that this would ensure that courts render decisions based on the particular facts of each matter, allowing for equitable decisions.

46. The amicus also contends that the relevant laws to be applied when it comes to matrimonial property remain to be article 45(3) of the *Constitution* as well as the provisions of the *Matrimonial Property Act*. They argue that upon commencement of the *Matrimonial Property Act* on January 16, 2014, the repealed Married Womens Property Act ceased to apply and therefore reliance by the appellant on the *Married Womens Property Act* and on the legitimate expectation that the law that was in force at the time of filing of the matter should be the same one to be used to determine the matter, is erroneous. LSK further counter this argument by submitting that there can be no legitimate expectation against clear provisions of the law or the *Constitution*. In support of this submission, they rely on this court's decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

47. LSK have furthermore submitted that, what constitutes matrimonial property should be distinguished from separate property acquired during the subsistence of a marriage by respective spouses and this often leads to erroneous judgments with respect to apportionment of matrimonial property upon dissolution of marriage. It is their other argument that though sections 6 and 9 of the *Matrimonial Property Act* give a definition of what is matrimonial property, the court ought to interrogate each case based on its particular facts in order to give life to these provisions. In addition, LSK argues that sections 13 and 14 of the *Matrimonial Property Act* provide for the treatment of separate and joint properties in relation to matrimonial property, also submitting that the factors courts should consider in determining beneficial interest in relation to separate and joint properties should be; the parties' intention at the time of registration of the property, their conduct during the marriage and their contribution to the acquisition of the property and subsequent to its registration.

48. In conclusion, LSK urges the court to render a firm decision on apportionment of matrimonial property to guide determination of future disputes and cure the divergent and uncertain positions taken by different courts on the issue.

D. Issues for Determination

49. This appeal was certified as one involving a matter or matters of general public importance with the Court of Appeal (Ouko (P), Warsame, Sichale, JJA) stating:

> "We have considered the applicant's grounds in support of certification and in our view, the intended appeal primarily questions the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being the *Constitution* and the *Matrimonial Property Act, 2013*. In essence, should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under section 17 of the old 1882 Married Womens Property Act of England and in accordance with the principles espoused in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR or should courts follow the new regime as at the time of determination by applying the provisions of article 45(3) of *Constitution* and the *Matrimonial Property Act, 2013* which underpin the principles of equality?"

50. Further, the court went on to identify the other question for determination by this court in rendering itself thus:

> "More importantly and of concern, is whether article 45(3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property without parties fulfilling their obligation of proof [of] what they are entitled to by way of contribution. There is a concern that article 45 talks about equality and cannot and should not be used as a distribution matrix of matrimonial property. Again, whether article 45(3) can be or is a ticket for 50-50 distribution has to be sorted out by the Supreme Court. In our view, the matters raised by the applicant are not only weighty and substantial but completely transcend the dispute between the parties herein. These are so fundamental, that the Supreme Court ought to have a bite."

51. Having considered the above expressions by the appellate court, the issues arising for our determination as matters of general public importance are:

i. What is the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being the *Constitution* and the *Matrimonial Property Act, 2013*?

ii. Should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under section 17 of the Married Womens Property Act,1882 and in accordance with the principles espoused in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR or should courts follow the new regime as at the time of determination by applying the provisions of article 45(3) of the *Constitution* and the *Matrimonial Property Act 2013* which underpin the principles of equality?

iii. Whether article 45(3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.

iv. What relief is available to the parties including on the issue of costs?

We shall address issues i. separately and address issues ii and iii. in two parts; propriety rights, if any, under article 45(3) and the controversy around the 50/50 division of matrimonial property.

E. Analysis

i. Retrospective application of the Matrimonial Property Act as well as article 45(3) of the Constitution.

52. Regarding the Court of Appeal's reliance on the *Matrimonial Property Act, 2013* the appellant contends that the appellate court erred in law by failing to apply the Married Womens Property Act,1882 which was the applicable law at the time the suit was lodged as that is also when rights, duties and remedies accrued between the parties.

53. The respondent submits on the other hand that, the Court of Appeal did not apply the law retrospectively, but only recognised that the body of family law had developed exponentially since the promulgation of the 2010 *Constitution*, with the appellate court noting that the *Matrimonial Property Act* had augmented the provisions of the *Constitution*. Further to this, she argues that the Court of Appeal did not apply the *Matrimonial Property Act* retrospectively but only went on to recite the development of the law on division of matrimonial property and its applicability in Kenya.

54. In the above context, the undisputed fact is that the suit before the High Court was brought by way of originating summons under section 17 of the *Married Womens Properties Act* 1882. The High Court applied the provisions of that act in rendering its decision. The Court of Appeal also remained alive to the fact that the claim was filed under the Married Womens Property Act but nevertheless went on to note that the claim was determined after the enactment of the *Matrimonial Property Act* as well as article 45(3) of the *Constitution*. The Court of Appeal's rendered itself as follows:

> " 11. Although the suit was filed before the above law came into effect, the hearing and determination took place between 2015 and 2017 when the judgment was delivered. It is obvious the learned judge took note of the above provisions of the law as submissions by respective counsel but did not bring them to bear in her determination which was largely guided by the case of *Echaria v Echaria* and *Njoroge v Njoroge* (*supra*). It is perhaps opportune to mention that before the promulgation of the *Constitution* 2010, and the enactment of the *Matrimonial Property Act*, suits filed by spouses claiming a determination of the share of properties acquired during marriage were brought under section 17 of the 1882 Married Womens Property Act of England. section 3 of the repealed Matrimonial Causes Act gave jurisdiction to the High Court, but such jurisdiction was to be exercised in accordance with the procedures applied in matrimonial proceedings in the High Court of Justice in England."

55. The *Matrimonial Property Act* No 49 of 2013 came into being in 2013, with the act giving its date of commencement as January 16, 2014, while the matter before us was filed in 2010, four years before the commencement of the act. Should the said act be applied retrospectively?

56. The *Black's Law Dictionary* (6th Edition), defines retrospective law as:

> " A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."

57. Further, *Halsbury's Laws of England, 4th* Edition, Re-Issue Volume 44(i) para 1433 states as follows on enactments: -

> " It is a principle of legal policy that an amending enactment should be generally presumed to change the relevant law only from the time of the enactment's commencement."

58. This court has itself previously addressed the question of the retrospective effect of statutes in the *Samuel Kamau Macharia* case where we held:

> " (61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

59. We also stated in *Daniel Shumari Njiroine v Naliaka Maroro,* SC Motion No 5 of 2013; [2014] eKLR that:

> " (36) ... it is a general principle that laws, where enacted or promulgated, are progressive in nature. Where the legislature intends a law to apply retrospectively, it will expressly say so. While the *Constitution* is not, in its essence, to be interpreted like a statute, if and where it intends a particular provision to apply retrospectively, the makers will expressly have stated so."

60. We reiterate the above holdings and further note that for legislation to have retrospective effect, the intention must be clear and unambiguous from the words of such statute or legislation. Having perused the act in contention and considered the submissions by parties as well as the law as expressed above, we have come to the conclusion that there is no retrospective application of the *Matrimonial Property Act* and hold that the applicable law to claims filed before the commencement of that act is the *Married Womens Property Act,1882*.

61. In finding as above, we have also taken into account the provisions of section 23(3) of the *Interpretation and General Provisions Act*, cap 2, Laws of Kenya which provides:

> " Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

a. revive anything not in force or existing at the time at which the repeal takes effect; or

b. affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

d. affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

e. affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

62. But the issue does not end there because the question of retrospective application of the *Constitution* has arisen with arguments on whether article 45(3) of the *Constitution* was also applied retrospectively. Again, we take cognizance of our finding in the *Samuel Kamau Macharia* case where further to finding that retrospective operation is not given to statutes, we also addressed the question of the retrospective effect of the *Constitution*. We rendered ourselves as follows on the issue:

> "At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the *Constitution* to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the *Constitution*."

63. Again, we reiterate this finding and find it most appropriate in resolving the matter at hand. Article 45(3) provides that:

> 'Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.'

64. In our view, the language used in the article by itself resolves the question of retrospectivity. The right to equality is one of the fundamental rights and freedoms that are protected by *Constitution*, a right that is inherent and indefeasible to all human beings. More fundamentally, as we stated in *Samuel Kamau Macharia Case*, only the language of the *Constitution* may act as a guide as to whether a provision in th *Constitution* applies retrospectively or not.

65. In that regard, the language of article 45(3) of the *Constitution* does not connote that it may not be applied retrospectively. The language plainly provides for the right to equality to all parties of a marriage during the subsistence of such marriage, as well as at the dissolution of such a marriage. The *Constitution* cannot be subjected to the same principles of interpretation applied to statutes on retrospective application of the law. It is therefore our finding that a reading of article 45(3) of the *Constitution* can only lead to the conclusion that there is nothing that bars its provisions from being applied retrospectively.

66. Having therefore come to the above conclusion, we are of the view that the principles in Echaria are good law and remain the basis within which matrimonial property should be distributed for matters filed before the commencement of the *Matrimonial Property Act, 2013*. We shall address applicability of article 45(3) in the context of our findings, on this issue, here below.

i. Whether article 45(3) provides for proprietary rights

67. The appellant, while relying on section 17 of the *Married Womens Property Act*, argues that the appellate court erred in finding that the respondent had contributed to the acquisition of the contested property and rental units for the reason that she was in occupation of the matrimonial home thereon for a considerable period of time. In this context, the appellant contends that the respondent did not in fact, make any direct financial contribution towards the acquisition and development of the property but he was willing to cede 10% to her nonetheless.

68. It is also the appellant's case that the High Court was right in relying on the principles set out in Echaria which principles were reiterated in *Francis Njoroge v Virginia Wanjiku Njoroge* (*supra*) in interpreting section 17 of the *Married Womens Property Act* on contribution and division of matrimonial property. The appellant is furthermore emphatic that the

respondent did not contribute to the purchase of the matrimonial property, and for this, cannot be entitled to a 50% share of it. The appellant therefore contends that the Court of Appeal erred in faulting the High Court for relying on the decisions in *Echaria* and *Francis Njoroge v Virginia Wanjiku Njoroge* (*supra*).

69. The respondent on the other hand argues that direct financial contribution was proved as she was responsible for running the family expenses, which amounted to direct contribution on her part and therefore supports the finding of the appellate court on the issue.

70. The High Court, in considering the extent of the respondent's contribution to the matrimonial property found that she had failed to prove direct contribution to the acquisition of the matrimonial property, but went on to also find that she had made indirect non-monetary contribution towards the family welfare. It expressed itself thus:

> "It is not in dispute that from the time the parties started cohabiting and prior to their marriage, the applicant was in formal employment and was drawing a salary, there are also loan application forms that showed she borrowed funds to put towards the children's school fees. However, the respondent claims to have purchased and developed the said property solely without any contribution from the applicant. In support of his claim, he has adduced loan application documents that showed he had mortgaged the parcel of land to his then employer to secure funds to develop the same. Though the applicant claims she contributed both monetary and non-monetary there is no evidence that she directly contributed towards the acquisition of the parcel of land or the construction of the property therein despite her alleging to have secured a loan of Kshs 200,000/- with only Kshs 183,000/-being approved- a loan the respondent claims no knowledge of- and there is no evidence adduced that he gave the saidapproved sum of Kshs 186,000/- to the defendant. Guided by the principles set out by this court (sic) in *Echaria v Echaria* which principles were summarized by this court in *Francis Njoroge v Virginia Wanjiku Njoroge* [2013] eKLR, I find that the plaintiff has not proved her case on the claim that she made direct contribution to the acquisition of the property on Nairobi/Block xx/567 in Tassia Estate, Embakasi. The plaintiff however did make indirect non-monetary contribution towards the family welfare as such she should benefit to some degree as she contributed towards the family."

71. The Court of Appeal on the other hand noted that a woman's direct and indirect contribution could be taken into consideration during distribution with each case being decided on its merits. In making that finding, the appellate court stated:

> " 14. We have recited the above history to demonstrate that, even under the old regime, a woman's direct and indirect contribution was taken into consideration and every case was determined on its own merit while bearing in mind the principles of fairness and human dignity. Once a spouse has been in occupation of a matrimonial home for a considerable period of time, where she lived with her children and established herself like the respondent did by even starting a business of selling cereals to support herself after she was retrenched from employment, all these are relevant factors to consider in determining the mode of distribution. On the other hand, the respondent was able to purchase another residential house on separation and the foremost question was to seek a mode of distribution that will not disadvantage one party and render them destitute."

72. On our part, the question of whether the provisions of article 45(3) of the *Constitution* can vest any proprietary rights in this matter can only be considered on the basis of the provisions of section 17 of the *Married Womens Property Act of 1882* which we have held is applicable to the present dispute.

73. Section 17 of the *Married Womens Property Act* provides in relevant part as follows:

> " 17. In any question as to between husband and wife as to the title to or possession of property, either party... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice... and the judge of the High Court of Justice ... may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit"

74. As was decided in *Pettitt v Pettitt* [1970] AC 777 by Lord Morris, it is an established principle of law that:

> " If matrimonial troubles bring the spouses to the courts, there are various statutory powers relating to property which can be exercised. But if in a question between a husband and a wife as to the title to property recourse is had to the special procedure made possible by section 17, decision must be reached by applying settled law to the facts as they may be established."

75. Lord Morris went on to further hold:

> " ...one of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that section 17 was signed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property, the question for the court was whose is this? and not "to whom shall this be given?"

76. In *Echaria*, a five-judge bench of the Court of Appeal held that where the property in dispute is registered in the name of one spouse, the beneficial interest of each spouse would depend on the financial contribution by each spouse, either directly or indirectly. The court held:

> " Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equality is equity" while heeding the caution by Lord Pearson in *Gissing v Gissing* (*supra*) at page 788 paragraph c that:
>
> > "No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think

> it is helpful or right for the court to feel obliged to award either one-half or nothing".

77. We further note that the court in Echaria was of the view that where the disputed property is not registered in the joint names of the parties to the marriage, but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective financial contributions, either directly or indirectly in the acquisition of the property. The court in Echaria then went on to find that for a wife to be entitled to a share of the property that is registered in the husband's name, she had to prove contribution towards acquisition of that property.

78. To our minds, the finding in Echaria, was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse to a specific share of the property. Furthermore, the position taken by our courts following *Echaria* is that as much as section 17 of the *Married Womens Property Act* gave courts discretion to do what is just and fair under the varying circumstances before them, it did not entitle a court to make an order which is contrary to any well-established principle of law on proprietary interests or ownership of property. The Court of Appeal in this regard held:

> " The decision of the House of Lords in *Pettitt v Pettitt* that section 17 of 1882 Act is a procedural section and did not entitle the court to vary the existing proprietary rights of the parties has often been misunderstood. All that the House said, in simple language, was that if a spouse indisputably owns property alone before the dispute reaches the court, section 17 of the 1882 Act did not give the courts discretion to take that property right away and allocate it to the other spouse. The House did not say that after the ascertainment of a property dispute between husband and wife, the court did not have any power to make appropriate orders as would give effect to its decision."

79. The court in *Echaria* also noted that for one to be entitled to a share of the property, the court should consider the circumstances of each arising case independently in assessing contribution further noting that what amounts to contribution may either be direct and monetary and indirect and non-monetary. The court's holding in that regard was as follows:

> " In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share (see *Essa v Essa* (*supra*); *Nderitu v Nderitu*, civil appeal No 203 of 1997 (unreported), *Kamore v Kamore* (*supra*); *Muthembwa v Muthembwa*, civil appeal No 74 of 2001 and *Mereka v*

> *Mereka*, civil appeal No 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband." [Emphasis added]

80. Having considered the law as above, we have no hesitation in finding that Echaria is still good law for all claims made under the *Married Womens Property Act,1882*. Returning to article 45(3) in that context, we note that, in *Rwabinumi v Bahimbisomwe* (Civil Appeal 10 of 2009) [2013] UGSC 5 the Supreme Court of Uganda also considered the question of whether article 31(1) of the Ugandan Constitution-the equivalent of our article 45(3)-may vest property rights to a party upon dissolution of a marriage. Kisaakye, JSC noted as follows in that regard:

> "In my view, the *Constitution of Uganda (1995)*, while recognizing the right to equality of men and Womens in marriage and at its dissolution, also reserved the constitutional right of individuals, be they married or not, to own property either individually or in association with others under article 26(1) of the *Constitution of Uganda (1995)*. This means that, even in the context of marriage, the right to own property individually is preserved by our Constitution as is the right of an individual to own property in association with others, who may include a spouse, children, siblings or even business partners. If indeed the framers of our Constitution had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly stated so." [Emphasis added]

81. We are persuaded by the above reasoning and should only add that the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of the *Constitution* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.

82. While therefore reiterating the finding in *Echaria*, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and

no more. Nowhere in the *Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

83. The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution. We thus approve the finding in Echaria that:

> " As the case law currently shows, the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties. Even the fact that the wife was economical in spending on house keeping will not do..."

84. The Court of Appeal in *EGM v BMM [2020]* eKLR also discussed whether article 45(3) grants property rights upon dissolution of a marriage and found thus:

> " With great respect, we find the learned judge's interpretation of article 45(3) to be textually and contextually untenable. He failed to appreciate that the sub-article simply deals with equality of the fundamental rights and freedoms of spouses during and after the dissolution of marriage. There was no basis for reading into the provision what the text does not ordain. Equality of spouses does not involve the re-distribution of property rights at the dissolution of marriage." [Emphasis added]

85. The above is a correct exposition of the law and the Court of Appeal, in this case and in that context, considered the question of whether the respondent had provided evidence to prove direct financial contribution to the purchase of the matrimonial property as well as the rental units constructed thereon. It was the appellate court's finding that:

> " 16. We find the above conclusions somewhat problematic as there is a lot of evidence contained in the appellant's witness statement and a bundle of documents that she produced which do not seem to have been analysed by the learned Judge. The appellant was working as a secretary in East African Building Society from 1984 to 2005 when she was retrenched; she started cohabiting with the respondent in 1990 therefore she was earning a salary for 15 years until she was retrenched and the marriage subsequently broke down in 2008. Another aspect that was not considered was the fact that at one time the appellant was evicted from the matrimonial home and had to seek a restraining order of injunction against the respondent on May

28, 2010. The appellant alleged that in the process of eviction, she lost several documents, therefore she was not able to produce the originals and this was overlooked when the judge faulted her for not producing documents.

17. Another reason why we find ourselves disagreeing with the learned judge is the dearth of documents that were produced by the appellant in the list of documents filed with the suit. There are no less than a dozen loan application forms from 1993 to 2004. Majority of those loans were for school fees. The appellant also stated that she gave some Kshs 183,000 the proceeds of one such loan to the respondent when he was constructing the matrimonial home. Indeed, one such application for loan, the appellant applied for a whooping Kshs 1,065,000 which indicated therein it was for construction of a house. She stated that she used the loan proceeds to build the rental units within the matrimonial home. However, the learned judge disregarded this evidence as there were no documents to prove [the same]"

86. We shall return to this specific issue later but in the context of the issue at hand, it is apparent that the respondent indeed provided evidence to prove direct financial contribution during the subsistence of the marriage and this aligns with our finding that a party must prove contribution to enable a court determine the percentage available to it at distribution and furthermore safeguards against a blanket expectation that the principle of equality will be applied generally in the division of matrimonial property irrespective of contribution. We therefore find that the test to be applied to determine the extent of contribution is ultimately one of a 'case to case basis'-See also Mativo J (as he then was) in *Federation of Womens Lawyers Kenya (FIDA) v Attorney General & another [2018]* eKLR.

iii. Whether article 45(3) provides for an absolute division of 50: 50 to be used as a matrix in the distribution of property

87. The learned judge of the High Court, while determining the contribution by the appellant and while also applying the principle enunciated in *Echaria* stated thus:

> "I find that the plaintiff has not proved her case on the claim that she made direct contribution to the acquisition of the property on Nairobi/Block 97/567 in Tassia Estate, Embakasi. The plaintiff however did make indirect non- monetary contribution towards the family's welfares as such (sic) she should benefit to some degree as she contributed towards the family...

> It is evident though the applicant did not earn much from the employment, she did contribute something towards the upkeep and maintenance of the child this allowed (sic) the respondent to carry on development in the said parcel of land. As such, though the applicant did not contribute much in monetary terms, she definitely has proven she did contribute non-monetary and this court in rendering its decision has to put the same consideration. Am guided by the case of *Echaria v Echaria* where the court cited the English case of *Burns v Burns* [1984] 1 All ER 244..."

88. The Court of Appeal, in arriving at the finding that the matrimonial property should be shared equally between the appellant and the respondent, found:

> " 18. It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises."

89. In the above context, we note that equality of parties to a marriage has largely been interpreted and construed in two ways. On the one hand, an interpretation of article 45(3) of the *Constitution* has been construed to mean a division of matrimonial property down the middle through the literal application of the 50:50 division ratio. Proponents of this argument largely opine that since non-monetary contribution cannot be quantified but is equally important, a split right in the middle would be more appropriate. The second approach, supported by the respondent, is that 'equal' as provided for under article 45(3), means that a party obtains an equivalent of what one contributes, monetarily or otherwise. We have partly resolved this dichotomy above but we now need to address the 50/50 question squarely.

90. In *Rwabinumi v Bahimbisomwe* (*supra*) the Supreme Court of Uganda gave a purposive interpretation of the provisions of article 31(1)(b) on equal rights to parties in a marriage at its dissolution and Kisaakye, JSC determined the question of how a court should determine a spouse's share in a jointly owned property. The court in that regard noted that the contributing spouse's share is not restricted to a maximum of 50% share either in the matrimonial home or property that is held jointly. More fundamentally, the Supreme Court found that article 31(1)(b) does not guarantee that all property acquired during the subsistence of a marriage should be shared equally. The learned judge rendered herself thus:

> "So, while I agree that article 31(1)(b) of the *Uganda Constitution* (1995) guarantees equality in treatment of either the wife or the husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases, be shared equally upon divorce. It was therefore erroneous for the Court of Appeal to hold that all individually held property of persons who contract religious marriages under the *Marriage Act* becomes matrimonial property upon marriage and joint property of the couple and that it should be shared equally on divorce by virtue of their marriage vows and article 31(1) of the *Constitution of Uganda (1995)*. The court's holding was irrespective of whether the claimant proves that he or she contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage installments or its development; or indirectly through payment of other household bills and other family requirements including child care and maintenance and growing food for feeding the family."

91. We are also aware that in the Malawian case of *Kishindo v Kishindo* [2015] MWHC 447 , the High Court held that in distributing property between spouses upon the dissolution of a marriage, the court should consider the principle of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity that will result in the property being equally divided between the husband and the wife. The court also discussed the concept of equality and fairness by holding that fairness depends on the circumstances of the case when it comes to disposal of property on dissolution of marriage while equality means that parties in a marriage are entitled to an equal share of the matrimonial property irrespective of the mode of acquisition. The court held:

> "There is no blue print of fairness that fits all. Fairness depends on circumstances on each case. One cannot successfully list all the circumstances. Consequently, decisions of this should be understood as not laying general or broad principles. Each decision is the courts' attempt to be fair in a particular situation...

> "Applying all these principles to this case, the correct order in the circumstances is that all property is up to be shared fairly subject to equality. Equality here implies that both husband and wife come on equal footing to property which, from the reasoning above, is jointly held between them and, in respect of the houses, irrespective of the motivation, the mode of acquisition or in whose name it is..." [Emphasis added]

92. The Court of Appeal in *MEK v GLM* [2018] eKLR further espoused the meaning of equality as follows:

> " Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations." [Emphasis added]

93. Article 45(3) of the *Constitution* underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.

94. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

95. As was pointed out by the court in the English case of *Gissing v Gissing* [1971] AC 886, the maxim 'equality is equity' has never been truer. To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property

amounts to significant contribution. Such direct or indirect acts as was discussed by Lord Justice Fox in *Burns v Burns* [1984] 1 All ER 244 may include:

i. Paying part of the purchase price of the matrimonial property.

ii. Contributing regularly to the monthly payments in the acquisition of such property.

iii. Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.

iv. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.

v. Caring for children and the family at large as the other spouse works to earn money to pay for the property.

96. These considerations are in line with the finding of the court in the English case of *White v White* [2001] 1 AC 596 where Lord Nicholls of Birkenhead held that the court should always ensure a fair outcome in considering the contribution of spouses by stating:

> "Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely ... But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contribution."

This is implicit in the very language of paragraph (f):

> " the contributions which each ... has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family.'

> If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer."

97. In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married. Kiage JA in his concurring opinion in *PNN v ZWN*, Civil Appeal No 128 of 2014; [2017] eKLR discussed the concept of marital equality and whether it is translated to mean that matrimonial property should be divided equally at dissolution of marriage. He succinctly penned his thoughts as follows:

> " Does this marital equality recognized in the *Constitution* mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.
>
> The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts...
>
> I think that it would be surreal to suppose that the *Constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the *Constitution* gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

> Thus it is that the *Constitution*, thankfully, does not say equal rights "including half of the property."

98. Kiage JA's poetic and graphic finding had earlier found its way into Tuiyott J's mind when, while still at the High Court, in the case of *UMM v IMM* [2014] eKLR he discussed the right to equality as provided for under article 45(3) and whether it decrees an automatic 50:50 sharing. He stated thus:

> "I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the courts should give it effect. But to hold that article 45(3 decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non- monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by article 45(3)."

99. We find the above opinions and findings persuasive and it is our finding that the stated equality under article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed.

100. In making that finding, we are further persuaded by the Supreme Court of Zambia's decision in *Mathews Chishimba Nkata v Ester Dolly Mwenda Nkata* [SCZ Appeal No 60/2015] where the court held that sharing of matrimonial property should not be done on a fixed formula in law but on the basis of fairness and conscience. The court held:

> "If the basis of sharing family property is that both spouses contributed to its purchase or creation, it should follow that where it can be demonstrated that one spouse invested nothing (financially or in-kind) in the acquisition of the property, they should technically not be entitled to a share of what was in fact an investment by the one spouse on the basis only that they had entered into a marriage. Our view is that property should be undertaken on the basis of fairness and conscience, not on an unjustified reference to 50:50 dogma. In our opinion, the sharing of

> matrimonial property should not reside in a fixed formula in law. It should not be a matter of mathematics as simply splitting a piece of land into two equal portions. Equal rights between husbands and wives do not necessarily translate, in every case, into equal portions of family property." [Emphasis added]

101. Further, in the Canadian case of *MacLean v MacLean,* [2005] NSSC 284, the court found that, while the law recognizes equality in the division of property, the same should also not be unfair or unconscionable. The court held thus on that point:

> "[10] The philosophy or underlying principle of the *Matrimonial Property Act* is that property acquired for the mutual benefit of a couple during marriage is to be divided equally. This principle may be departed from only where one of the parties is able to establish under section 13 of the act that an equal division would be unfair or unconscionable."

102. Furthermore, in *Hardwood v Thomas* [1981] 4167 (NS CA), the Canadian Court also acknowledged that equality is encouraged in division of property by stating:

> "Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the act and prescribed by section 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made."

103. In agreeing with the above decisions, we must note that, in a marriage, the general assumption is that both spouses share everything, and on the face of it, both parties contribute towards the home or family, in one way or another, to whichever extent, however big or small. Again, and further to this, both spouses may also work and earn income, which inevitably, at most instances, always ends up being spent on the family unit. It may be the whole income, or a substantial part of it, but ultimately, a percentage of it goes into the family. This is the essence of section 14 of the *Matrimonial Property Act, 2013*.

104. Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of the *Constitution*. To hold that article 45(3) has the meaning of declaring that

property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non- monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.

105. We should only add that this position is not unique to our realm because the Supreme Court of Zambia in the case of *Penelope Chishimba Chipasha Mambwe v Mambwe* (Appeal 222 of 2015); [2018] ZMSC 317 also questioned the rationale of sharing property at the ratio of 50:50 where a spouse fails to offer any financial contribution with the court noting:

> " In this jurisdiction, as many others in the commonwealth, the prevailing position is that a spouse who contributes either financially or in-kind to the home earns an interest in the property of the family acquired during the subsistence of the marriage. In numerous authorities, the holding has been consistent that family property should be shared on a 50/50 basis...
>
> Although indeed many marriages are built on happiness and mutual support, there are still many others where one spouse may be perpetually wasteful, uncooperative, distant and providing absolutely no warmth of companionship let alone financial contribution. It is debatable whether such spouses should be taken to have earned the entitlement to 50% share of the property of the family at dissolution of the marriage."

106. In light of the above findings, we are of the view that the question of what amounts to a fair and equitable legal formula for the reallocation of matrimonial property rights at the dissolution of a marriage and whether the same can be achieved by a fixed means of apportionment at a 50:50 ratio or whether such apportionment should be done in light of the circumstances of each individual case is one best answered again by the finding by the court in Echaria and we have explained why.

(iv) What Relief is Available to the Parties?

107. We have indicated above that the Court of Appeal awarded the respondent 50% of the matrimonial property and 50% of the rental units thereon. We have also set out the law on the subject and found no reason to fault the Court of Appeal on that finding based on its analysis of the evidence placed before the High Court and itself. We thus have no option than to uphold the decision of the appellate court in entirety and reject the submission that the decision of the High Court should be sustained. Like the Court of Appeal we

are inclined to agree with the evidence tendered that the respondent took out loans and contributed substantially to the purchase of the matrimonial property and rental units. The 50-50 division is therefore reasonable in the specific circumstances of this case.

108. Since costs follow the event as previously decided by this court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,* Sup Ct Petition No 4 of 2012; [2014] eKLR , the appellant shall bear the costs of appeal in this court.

109. Consequently, the appeal is dismissed.

F. Orders

110. Flowing from above, the final orders are:

i. The petition of appeal dated and filed on July 3, 2020 is hereby dismissed.

ii. The appellant shall bear the respondents' costs.

MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 2 (KLR)

Family Law *– marriages – applicable law for marital disputes that arose before 2013 – application and operation of the Married Women's Property Act (repealed) - what was the applicable law to matrimonial disputes that arose before the enactment of the Marriage Act, cap 150, and Matrimonial Property Act, cap 152 - whether the Marriage Act, cap 150, and Matrimonial Property Act, cap 152 applied to matrimonial disputes before 2013 - whether cohabitants could file proceedings under the Married Women's Property Act (Repealed).*

Family Law *– marriages – presumption of marriage – conditions precedent - what were the parameters in which courts could presume a marriage – whether a party that had separated from a previous marriage but had not formally registered the divorce could be presumed to be married – who had the burden of proving presumption of marriage - Evidence Act, cap 80, sections 109 and 119*

Family Law *– marriage – matrimonial property – division of matrimonial property - contribution of spouses towards the acquisition of the matrimonial property – principles applicable in assessing beneficial interests after a separation – direct financial contribution vis-à-vis other forms of contribution - where the parties were cohabitees that had acquired property together through the existence of their relationship – whether property acquired under such circumstances formed part of a constructive trust - whether a constructive trust as envisioned could be applied in solving disputes relating to cohabitees – whether a constructive trust could be inferred from the conduct of cohabitees who purchased property together in the subsistence of their relationship - what principles were courts to consider in assessing the beneficial interests due to cohabiting parties who separated - whether courts were to consider both direct financial contributions to the acquisition of the property and other forms contributions – Land Act, cap 280, section 38.*

Words and Phrases *– constructive trust – definition of - the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title - Black's Law Dictionary 9th Edition at pg 1649*

Brief facts

The respondent instituted Nairobi High Court Civil Suit No 6 of 2012, POM vs MNK, by way of an originating summons dated November 5, 2013, against the appellant whom he claimed to be his wife. The respondent invoked the provisions of section 17 of the repealed Married Women's Property Act, 1882 (MWPA) on the claim for division of matrimonial property. The respondent contended that he and the appellant began to cohabit as husband and wife sometime in 1986. It was his case that from joint savings, they purchased the suit property. He asserted that he belonged to the Kisii tribe and that the seller who belonged to the Kikuyu tribe was not comfortable selling the

parcel of land to a non-Kikuyu therefore, the parties resolved to have the property registered in the appellant's name although they had both contributed to its acquisition.

The High Court dismissed the suit and found that although there was long cohabitation between the parties, the principle of presumption of marriage, was inapplicable under the circumstances seeing that the appellant was already married to KM. The court held that the appellant could not marry the respondent, that the relationship between the parties was adulterous and the resulting cohabitation could not be deemed a marriage. In the absence of a marriage, the court held that the respondent could not rely on the provisions of MWPA (repealed) whose reliefs were based on proof of marriage.

Dissatisfied, the respondent approached the Court of Appeal which held that the High Court erred in finding that there was long cohabitation but declined to presume marriage because of a one KM, whose existence the Court of Appeal found was not proved. The appellate court presumed the existence of a marriage and allowed the appeal, and ordered the suit property to be divided into two halves, a share for each party.

Aggrieved the appellant filed the instant appeal. The appellant argued that parties to a marriage must have the capacity to enter into a marriage and that she did not have the requisite capacity for the relationship between her and the respondent to be presumed a marriage as she was married to KM and had three children out of that relationship. The appellant also argued that a long-term relationship that resembled a marriage was not a marriage. The appellant further argued that she solely contributed to the acquisition of the suit property.

Issues

i. Whether the Marriage Act, 2014, and Matrimonial Property Act, 2013 applied to matrimonial disputes before 2013.
ii. Whether cohabitants could file proceedings under the repealed Married Women's Property Act.
iii. What were the parameters in which courts could presume a marriage?
iv. What was the definition and application of the doctrine of constructive trust?
v. Whether a constructive trust as envisioned under section 38 of the Land Act could be applied in solving disputes relating to cohabitees.
vi. Whether a constructive trust could be inferred from the conduct of cohabitees who purchased property together in the subsistence of their relationship.
vii. What principles were courts to consider in assessing the beneficial interests due to cohabiting parties who separated?
viii. Whether courts were to consider both direct financial contributions to the acquisition of the property and other forms of contributions.

Held

1. The cause of action arose in 2011 and the matter was filed in 2012 before the enactment of the Marriage Act, cap 150, and Matrimonial Property Act, 2013. The Marriage Act and Matrimonial Property Act, cap 152, were not applicable in the instant matter as the

cause of action arose before the said statutes were enacted into law and could not be applied retrospectively.

2. Section 17 of the MWPA (repealed) provided that in any question between husband and wife as to the title to or possession of the property, either party could apply to the High Court for orders with respect to the property in dispute. The MWPA (repealed) applied only to parties to a marriage; husband and wife. The MWPA (repealed) only referred to parties to a marriage and married women. It did not go into details as to how the marriage came to be or how it was contracted. Parties to a union arising out of cohabitation and/or in a marriage unrecognized by law could file proceedings under the MWPA (repealed) upon the basis that the MWPA (repealed) did not distinguish between marriages recognized or unrecognized in law. The MWPA (repealed) applied to all marriages recognized or unrecognized in law.
3. If a man and woman cohabited and held themselves out as husband and wife, that in itself raised a presumption that they were legally married. Section 119 of the Evidence Act provided that courts could presume the existence of any fact which it thought likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Courts were permitted to make a *prima facie* legal inference that certain facts existed without proof, regard being taken to the common course of natural events and human conduct, in relation to the facts of a particular case.
4. The presumption covered two aspects, that the parties must have had the capacity to enter into a marriage and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree or divorce.
5. The appellant's father was MW and his name did not appear in the appellant's identity document. The Court of Appeal disregarded the appellant's evidence regarding her name and the reasons for the use of the names 'P' and 'K.' The appellant could not contract a marriage with the respondent. The appellant's name was MNK and the name K was attributable to her deceased husband 'KM'.
6. There was a long cohabitation between the appellant and the respondent. He who alleged the existence of certain facts had to prove their existence. Section 109 of the Evidence Act provided that the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence unless any law provided that the proof of that fact was to lie on any particular person. The respondent, having claimed he was married to the appellant, ought to have adduced cogent evidence to prove the marriage. However, in his testimony in the record, he had a first wife and the appellant was allegedly his second wife. He also confirmed that he had not paid dowry for the appellant. His cohabitation with the appellant was not sufficient to prove his marriage to the appellant.

7. The respondent did not controvert the evidence by the appellant that she was married to KM until 2011 when he died. She only had the capacity to marry in 2011. The appellant's evidence that she was married to KM under Kikuyu customary marriage was uncontroverted. Uncontroverted evidence was weighty and courts would rely on it to prove facts in dispute.
8. The instant case was not one of the safe instances where a court could rightly presume a marriage. The appellate court erred in presuming a marriage between the parties. The relationship between the parties and the resulting cohabitation could not be deemed to have brought forth a marriage. A presumption of marriage could not apply in the instant case.
9. The strict parameters within which a presumption of marriage could be made were:
    1. the parties must have lived together for a long time.
    2. The parties must have the legal right or capacity to marry.
    3. The parties must have intended to marry.
    4. There must be consent by both parties.
    5. The parties must have held themselves out to the outside world as being a married couple.
    6. The onus of proving the presumption was on the party who alleged it.
    7. The evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive.
    8. The standard of proof was on a balance of probabilities.
10. The doctrine of presumption of marriage was on its deathbed which reasoning was reinforced by the changes to the matrimonial laws in Kenya. The presumption should only be used sparingly where there was cogent evidence to buttress it.
11. Marriage was an institution that had traditional, religious, economic, social, and cultural meanings for many Kenyans. However, it was becoming increasingly common for two consenting adults to live together for long durations where these two adults had neither the desire, wish nor intention to be within the confines of matrimony. There existed relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside of marriage. While some may find that amoral or incredible, it was a reality of the times we live in today.
12. A person could have been in a marriage before and the marriage was no more due to the death of a spouse or divorce. Due to their prior experiences, such persons may choose to have an interdependent relationship outside of marriage. For others, it could just be their desire never to marry but to have a partner without the confines of marriage. Where such a situation was evident and there was no intention whatsoever of contracting a marriage, the presumption of marriage must never be made where that intention did not exist. Marriage was a voluntary union. Courts should shy away from imposing marriage on unwilling persons.

13. Statistics revealed that a man and a woman could choose to cohabit with the express intention that their cohabitation did not constitute a marriage. The pervasiveness of having interdependent relationships outside marriage over the past few decades meant that no inferences about marital status could be drawn from living under the same roof. Inter-dependent relationships outside marriage were not a new concept.
14. It was time for the National Assembly and the Senate, in collaboration with the Attorney-General to formulate and enact statute law that dealt with cohabitees in long-term relationships; their rights, and obligations.
15. The circumstances in which the presumption of marriage could be upheld were limited. A presumption of a marriage was the exception rather than the rule.
16. The two parties contributed to the acquisition and development of the suit property which led to their proprietary rights. Those proprietary rights arose out of a constructive trust. A constructive trust was the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person held the legal title.
17. Whenever two parties by their joint efforts acquired property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner was bound to hold the property in trust for them both. That trust did not need any writing. It could be enforced by an order for sale, but in a proper case, the sale could be postponed indefinitely. It applied to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture, and the making of their home were based on, and for, that joint relationship.
18. Disputes between cohabitants or former cohabitants over ownership, occupation, or use of the property had to be resolved by applying ordinary legal rules applicable to strangers. Legislation that enabled courts to allocate or reallocate beneficial interests in the assets following a divorce did not apply to cohabiting couples.
19. Kenya did not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couples' property had increasingly become a social problem due to the high number of people resorting to cohabitation and in the process of acquiring properties, upon separation there being no legislation governing the division of property. While resolving such disputes was difficult, a *laissez-faire* approach could result in injustice for parties to a relationship who might be more vulnerable or who contributed less in financial terms than their partners. The interventionist approach risked creating uncertainty, and attaching a monetary value to the party's actions within that type of relationship was often highly complex as was in the instant case.
20. The common intention of the parties at the time of purchase was sufficient to give rise to a constructive trust, which could be inferred from conduct other than making financial contributions to cohabitees.

21. Even though the constructive trust was premised on section 38 of the Land Act, 2012 the same had not been applied in solving disputes relating to cohabitees. The common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust between the appellant and the respondent.
22. The appellant and respondent had been cohabiting since 1986. In 1991 the suit property was bought by the two parties and registered in the name of the appellant. The respondent was present during the drafting and signing of the sale agreement and was a witness. The parties lived in one of the rooms from 1993 and plowed the proceeds of rent to construct more rental units. It was proved that the meters were in his name and operated a bar on the same premises. There was a common intention for the appellant and respondent to have beneficial interests in the suit property.
23. In 2011 when the parties separated the appellant evicted the respondent from the matrimonial home and the business premises contrary to the common intention, they had at the time of purchasing the property. Thereby, unjustly enriching herself with a property meant to be of benefit to her and the respondent. The respondent paid for the water and electricity connection charges and bills from when the property was constructed to 2011 when he was evicted from the property and that jointly the parties had made several improvements on the suit property. The common intention could be inferred from the appellant and respondent's conduct during the existence of their relationship.
24. In assessing the beneficial interests due to the parties, the court could not only be primarily focused on the direct financial contribution to the acquisition of the property but also interrogate other forms of contribution such as actions of the parties in maintaining and improving such properties.
25. The appellant and the respondent jointly contributed to the acquisition and the construction of the suit property and the two jointly invested in the property for more than 20 years. The respondent proved his case on a balance of probabilities that the suit property was acquired and developed through joint efforts and/or contribution of the parties. The share of the parties was apportioned as 70% for the appellant and 30% for the respondent based on their respective contributions.

Appeal partly allowed.

Orders

Each party was to bear their own costs.

Citations

Cases

Kenya

1. *CWN v DK* Civil Suit 17 of 2017; [2021] KEHC 7895 (KLR) - (Applied)
2. *Juletabi African Adventure Limited & another v Christopher Michael Lockley* Civil Appeal 75 of 2016; [2017] KECA 118 (KLR) - (Applied)

3. *Karanja, Phylis Njoki & 2 others v Rosemary Mueni Karanja & another* Civil Appeal 313 of 2001; [2009] eKLR - (Applied)
4. *Kiarie, Esther Wanjiru v Mary Wanjiru Githatu* Prob & Admin Cause 244 of 2002; [2008] KEHC 3100 (KLR) - (Followed)
5. *M v RM* Civil Appeal 61 of 1984; [1985] KECA 77 (KLR) - (Followed)
6. *Machani v Vernoor* Civil Appeal 61 of 1984; [1985] KECA 124 (KLR) - (Applied)
7. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] 3 KLR 199 - (Applied)
8. *Mwagiru v Mumbi* [1967] EA 639 - (Applied)
9. *Njoki, Mary v John Kinyanjui Mutheru* Civil Appeal 71 of 1984; [1985] KECA 32 (KLR) - (Applied)
10. *OKN v MPN* Civil Appeal 332 of 2014; [2017] eKLR
11. *SMM alias GSM alias SSM v CAK M* Civil Appeal 2 of 2015; [2017] eKLR - (Followed)
12. *Steyn, Hermanus Phillipus v Giovanni Gnecchi-Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Applied)
13. *Yawe, Hottensiah Wanjiku v Public Trustee* Civil Appeal 13 of 1976; [1976] KECA 1 (KLR) - (Followed)

South Africa

1. *Amod v Multilateral Motor Vehicle Accidents Fund* [1999] ZASCA 76; [1999] 4 All SA 421 (A) - (Followed)
2. *Ryland v Edros* [1997] (2) SA 690 (C) - (Followed)

United Kingdom

1. *Cooke v Heard* [1972] EWCA Civ J0119-2 - (Applied)
2. *Elayne Marian Teresa Oxley v Allan George Hiscock* [2004] EWCA 546 - (Followed)
3. *Eves v Eves* [1975] EWCA Civ J0428-2 - (Applied)
4. *Gissing v Gissing* [1971] AC 886; [1970] UKHL 3 - (Applied)
5. *Pettit v Pettit* [1969] UKHL J0423-2 - (Applied)
6. *Sastry Veliader Aronegary v Sembecutty Vaigalie* 1880-1 6 AC 364 - (Followed)
7. *Toplin Watson v Tate* [1937] 3 All ER 105 - (Followed)
8. *Walker v Hall* [1983] EWCA Civ J0630-4 - (Applied)

India

1. *Gokal Chand v Parvin Kumari* 1952 AIR 231; 1952 SCR 825 - (Applied)
2. *Indra Sarma v VKV Sarma* [2013] 15 SCC 755 - (Applied)

United States

Shepherd George v Thye 1904 1 Ch 456 - (Followed)

Canada

Barker v Linklater & another [2008] 1 QDR 405; [2007] QCA 363 - (Followed)

Australia

Baumgartner v Baumgartner [1987] 164 CLR 137 - (Applied)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 1649
2. Garner, BA., (Ed) (2019), *Black's Law Dictionary* Toronto: Thomson Reuters 11th Edn
3. Mackay, J., (Lord of Clashfern) *et al* (Eds) (2015), *Halsbury's Laws of England* London: LexisNexis Butterworths 5th Edn Vol 61 para 656
4. Mann, P., (Ed) (1976), *Family Law* London: Butterworths 5th Edn

Statutes

Statutes

Kenya

1. Constitution of Kenya articles 45, 163(4)(b) - (Interpreted)
2. Evidence Act (cap 80) sections 109, 119 - (Interpreted)
3. Judicature Act (cap 9) section 3 - (Interpreted)
4. Land Act (cap 280)section 38 - (Interpreted)
5. Marriage Act (cap 150) sections 2, 6(1)- (Interpreted)
6. Married Women's Property Act, 1882 (Repealed) section 17- (Interpreted)
7. Matrimonial Property Act (cap 152) In general - (Cited)
8. Supreme Court Act (cap 9B) section 3 - (Interpreted)

Canada

Adult Interdependent Relationships Act, 2002, In general - (Cited)

Instruments

Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979
In general

Advocates

Mr. Andrew Kagicha h/b Mr.Mitheka for the appellant
Ms. Moses Siagi for the respondent
Ms. Nyokabi Njogu for the *amicus curiae*

January 27, 2023, the Court delivered the following Judgment:

A. Introduction

1. This appeal raises a fundamental legal issue pertaining to property rights. It is premised on the provisions of the repealed *Married Women's Property Act (repealed) of 1882*. The act was repealed in January 2014 while this matter was filed in the High Court in November 2013. The appellant challenges the decision of the Court of Appeal (Waki, Kiage & Sichalle)

which set aside the decision of the High Court (Musyoka J) and determined that there was a presumption of marriage between the appellant and the respondent and that the respondent was entitled to half of the suit property being Plot No xx within Dagoretti/Riruta/xxx together with the developments thereon.

B. Background

i. Proceedings in the High Court

2. The respondent instituted Nairobi High Court Civil Suit No 6 of 2012, *POM v MNK* , by way of an originating summons dated November 5, 2013 against the appellant whom he claimed to be his wife. The respondent invoked the provisions of section 17 of the *Married Women's Property Act (Repealed) (1882), MWPA* on the claim for division of matrimonial property.

3. The respondent's contention was that he and the appellant began to cohabit as husband and wife sometime in 1986. It was his case that from joint savings, they purchased the suit property. He asserted that he belonged to the Kisii tribe and that the seller who belonged to the kikuyu tribe was not comfortable selling the parcel of land to a non-Kikuyu therefore, the parties resolved to have the property registered in the appellant's name although they had both contributed to its acquisition.

4. According to the respondent, the parties took possession of the parcel of land between 1992 and 1993 which they developed, and constructed rooms thereon, one of which they used as their matrimonial home, and let the other rooms out. It was his case that he did the legwork relating to the connection of electricity, sewerage, and water to the premises. In addition, he operated a bar from the premises. He claimed that the appellant evicted him from their matrimonial home in 2011 and at this time the amount of rent collected from the premises was Kshs 258,100 per month.

5. The appellant rejected all the respondent's claims. She denied his involvement in the purchase of the suit property, his contentions on registration of the property urging that she allowed him to manage the suit property because they were friends. According to her, she was already married under customary law to a one KM now deceased and although they were separated, she never divorced him. Therefore, she did not have the capacity to contract another marriage while her first marriage was still subsisting. She also claimed that after KM died in 2011, the respondent intensified harassment to coerce her into marriage. She subsequently filed CMCC No 4364 of 2011 to restrain the respondent from trespassing into her properties.

6. By a judgment delivered on June 9, 2017, Musyoka J dismissed the originating summons with costs to the appellant. The learned judge found that although there was long

cohabitation between the parties, the principle of presumption of marriage, was inapplicable under the circumstances seeing that the appellant was already in a married to KM. The learned judge held that the appellant did not have the capacity to marry the respondent, that the relationship between the parties was adulterous and the resulting cohabitation could not be deemed a marriage. In the absence of a marriage, the court held that the respondent could not rely on the provisions of *MWPA (repealed)* whose reliefs are based on proof of marriage.

ii. Proceedings in the Court of Appeal

7. Dissatisfied with the judgment of the High Court, the respondent filed Civil Appeal No 343 of 2017 based on two grounds. That the learned judge erred:

   i. In fact, in finding that the appellant, during the subsistence of the relationship between the appellant and the respondent, was married to one KM.

   ii. In law, in declining to deal with the property acquired by the respondent and the appellant during the relationship and/or cohabitation of parties, the fact that the appellant was married to somebody else notwithstanding.

8. The Court of Appeal allowed the appeal holding that the High Court erred in finding that there was long cohabitation but declined to presume marriage because of a one KM, whose existence the Court of Appeal found was not proved. The appellate court presumed the existence of a marriage and allowed the appeal, and ordered the suit property to be divided into two halves, a share for each party.

9. Aggrieved by this decision, and desirous to appeal to the Supreme Court, the appellant sought certification and leave before the Court of Appeal that her matter was of general public importance. Her application for leave was denied by a majority decision of the Court of Appeal. The majority held that the issues the appellant intended to raise before the Supreme Court were not issues before the trial court or on appeal. They held that the matter before the High Court had been a simple one - whether the applicant and the respondent had cohabited and whether, during that cohabitation, they had acquired the property in question. To the learned judges in the majority, these were straightforward matters of a private nature and findings had been made on those issues. Thus, there were no issues raised meeting the standard set by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR on what amounts to a matter of general public importance.

ii. Proceedings in the Supreme Court

10. Dissatisfied with the Court of Appeal's ruling on certification, the appellant sought for review. On July 16, 2021, in Sup Civil Application No 5 of 2020, this court in a ruling held that the issues raised by the appellant were not frivolous and they transcended the specific

circumstances of the parties. As such, the court granted a review of that certification, granted leave to file an appeal and confined the parties to the following issues for determination now before us:

i. Whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the *Married Women's Property Act* (repealed)? And if so, upon what basis would this be done?

ii. What relief is available to the present parties?

11. Consequently, the appellant filed an appeal before this court. The appeal is premised on article 163(4) (b) of the *Constitution*, section 3 of the *Supreme Court Act* No 7 of 2011, and this court's ruling of July 16, 2021 in Sup Civil Application No 5 of 2020. The appellants seek, *inter alia*, the following orders from the court:

i. A declaration that the common law doctrine of presumption of marriage has no application in Kenya in light of article 45 of the *Constitution*, section 3 of the *Judicature Act*, and the comprehensive provisions of the *Marriage Act* No 4 of 2014.

ii. A declaration that presumption of marriage is no longer a concept which is beneficial to the institution of marriage, to the status of the parties and to the issue of their union or in the alternative.

iii. A declaration that the doctrine of presumption of marriage ought to be sparingly applied as per this court's guidelines and principles.

iv. An order setting aside the judgment of the Court of Appeal and upholding the judgment of the trial court.

v. An order granting costs to the appellant.

vi. Any other relief that the court may deem just to make.

C. Parties' Submissions

a. The appellant

12. The appellant relied on her written submissions. On the issue of whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the *Married Women's Property Act* (repealed), the appellant submitted that the existence of a marriage recognized in law remains the central status that grants a party locus standi under section 17 of *MWPA (repealed)*. Additionally, she argued that marriage by cohabitation is not recognized under the current marriage legal regime in that it is neither one of the kinds of marriages that can be registered under section 6(1) of the *Marriage, 2014*

nor is there evidence of cohabitation- one of the means of proving the existence of marriage under of the said *Act*.

13. It was the appellant's case that mere cohabitation without any evidence on capacity, consent, and intention to marry is not enough to establish a marriage by presumption, especially in a situation where one party is denying consent, capacity, and intention to marry. Citing *M v RM* [1985] eKLR (Civil Appeal No 61 of 1984), the appellant argued that courts should not be used to force parties into a marriage relationship through the doctrine of presumption of marriage.

14. The appellant also submitted that in as much as the suit commenced before the enactment of the *Marriage Act* No 4 of 2014 and *Matrimonial Property Act* No 49 of 2013 these laws cannot be ignored as they were enacted in furtherance of article 45 of the *Constitution* which was in place before the respondent's suit was filed.

15. She urged that the doctrine of presumption of marriage ceased to apply in Kenya after the enactment of the current marriage legal regime which is not necessarily subject to the principles against retroactivity in that it was enacted in furtherance of article 45 of the *Constitution*.

16. She further submitted that section 17 of *MWPA (repealed)* cannot be used to establish a marriage by presumption, assuming that the doctrine is still alive in Kenya today. That this was applicable where such relief was not pleaded and prayed for before the trial court, the prayer initially sought being one for ascertainment of property rights between unmarried persons. In addition, the appellant argued that the respondent ought to have first established, in a separate suit, the existence of marriage by presumption and obtained a valid court declaration before purporting to file his proceedings under section 17 of *MWPA (repealed)*.

17. In the alternative, the appellant submitted that the respondent ought to have at least pleaded and prayed for the establishment and declaration of marriage by presumption in his originating summons to enable the court to entertain evidence touching on long cohabitation and presumption of marriage. The appellant concluded by urging the court to set aside the judgment of the Court of Appeal.

b. The respondent's case

18. The respondent relied on his written submissions. On the question of whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the *Married Women's Property Act, 1882* (repealed), the respondent's counsel urged that the correct interpretation of the term "marriage" in the *MWPA (repealed)* should be that it applies to all marriages recognized or unrecognized in law. Counsel was of the view that a plain and reasonable appreciation of the *MWPA (repealed)*

led to the inescapable position that any marriage qualifies as such under that Act. As a result, the essence of the MWPA (repealed) is to enable people in a union, who have jointly invested in property, to access courts with ease in a manner that meets the expectations of people in all spheres of life as envisaged in the *Constitution*.

19. It was further urged that the appellate judges, while aware that the matter was commenced under the *MWPA (repealed)*, had no problem deciding the matter of sharing the properties amongst the parties. He submitted that the appellate judges thus appreciated the existence of a presumption of marriage albeit unrecognized in law. On the issue of the relief available, the respondent agreed with the finding of the Court of Appeal on marriage and division of the suit property. In conclusion, the respondent urged that the judgment of the Court of Appeal be upheld and costs awarded to him.

c. Brief of amicus curiae

20. The amicus curiae submitted that although cohabiting relationships are mentioned in section 2 of the *Marriage Act*, it is not provided for in the substantive section of the legislation. The legal framework that is used to determine the existence of a marriage is therefore to be found in section 119 of the *Evidence Act* as well as case laws developed by the Court of Appeal.

21. ISLA asserted that long cohabitation and general repute will give rise to a rebuttable presumption that marriage exists between a man and wife as was recognized in *Hortensia Wanjiku Yawe v The Public Trustee Nairobi* [1976] eKLR and *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR.

22. It submitted that courts have also considered whether parties had the capacity to marry in determining if there would be a presumption of marriage. It cited *SMM alias GSM alias SSM v CAKM* [2017] eKLR and *OKN v MPN* [2017] eKLR to buttress this assertion.

23. It was urged that there is currently no legal framework to recognize and provide legal consequences to cohabitation relationships. Therefore, courts have been applying the legal framework applicable to recognized marriages. It was contended that though the division of property is determined based on the contribution, decisions do not take into consideration contribution to ensure equality. Consequently, parties who find themselves in cohabitation unions and who contribute to the acquisition and development of property that is used for the benefit of that union are often deprived of this property when the union ends. It urged that if protections afforded to marriage are extended to these relationships, the same should be extended even in the division of property.

24. ISLA pointed out that the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) Committee has developed its analysis to extend rights that apply

to women in marriage to women who are in relationships that are not recognized in law. It also submitted that various jurisdictions, such as the United Kingdom, Tanzania, Malawi, and Trinidad and Tobago have developed legislation and policies to extend protection to cohabitation unions. In the United States of America, the doctrine of common law marriage protects women upon the dissolution or relationships of dependence. If they qualify as wives under the system, it was contended, then the court ought to grant them all the rights of a wife or widow. Further, those states which provide for the protection of cohabitants provide for the protection of parties' property rights as well.

25. It further submitted that in South Africa, courts have grappled with this issue as there is no legislation that explicitly protects cohabitation. In various cases, the courts in dealing with the issue of cohabitees or long-term relationships have accorded the same benefits as spouses in terms of various statutes. Also, courts have had to consider that the relationships in those cases were worthy of similar protections as extended to marriages. It relied on *Ryland v Edros* 1997 (s) SA 690 (CC) and *Amod v Multilateral Motor Vehicle Accidents Fund 1999* (4) SA 1319 (SCA at 1327 G – H) to support the argument.

26. Based on the foregoing, ISLA submitted that the interpretation of article 45 of the *Constitution of Kenya*, as well as the international and regional human rights treaties to which Kenya is a party, means that provision for those parties in cohabitation unions, or unrecognized marriages must be afforded similar protections in the division of property acquired during those unions; and there is therefore need for a legal standard that ensures the right of parties to all forms of marriage, including cohabitation unions or other unrecognized marriages that ensure the protection of the right to access property.

27. It urged that the beginning of the development of this legal standard can start with this court deciding on the rights of those affected parties and how property should be equitably divided. This can be done under the legal framework for division of matrimonial property; and any remedies granted by this court on the foregoing would benefit from a structural order, requiring the state to report on the progress made in the reform of the law on division of property. This would ensure the effective implementation of any orders that the court will make.

D. Issues for Determination

28. The issues framed for determination are as follows;

    i. Whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the *Married Women's Property Act* (repealed)? And if so, upon what basis would this be done?

    ii. What relief is available to the present parties?

E. Analysis and Determination

29. Before delving into the issues as framed by this court, we note from the record that the cause of action in this matter arose in 2011 and the matter was filed in 2012 before the enactment of the *Marriage Act, 2014*, and *Matrimonial Property Act, 2013*. This court in the case of *Samuel Kamau Macharia & Ano v Kenya Commercial Bank Ltd & 2 Others* SC Application No 2 of 2011[2012] eKLR we held as follows regarding retrospective application of legislation:

> " As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless by express words or necessary implication it appears that this was the intention of the legislature." [emphasis added]

30. Flowing from the above, it is our considered view that the *Marriage Act, 2014* and *Matrimonial Property Act* No 49 of 2013 are not applicable in this matter as the cause of action arose before the said statutes were enacted into law and cannot be applied retrospectively. We now turn to the issues as framed.

(i) Whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the Married Women's Property Act (repealed)?

31. While it is the appellant's case that the existence of a marriage recognized in law remains the central status that grants a party *locus standi* under section 17 of *MWPA (repealed)*, the respondent contends that the correct interpretation of the term marriage in the *MWPA (repealed)* should be that it applies to all marriages recognized or unrecognized in law.

32. In that context, the *MWPA (repealed)* was enacted in England in 1882. It found its way into the Kenyan legal regime when it was inherited as a statute of general application pursuant to the *Judicature Act*. This made the MWPA (repealed) applicable in Kenya but that was until January 16, 2014 when our own statute, the *Matrimonial Property Act, 2013* (MPA) commenced. However, as earlier stated we will not delve into the MPA.

33. The MWPA (repealed) reads that it is "An act to consolidate and amend the acts relating to the property of married women." Lord Morris of Borthy-Guest in *Pettit v Pettit* [1970] AC 777 stated:

> 'One of the main purposes of the act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept separate.'

34. Section 17 of the *MWPA (repealed)* states as follows;

> 'In any question between husband and wife as to the title to or possession of property, either party ..... may apply by summons or otherwise in a summary way to any judge of the High Court of justice .....and the judge ..... may make such order with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.'

35. Accordingly, and in answer to the question posed above, it is clear to us that the *MWPA (repealed)* applied only to 'parties to a marriage; husband and wife.' It is worth noting from the onset that the *MWPA (repealed)* only refers to 'parties to a marriage' and 'married women'. It does not go into details as to how the marriage came to be or how it was contracted. To our minds therefore, we are of the view that parties to a union arising out of cohabitation and/or in a marriage unrecognized by law could file proceedings under the *MWPA (repealed)* upon the basis that the *MWPA (repealed)* does not distinguish between marriages recognized or unrecognized in law. In other words, the *MWPA (repealed)* applies to all marriages recognized or unrecognized in law. The question that then arises in the matter before us, is whether or not, the parties to this dispute were married.

36. The appellate court in this matter had determined that 'the appellant was, by presumption married to the respondent.' It is this determination that falls to us for examination. Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed.

37. According to *Halsbury's Laws of England, Matrimonial and Civil Partnership Law* (Volume 72) 5th Edition 2015:

> " Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have

occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary."

38. Similarly, *Bromley Family Law* 5th Edition provides that:

> "If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married."

39. Section 119 of the *Evidence Act*, cap 80 Laws of Kenya is also instructive. It provides as follows:

> "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

40. From the foregoing, courts are permitted to make a *prima facie* legal inference that certain facts exist without proof, regard being taken to the common course of natural events and human conduct, in relation to the facts of a particular case.

41. The presumption of marriage was first applied in Kenya in *Hortensia Wanjiku Yawe v The Public Trustee Nairobi* [1976] eKLR. The principles distilled from this former Court of Appeal (Wambuzi P, Mustafa VP and Musoke JA) for East Africa decision were outlined in *Mary Njoki v John Kinyanjui Mutheru & 3 Others, (Mary Njoki)* [1985] eKLR by Kneller JA as follows:

i. The onus of proving customary law marriage is generally on the party who claims it;

ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;

iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (*Mwagiru v Mumbi*, [1967] EA 639, 642)

iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate* [1937] 3 All ER 105

vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (*Sastry Veliader Aronegary v Sembecutty Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456)

42. The judge went on to state:

> "Cohabitation and repute do not always constitute a marriage. They can be part of a mode of proving one in that they are substituted for some missing element or elements. One of the earliest put it this way. Cohabitation, with habit and repute, in the absence of countervailing proof to the contrary, establish a marriage on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract that relationship." [Emphasis ours]

43. Nyarangi JA in the same judgment delivered himself as follows;

> "In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is marraige. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law."

44. Our courts have subsequently applied the doctrine of presumption of marriage in several cases. In *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR the Court of Appeal stated as follows:

> "Before presumption of marriage can arise a party a needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is ot a mere concubine that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

45. In *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR Bosire JA held as follows:

> " The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife."

46. More recently, Ngaah J, in *CWN v DK*[2021] eKLR was of the view that;

> " as far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law."

47. Bearing in mind the above case law, did the instant relationship possess the constitutive elements of presumption of marriage, that is, long cohabitation and repute of marriage absent cogent evidence to the contrary? In other words, is it safe in the circumstances of this case to presume a marriage?

48. The appellant argued that parties to a marriage must have the capacity to enter into a marriage and that she did not have the requisite capacity for the relationship between her and the respondent to be presumed a marriage as she was married to KM and had three children out of that relationship. The appellant further contended that she was married to KM in the 1980s, therefore, she did not have the capacity to enter into another marriage with the respondent, and that lack of capacity, consent, and intention to marry rebuts any presumption of marriage. This was interrogated by the High Court and the learned judge found as follows at paragraphs 26 and 27:

> " 26. I note that the plaintiff sued the defendant as MNK. Indeed, in all the other suits between the parties hereto, that is to say Milimani CMCCC No 4364 of 2011 and Milimani CMCCC No 454 of 2011, she is referred to as such. It would appear to me that that is her official name; it is the one appearing in her national identity card serial number[xxxx]. There is also material, procured by the plaintiff, indicating that her father was called M W. That then should raise the question as to where she could have gotten the surname K from. I feel inclined to agree with the defendant, and to

conclude that she had contracted marriage with the said KM which led to her adopting his name as part of her name."

27. ".....It is a cardinal principle of the civil process that he who alleges must prove. It is the plaintiff who came to court claiming that the defendant was his wife; it was therefore incumbent upon him to prove that assertion. When the defendant countered the claim by asserting that she was a spouse of a KM, the plaintiff ought to have sought to disprove that,especially given that the defendant had the K name as her surname, yet that could not possibly have been her maiden surname. He failed to adduce any evidence to disprove the defendant's assertions that she had no capacity to marry him at the time. I will therefore find that the marriage between the defendant and KM was not terminated until 2011 when he was alleged to have died. That would then mean that the defendant had no capacity at the time to marry the plaintiff. It is a notorious fact that polyandry is not practiced in Kenya, whether under statute or customary law. The relationship between the parties hereto was no doubt adulterous, and the resulting cohabitation could not be deemed to have brought forth a marriage."

49. The Court of Appeal on the other hand determined as follows;

" The learned judge placed much weight on the appearance of the name "K" on MNP's identity card and drew the conclusion without evidence being led, that the name appeared because she was married to him. In fact, it would seem that beyond that fact, no other cogent evidence existed as to the said marriage. We are not ourselves prepared to accept as correct a proposition that the appearance of a name on the identity card of a woman, without more, proves that the owner of that name, whoever he be, is the woman's husband. It is also troubling that the issue of the appearance of that name in the identity card did not feature in MNP's testimony so that the determinative conclusion the learned Judge reached was not preceded by any jural testing and was founded on the learned judge's own untested theorizing or extrapolation.

50. Case law guides us on the issue of capacity. In *Machani v Vernoor* [1985] KLR 859, the Court of Appeal held that:

" The presumption covers two aspects, that the parties must have capacity to enter into a marriage and that they did so in effect. During the continuance of a previous

> marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree or divorce."

51. Indian case law is also persuasive on the issue of capacity. The Supreme Court of India in *Gokal Chand v Parvin Kumari* AIR 1952 SC 231 held that continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the court cannot ignore them. Polygamy, that is, a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.

52. In *Indra Sarma v VKV Sarma* (2013) 15 SCC 755 the Supreme Court of India held that:

> " There is no necessity to rebut the presumption since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. Long standing nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of section 2(f) of the DV Act, which is restrictive and exhaustive."

53. On analysis and guided by the record, we are unconvinced that the appellant had capacity to contract a marriage with the respondent. Before the High Court,the appellant urged that her father gave her the name 'P' upon her baptism in 1979. She produced her baptism card before the court and also averred that she added the name 'P' on the suit property because she was having a dispute with her now deceased husband. She urged that although she had other properties, the suit property was the only one with the name "P.'

54. It is also not disputed that her father was MW and his name did not appear in her identity document. We find that the Court of Appeal disregarded the appellant's evidence regarding her name and the reasons for use of the name 'P' and 'K.' Without the benefit of having sight of the baptism card produced during the hearing, we have perused the record and find that the respondent did not controvert the production of the baptism card.

55. Furthermore, the appellant claimed she was married to 'KM'. Her evidence was her identity card, her official national identification document which bears this name. We find that by

parity of reason, the learned High Court judge was well within his bounds to determine that K was her husband's name bearing in mind that Kenyan adult women have their father's or husband's names as their surnames in their official identification cards. We also find that the appellate court, inclined to disbelieve the appellant, did not thoroughly interrogate this issue. In our considered view, the appellant has sufficiently proved that her name is MNK and the name K is attributable to the deceased man 'KM'.

56. The appellant also argued that a long-term relationship that resembles a marriage is not a marriage, and the person who alleges the existence of such a marriage must prove it.

57. On the issue of long cohabitation, the High Court held at paragraph 21 & 22 as follows:

> "So what do I make of the material that was placed before me with regard to the alleged relationship between the plaintiff and the defendant? From the documents annexed to the affidavits to the parties and the oral testimonies of the witnesses called by both sides, I am satisfied that the plaintiff and the defendant were indeed living together on a plot within Dagoretti/Riruta/xxx. It would appear that some people might have at that time considered them to be husband and wife, going by the oral testimonies and the documents, particularly the minutes of the meetings held with respect to the issues concerning the subdivision and excision of the plots from Dagoretti/Riruta/xxx.
>
> 22. What should be of concern is whether that cohabitation could lead to a presumption that the two parties had between them a marriage... From the material placed before me, I would be persuaded that there was a long cohabitation of the parties, from 1986 according to the plaintiff and 1992 or thereabout from the other witness, terminating in 2011 or 2012 when the plaintiff was allegedly locked out of the premises by the defendant. There is also material to suggest that there was a general repute within that period that the two were a married couple."

58. From the evidence on record, we agree with both the High Court and the Court of Appeal that there was long cohabitation between the appellant and the respondent. However, did the long cohabitation and repute as husband and wife raise a presumption of marriage?

59. The first issue to note here is that from the record, it is evident that when the respondent filed the suit in the High Court, he was not claiming to be the husband of the appellant. The issue of the presumption of marriage through long cohabitation was not specifically pleaded. Indeed, it was only during the proceedings that the respondent asserted that they were married by repute. This assertion was vehemently denied by the appellant and she

claimed that she was married to another man and known by his name. We have already made a finding on this issue and will say no more on it.

60. In addition, is trite law that he who alleges the existence of certain facts must prove its existence. Accordingly, section 109 of the *Evidence Act* provides:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

61. The respondent, having claimed that he was married to the appellant, ought to have adduced cogent evidence to prove the marriage. However, in his own testimony in the record, he had a first wife and the appellant was allegedly his second wife. He also confirmed that he had not paid dowry for the appellant. We are therefore not convinced that his cohabitation with the appellant was sufficient to prove his marriage to the appellant.

62. We are thus in sync with the High Court that the respondent did not controvert the evidence by the appellant that she was married to KM until 2011 when he died. In this regard, she only had the capacity to marry from 2011. This evidence was in the form of her identity card. This was not disproved by the respondent. As such, we are of the view that the appellant's evidence that she was married to KM under Kikuyu customary marriage was uncontroverted.

63. Uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. Considering the facts as pleaded and the evidence as tendered in this matter, in particular the existence of the first marriage and failure by the respondent to prove the presumption of marriage and/or controvert the appellant's evidence, we must return a finding that this is not one of the safe instances where a court can rightly presume a marriage. We must respectfully find, which we do, that the appellate court erred in presuming a marriage between the parties. We agree with the High Court that the relationship between the parties and the resulting cohabitation cannot be deemed to have brought forth a marriage. Consequently, a presumption of marriage cannot apply in the instant case.

64. We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

1. The parties must have lived together for a long period of time.
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.

5. The parties must have held themselves out to the outside world as being a married couple.

6. The onus of proving the presumption is on the party who alleges it.

7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.

8. The standard of proof is on a balance of probabilities.

65. The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.

66. In the same breath, we would be remiss if we did not point out that marriage is an institution that has traditional, religious, economic, social and cultural meaning for many Kenyans. However, it is becoming increasingly common for two consenting adults to live together for long durations where these two adults have neither the desire, wish nor intention to be within the confines of matrimony. This court recognizes that there exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside marriage. While some may find this amoral or incredible, it is a reality of the times we live in today.

67. For instance, a person may have been in a marriage before and the marriage is no more due to death of a spouse or divorce. Due to their prior experiences, such persons may choose to have an interdependent relationship outside of marriage. For others, it may just be their desire never to marry but have a partner without the confines of marriage. Where such situation is evident and there is no intention whatsoever of contracting a marriage, the presumption of marriage must never be made where this intention does not exist. It must always be remembered that marriage is a voluntary union. As such, courts should shy away from imposing 'marriage' on unwilling persons.

68. In addition, in our ever-changing society, current statistics reveal that a man and a woman can choose to cohabit with the express intention that their cohabitation does not constitute a marriage. The pervasiveness of having interdependent relationships outside marriage over the past few decades means that no inferences about marital status can be drawn from living under the same roof. 'Interdependent relationships outside marriage' is not a new concept.

69. In Alberta, Canada, since 2003, adult interdependent relationships have been recognized and protected through the *Adult Interdependent Relationships Act*. This creates a specific type of relationship, called an adult interdependent relationship ("AIR"). This term is used

in place of the 'common law relationship'. The *act* gives rights and obligations to couples in qualifying long-term relationships. In this regard, perhaps, it is time for the National Assembly and the Senate, in collaboration with the Attorney-General to formulate and enact statute law that deals with cohabitees in long-term relationships; their rights, and obligations.

70. To conclude on this issue, we find that the circumstances in which presumption of marriage can be upheld are limited. In other words, a presumption of a marriage is the exception rather than the rule.

ii) What relief is available to the present parties?

71. Since the presumption of marriage does not exist in this case, is the respondent entitled to a share of the suit property?

72. Although the respondent urges that at all material times, the two parties contributed to its acquisition and development of the suit property, on analysis of the evidence before the High Court, the appellant's and respondent's financial contribution in purchasing and developing the property was not ascertained.

73. The Court of Appeal in evaluating the proprietary rights relating to the ownership of the suit property together with the developments thereon held that the respondent had jointly contributed to the acquisition, building and development thereon and awarded each of the parties a 50% share.

74. We now turn to the history of how the suit property was purchased. From the record, the respondent alleged that the suit property was the subject of a succession matter which upon conclusion was available for transfer but not to someone who was not 'Kikuyu'. The respondent averred that the purchase price was Kshs 250,000.00 and they jointly contributed Kshs 200,000.00 and obtained financing of Kshs 100,000.00 from the appellant's sister one EN. Upon cross-examination, the respondent averred that he contributed Kshs 60,000.00. That after the sale, the property was registered under the name MKP. The respondent urged that the utility bills were registered in his name. It is not in dispute that rental rooms were developed on the property and that the respondent operated a bar and butchery business on the premises. The respondent urged that the tenancy agreements were registered in his name as the landlord and that he collected rent which was utilized for his upkeep together with the appellant.

75. The appellant urged before the High Court that she solely contributed to the acquisition of the suit property. She confirmed that although she had other properties it is only the suit property where she added the name P to her name for registration purposes. The appellant urged that she had allocated the respondent a shop to operate his business and had also appointed him as an agent for purposes of rent collection.

76. The learned judge of the High Court downed his tools on determination of proprietary rights after making a finding that no marriage could be presumed. The Court of Appeal on the other hand made a finding that the High Court erred in failing to make a finding regarding the proprietary rights of the parties and proceeded to make a determination on the legal issue which was the gravamen of the suit filed. We agree with the learned judges that it was crucial to make a finding on the parties' proprietary rights, whatever the nature of the relationship.

77. Wheareas the appellate court in evaluating the evidence made a finding that the purchase and development of the property was a joint effort and proceeded to apportion a 50% share to each party. The court further held that the true purchaser was the respondent but due to prevailing circumstances regarding tribe, the property was registered in the appellant's name. We disagree as we find there is insufficient evidence on record to make this finding.

78. On our part, on evaluating the evidence, we are convinced that the two parties contributed to the acquisition and development of the suit property which led to their proprietary rights. These proprietary rights arose out of a constructive trust. The *Black's Law Dictionary* 9th Edition at pg 1649 defines a constructive trust as "the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title."

79. England and Wales Court of Appeal's Lord Justice Browne in *Eves v Eves* [1975] 1 WLR 1338 quoted with approval the decision in *Cooke v Heard* [1972] WLR 518 where it was held;

> " ... whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property in trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too."

80. Likewise, we are persuaded by the decision of the Supreme Court of Queensland in *Barker v Linklater & Another* [2007] QCA 363 quoted with *Baumgartner v Baumgartner* [1987] 164 CLR 137 where the court held:

> " Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his

> sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.'

81. According to *Bromley's Family Law* 10th Edition, disputes between cohabitants or former cohabitants over ownership, occupation, or use of the property must be resolved, generally speaking by applying ordinary legal rules applicable to strangers. This is due to the fact that legislation that enables courts to allocate or reallocate beneficial interests in the assets following a divorce does not apply to cohabiting couples.

82. Kenya, just like many other countries, does not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couples' property has increasingly become a social problem due to the high number of people resorting to cohabitation and in the process of acquiring properties, upon separation there is no legislation governing the division of property.

83. While we acknowledge the difficulties of resolving such disputes, a *laissez* fair approach can result in injustice for parties to a relationship who might be more vulnerable or who contribute less in financial terms than their partners. Conversely, we do note that the interventionist approach risks creating uncertainty, and attaching a monetary value to the party's actions within this type of relationship is often highly complex as is in the present case.

84. The difficulty was aptly captured in *Walker v Hall* [1984] FLR 126 where Lord Lawton observed as follows:

> "During the past two decades the courts have had to consider on a number of occasions the division of property between men and women living together without being married..... courts have been able to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. No such jurisdiction exists when the cohabitees are unmarried. When such a relationship comes to an end, just as with many divorced couples, there are likely to be disputes about the distribution of shared property. How are such disputes to be decided? They cannot be decided in the same way as similar disputes are decided when there has been a divorce. The courts have no jurisdiction to do so. They have to be decided in accordance with the law relating to property... There is no special law relating to property shared by cohabitees any more than there is any special law relating to property used in common by partners or members of a club. The principles of law to be applied are clear, though sometimes their application to particular facts are difficult. In

> circumstances such as arose in this case the appropriate law is that of resulting trusts. If there is a resulting trust (and there was one in this case) the beneficiaries acquire by operation of law interests in the trust property. An interest in property which is the consequence of a legal process must be identifiable. It must be more than expectations which at some later date require to be valued by a court..."

85. In England, courts have long recognized that common intention of the parties at the time of purchase is sufficient to give rise to a constructive trust, which can be inferred from conduct other than making financial contributions to cohabitees.

86. In defining constructive trusts, the Court of Appeal in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR the court held that;

> " In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing . ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such aswould demand the equity treats the legal. owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit _ (see *Halsbury's Laws of England supra* at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment ." [emphasis added]

87. We however note that even though constructive trust is premised on section 38 of the *Land Act*, 2012 the same has not been applied in solving disputes relating to cohabitees.

88. In the case of *Elayne Marian Teresa Oxley v Allan George Hiscock* [2004] EWCA 546 the Court of Appeal of England and Wales quoted with approval Lord Diplock in *Gissing v Gissing* [1971] AC 886 where the guidelines to consider when interrogating constructive trust were laid down as follows:

> " . . . the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right.
>
> 1. The nature of the substantive right

If the legal estate in the joint home is vested in only one of the parties ('the legal owner') the other party ('the claimant'), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; and (b) that the claimant has acted to his or her detriment on the basis of that common intention.

2. The proof of the common intention

   a. Direct evidence , it is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention.

   b. Inferred common intention , Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention, viz contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.

3. The quantification of the right

   Once it has been established that the parties had a common intention that both should have a beneficial interest and that the claimant has acted to his detriment, the question may still remain 'what is the extent of the claimant's beneficial interest?' This last section of Lord Diplock's speech shows that here again the direct

> and indirect contributions made by the parties to the cost of acquisition may be crucially important." [emphasis added]

89. The court further observed as follows:

> " I have referred, in the immediately preceding paragraphs, to "cases of this nature". By that, I mean cases in which the common features are: (i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust ." [emphasis added]

90. Applying the above guidelines we reiterate that common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust between the appellant and the respondent. From the evidence on record that the appellant and respondent had been cohabiting since 1986 and that in 1991 the suit property was bought by the two parties and registered in the name of the appellant. The respondent was present during the drafting and signing of the sale agreement and was in fact a witness. The parties lived in one of the rooms from 1993 and ploughed the proceeds of rent to construct more rental units. It was proved that the meters were in his name and operated a bar on the same premises. In these circumstances, we conclude that there was a common intention for the appellant and respondent to have beneficial interests in the suit property.

91. However, in 2011 when the parties herein separated the appellant evicted the respondent from the matrimonial home and from the business premises contrary to the common intention, they had at the time of purchasing the property. Thereby, unjustly enriching herself with a property meant to be of benefit to her and the respondent.

92. It is in evidence that the respondent paid for the water and electricity connection charges and bills from when the property was constructed to 2011 when he was evicted from the property and that jointly the parties have made several improvements on the suit property. It is, therefore, our finding that the common intention can be inferred from the appellant and respondent's conduct during the existence of their relationship.

93. Having established that there was a common intention and that both the appellant and the respondent should have a beneficial interest in the property, it follows that we need to proceed and quantify the beneficial interest to the parties.

94. In assessing the beneficial interests due to the parties, we cannot only be primarily focused on the direct financial contribution to the acquisition of the property but also interrogate other forms of contribution such as actions of the parties in maintaining and improving such properties.

95. The record shows that the appellant and the respondent jointly contributed to the acquisition and the construction of the suit property and the two jointly invested in the property for more than 20 years. Therefore, we are of the view that the respondent did prove his case on a balance of probabilities that the suit property was acquired and developed through joint efforts and/or contribution of the parties. We therefore make a finding that the share of the parties is apportioned as 70% for the appellant and 30% for the respondent based on their respective contributions.

96. This being a matter of public interest, each party shall bear their own costs.

E. Orders

97. Having considered the issues delineated by this court for determination, the final orders are as follows:

    a. The appeal dated August 12, 2021 partially succeeds.

    b. A presumption of marriage between the appellant and the respondent does not exist.

    c. Both parties having a beneficial interest in the property, the share is 70% for the appellant and 30% for the respondent.

    d. Each party to bear their own costs.

98. It is so ordered.