



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E128 OF 2022

-BETWEEN-

KATIBA INSTITUTE.....PETITIONER

-VERSUS-

1. JUDICIAL SERVICE COMMISSION

2. THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA

3. THE ATTORNEY GENERAL.....RESPONDENTS

-AND-

1. THE KENYA MAGISTRATES AND JUDGES ASSOCIATION

2. THE LAW SOCIETY OF KENYA.....INTERESTED PARTIES

RULING NO. 1

Introduction:

1. This ruling is in respect of three preliminary objections. They are the Notice of Preliminary Objection dated 13th April, 2022 taken out by the 1st and 2nd Respondents, the Notice of Preliminary Objection dated 13th April, 2022 by the 1st Interested Party herein and the Notice of Preliminary Objection dated 12th April, 2022 by the 2nd Interested Party herein.

2. All the objections variously impugn on the jurisdiction of this Court.

3. Whereas the objections are supported by the Hon. Attorney General, the 3rd Respondent herein, they are vehemently opposed by the Petitioner.

4. The objections were heard by way of oral submissions. All parties were represented by Counsel.

The Objections:

By the 1st and 2nd Respondents:

5. I will hereinafter refer to the Notice of Preliminary Objection dated 13th April, 2022 by the 1st and 2nd Respondents to as ***‘the first objection’***.

6. The first objection is tailored as follows: -

1. THAT the Petition and application dated 31st March 2022 as drawn and instituted herein are in substance incompetent, premature for determination by this Honourable Court and fatally defective because

a. The basis of the instant petition and application is several cases that are currently under consideration by the Court of Appeal (see paragraph 3 of the Petition) after various High Court benches heard and determined the same. The said appeals deal with the issue of the Gazettement of 34 out of 41 Judges which is the crux of the Petitioner's grievance. Moreover, the already determined petitions before the High Court and the pending respective appeals involve the same parties and concern the same subject matter thus making the instant Petition and Application both sub-judice and *res judicata*.

b. Consequently, the Petition and Application give rise to a situation of parallel proceedings where both this Court and the Court of Appeal shall be actively dealing with the same dispute at the same time. Therefore, the issues raised in the instant Petition and application should have been raised in any of the cases pending before the various courts.

2. THAT further, the application has not met the threshold for the grant of conservatory orders as it not only lacks inherent merit but also fails to demonstrate the nugatory aspect or any public interest that supports it hearing, determination and grant.

3. THAT furthermore, there is misjoinder of the 2nd Respondent herein-the Chief Justice of the Republic of Kenya, who has been sued in her Ladyship's capacity as the Chairperson of the Judicial Service Commission - the 1st Respondent herein, which is an independent Constitutional Commission capable of suing and being sued in its own capacity. Her Ladyship is thus an unnecessary party to the instant proceedings

4. THAT in the premises, the Petition and application dated 31 March 2022 are an abuse of the process of this Honourable Court and as such should be dismissed with costs to the 1st & 2nd Respondents.

5. THAT based on the aforesaid reasons, the Jurisdiction of this Honourable Court has been erroneously invoked.

6. THAT in the premises, the Petition and application dated 31st March 2022 is not properly before this Honourable Court and as such this Honourable Court should down its tools

7. Mr. Charles Kanjama led Miss. Owano Counsel in prosecuting the first objection.

8. Counsel argued that the instant proceedings were *res judicata* and *sub-judice*. He made reference to several parts of the Petition in his bid to buttress the position.

9. Counsel also dispelled the Petitioner's preliminary notion that the first objection was based on unresolved facts hence could not lie and submitted that the doctrines of *res judicata* and *sub-judice* were pure points of law and were raised on the basis of the facts as pleaded and agreed to.

10. On the limb of *res judicata*, it was submitted that the instant proceedings had been the subject of various Petitions before the High Court which matters were concluded and final decisions rendered.

11. Counsel submitted that Section 7 of the Civil Procedure Act was the legal basis of the *res judicata* doctrine and urged Court to find that the matters in the instant Petition were matters in issue in the previous proceedings as they dealt with the recruitment of Judges.

12. As to the aspect of *sub-judice*, it was argued that there are pending proceedings before the Court of Appeal over the matters raised in the instant Petition.

13. It was further submitted that the Court of Appeal stayed the execution of the decisions of the High Court. According to Counsel, the Petitioner ought to apply before the Court of Appeal under Rule 5(2) of the Court of Appeal Rules for appropriate reliefs.

14. Counsel submitted that the Supreme Court has affirmed that the doctrines of *res-judicata* and *sub-judice* are applicable to constitutional petitions as a means of saving judicial time and to avoid abuse of the Court process.

15. Further submissions were made that none of the decisions stopped the 1st Respondent from discharging its constitutional duties including the recruitment of Judges since there is a continuing need to undertake such exercises.

16. Counsel submitted that unlike what was claimed by the Petitioner, the first objection was neither brought in bad faith nor malicious. He urged the Court to find that it was not vested with jurisdiction going by several decisions by superior Courts on the doctrines of *res-judicata* and *sub-judice* and to accordingly down its tools.

17. On the issue of the misjoinder of the 2nd Respondent, Counsel submitted that it was also a point of law and could even be raised informally before Court. It was argued that the objection was sustainable since the 2nd Respondent was acting on behalf of a disclosed principal, the 1st Respondent, and that there was no prayer sought against the 2nd Respondent in the matter.

18. Counsel supported the objections by the Interested Parties and urged this Court to dismiss the Petition.

By the 1st Interested Party:

19. The Notice of Preliminary Objection by the 1st Interested Party was also dated 13th April, 2022 and I will refer to it as **‘the second objection’**.

20. The objection was as follows: -

a. The dispute in question is an employment and labour dispute as contemplated by Article 162(2) (a) of the Constitution and Section 122 of the Employment and Labour Relations Court Act No. 20 of 2011.

b. That though no “Employer-Employee Relationship” exists as between the Applicant/Petitioner and the Respondents the recruitment dispute falls within disputes contemplated under the jurisdiction of the Employment & Labour Relations Court as contemplated under Section 12(2) of the Industrial Court Act, 2011.

21. *Mr. Shadrack Wamboi*, Counsel, argued the objection on behalf of the 1st Interested Party.

22. Starting off, Counsel associated himself with the submissions by *Mr. Kanjama*.

23. In urging that this Court lacks jurisdiction over the Petition, Counsel averred that whereas the dispute between the Petitioner and the Respondents was not an employment and labour dispute, it instead dealt with a recruitment process and as such it fell within Section 12(2) of the Industrial Court Act, 2011 and in that case the High Court is not properly seized of the matter.

24. Counsel further referred to several decisions in the Lists of Authorities in buttressing the position.

25. In the end, the Court was urged to down its tools by striking out the Petition and not to transfer it to any other Court.

By the 2nd Interested Party:

26. The Notice of Preliminary Objection by the 2nd Interested Party was dated 12th April, 2022 and I will refer to it as **‘the third objection’**.

27. The objection was rendered as follows: -

*1. The Honourable Court lacks jurisdiction to hear and determine the Motion dated 31st March, 2022 and the petitioner view of Justice Rika’s judgment in **Okoiti Vs Attorney general; Njenga (Interested Party) (Petition E101 of 2020 {2022} KEEKRC 2(KLR)***

2. The Interested Party is shall refer to the said judgment for its full tenor and effect at the hearing hereof.

28. *Mr. Onderi*, Counsel, led *Mr. Mokuu*, Counsel, in the attack on the jurisdictional objection.

29. While supporting the other objections, Counsel argued that what was at stake was a recruitment process initiated by the 1st Respondent and that any decision by this Court will have a bearing on the persons seeking the employment.

30. It was argued that pursuant to Articles 162 and 77 of the Constitution, a judicial office is employment and that is why Judges and Magistrates are not allowed to engage in any other form of employment. Reliance was placed in *Okoiti v Attorney General; Njenga (Interested party) (Petition E101 of 2020) [2022] KEELRC 2 (KLR) (Employment and Labour) (17 February 2022) (Judgment)*.

The Responses:

31. *Mr. Bitta*, Deputy Chief State Counsel representing the Hon. Attorney General supported the objections. He aligned himself with the submissions by the Counsel for the Respondents and Interested Parties.

32. The Petitioner opposed the objections. *Miss. Julie Soweto* appeared for the Petitioner.

33. The first salvo was on the competency of the objection by the 1st and 2nd Respondents.

34. Counsel argued that the objection raised in paragraph 2 of the objection was premised on unsettled factual issues and as such did not pass the test to be considered as a preliminary objection. Reference was made to *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) E.A 696* to support the argument.

35. Similar arguments were also made on the issue of misjoinder of the 2nd Respondent in paragraph 3 of the objection. It was submitted that since Rule 5 of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as **‘the Mutunga Rules’**) was to the effect that no Petition may be defeated for misjoinder, the objection was brought in bad faith and with a view to delay the determination of the matter.

36. Furthering the onslaught, Counsel submitted that the 2nd Respondent was properly enjoined in the proceedings as it was the Chief Justice

who issued the impugned Gazette Notices under her hand and as the Chief Justice and not on behalf of the 1st Respondent or in her capacity as the Chairperson of the 1st Respondent.

37. Counsel argued that Courts have variously held that where a decision is challenged and the maker thereof is not sued, then such proceedings cannot stand.

38. The second salvo by the Petitioner was that the Petition was neither *res-judicata* nor *sub-judice*.

39. It was argued that the essence of the Petition had been misunderstood and that the Petition had nothing to do with the matters which were previously dealt with by the High Court and are now pending determination of appeals before the Court of Appeal.

40. Counsel argued that the Petition challenged the constitutionality of the decisions made by the 2nd Respondent which were contained in the Gazette Notices whereas serious issues on the constitutional probity and independence of the Respondents, among many other constitutional issues, were pending determination; issues which have never been litigated elsewhere before.

41. It was the Petitioner's position that the 1st Respondent has in previous and pending proceedings before the High Court and the Court of Appeal taken the position that the unresolved matters impugned on its independence and that the High Court held as much. The Petitioner was then utterly shocked and surprised that even before the issues were resolved on appeal, the 1st Respondent would initiate a fresh recruitment process with a possibility of a repeat of what was still pending before Court. According to the Petitioner, such triggered a fresh cause of action hence the instant Petition. To it, therefore, there was no nexus between what was pending before Court and the current proceedings which were based on a new cause of action.

42. Counsel submitted that, as a result of the foregoing, the position that the Petitioner should instead file an application in the Court of Appeal and to seek a stay of any further dealings by the 1st Respondent under Rule 5(2) of the Court of Appeal Rules was misguided, unmerited and in bad faith.

43. The other issue taken by the Petitioner was that the dispute in the instant proceedings was not a labour dispute, but a pure constitutional issue which ought to be determined by the High Court.

44. To that end, Counsel made reference to several decisions in an attempt to persuade the Court that indeed it was vested with jurisdiction.

45. The Court was urged to dismiss the objections and proceed on with the matter further.

46. Lastly and on a without prejudice basis, the Petitioner urged this Court not to dismiss the Petition if it finds that it has no jurisdiction, but to instead transfer it to the appropriate Court.

Analysis:

47. From the foregoing background and in consideration of the parties' submissions and the decisions referred to, I hereby discern the following issues for determination: -

i. *Whether the Preliminary Objection is sustainable in law.*

ii. *In the event the answer to (i) above is in the affirmative, whether this Court is deprived of the jurisdiction on the basis of the doctrines of res-judicata and sub-judice;*

iii. *In the further event that the answer to (ii) above is in the negative, whether it is the High Court or the Employment and Labour Relations Court which has the jurisdiction over the instant proceedings;*

iv. *The joinder of the 2nd Respondent.*

v. *Disposition.*

48. I will now deal with the issues as under.

i. Whether the Preliminary Objection is sustainable in law:

49. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.

50. To that end, the *locus classicus* decision in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*** (1969) E.A 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to

refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

51. The Supreme Court weighed in on the issue in **Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others** [2015] eKLR and stated thus: -

... Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

52. **Ojwang J**, as he then was, emphasized the finding in **Mukisa Biscuit -vs- West End Distributors** case (supra) in Civil Suit No. 85 of 1992, **Oraro -vs- Mbaja** [2005] 1 KLR 141 when he observed as follows: -

.... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

53. In **John Musakali -vs- Speaker County of Bungoma & 4 others** (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

54. Finally, in **Omondi -vs- National Bank of Kenya Ltd & Others** {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

.... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....

55. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in **Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others**, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

56. I now return to the contents of the objections.

57. The first objection in this matter has six limbs. The first limb is on the doctrines of *res-judicata* and *sub-judice*. The second limb is on the failure of the Petitioner's application for conservatory orders to attain the constitutional and legal threshold.

58. The third limb is the misjoinder of the 2nd Respondent. The fourth limb is that the Petition and application are an abuse of the Court process. The fifth limb impugned the jurisdiction of the Court in view of the foregoing reasons. The last limb has it that the Petition and the application are not properly before Court and the Court ought to down its tools.

59. Drawing from the above, there is no doubt that the second limb which contended that the application for conservatory reliefs fell short of the required legal threshold in law cannot be a basis of a preliminary objection in law. The second limb is hereby struck out of the first objection.

60. On the doctrines of *res-judicata* and *sub-judice* as well the aspect of misjoinder of the 2nd Respondent, it is a fact that the issues are settled legal principles and doctrines applicable in constitutional petitions. I will, however, later address the manner in which the said doctrines and principles ought to be raised and relied upon in constitutional Petitions.

61. And, as held by the Supreme Court, the issue of jurisdiction of a Court or Tribunal is a pure question of law. As such, the second and third objections raised proper questions of law capable of dealing as preliminary objections.

62. Having said so, suffice to say that the jurisdictional challenges raised by the doctrines of *res-judicata* and *sub-judice* and the appropriateness of the forum are issues, which if sustained by this Court, can terminate the matter. Therefore, save for the second limb of the first objection, which has been struck out of the first objection, the rest of the issues raised in the first objection as well as those raised in the second and third objections shall proceed on for consideration as preliminary objections.

ii. Whether this Court is deprived of the jurisdiction on the basis of the doctrines of *res-judicata* and *sub-judice*:

63. I will consider the two doctrines separately.

Res-Judicata:

64. The 1st and 2nd Respondents contended that the issues in the instant Petition were raised and fully determined by the High Court in previous proceedings which were captured by the Petitioner in paragraph 3 of the Petition.

65. According to the paragraph 3 of the Petition, the cases were two. They are High Court Petition No. 369 of 2019 ***Adrian Kamotho Njenga vs. Attorney General; Judicial Service Commission & 2 Others (Interested Parties)*** (2020) eKLR (hereinafter referred to as '**Petition No. 369 of 2019**' or '**Adrian Kamotho case**') and High Court Petition No. 206 of 2020 ***Katiba Institute vs. President of the Republic of Kenya; Judicial Service Commission & 3 Others (Interested Parties)*** (2021) eKLR (hereinafter referred to as '**Petition No. 206 of 2020**' or '**Katiba Institute's case**').

66. Before I venture into whether the doctrine of *res-judicata* was rightly raised in the matter, I will consider a brief constitutional and legal discourse on the doctrine.

67. The doctrine of *res judicata* is not novel. It is a subject which Superior Courts have sufficiently expressed themselves on. The Supreme Court in ***Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR*** delimited the operation of the doctrine of *res-judicata* in the following terms;

[317] *The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.*

[318] *This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:*

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.

[319] *There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.*

[320] *So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.*

[333] *We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).*

[334] *Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."*

[352] *The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago, [1991] LRC (Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, Daryao & Others v. The State of UP & Others, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of res judicata. The Indian Court also rejected the notion that res judicata could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:*

But is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of res judicata...has no doubt some technical

aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

[353] Kenya's High Court recently pronounced itself on the issue of the applicability of *res judicata* in constitutional claims. In *Okiya Omtatah Okioti & Another v. Attorney General & 6 Others*, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

[354] On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[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. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

68. The Court of Appeal in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others*** [2015] eKLR also discussed the doctrine of *res judicata* at length. The Court stated in part as follows: -

The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being *res judicata*. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

- i) The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.
- ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.
- iii) The ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

69. I have keenly studied Petition No. 369 of 2019 and Petition No. 206 of 2020.

70. Petition No. 369 of 2019 challenged the refusal by the President of the Republic of Kenya to appoint to the office of Judge, 41 persons

who had been recommended to the President by the 1st Respondent herein.

71. The High Court (*Achode, Makau and Mwitia, JJ*) declared *inter alia* that the President is constitutionally bound by the recommendations made by the 1st Respondent.

72. Petition No. 206 of 2020 was filed challenging the President's decision to gazette and subsequent appoint into office 34 nominees leaving out 6 nominees, one having died.

73. The High Court (*Dulu, Wakiaga and Musyoka, JJ*) gave the following final orders: -

a. That an order of mandamus is hereby issued directing the 1st respondent to appoint the remaining six nominees as Judges to their respective courts, within the next fourteen days;

b. That upon the lapse of the fourteen days, in (a), above, without the 1st respondent having made the appointments, it shall be presumed that his power to make them has expired and his office become functus, so far as the appointments are concerned, and the six nominees shall be deemed duly appointed, effective from the date of default, as Judges of the Superior Courts for which they were recommended;

c. That subsequent to their being deemed appointed, under (b), above, the 3rd respondent, in conjunction with the 1st interested party, shall be at liberty to take all necessary steps to swear the six Judges; and

d. That the costs of the petition to be paid to the petitioner by the 1st and 2nd respondents.

74. The decisions in both Petitions were appealed against to the Court of Appeal, which appeals are still pending.

75. It is on the basis of the two Petitions that the 1st and 2nd Respondents raised the bar of *res-judicata*.

76. I have, as well, carefully considered the instant Petition. A plain reading of the same undoubtedly reveals that what is in contention in the instant Petition is the constitutionality of the decisions made by the 2nd Respondent and contained in Kenya Gazette Notices No. 2529 and 2530 respectively both dated the 11th March, 2022.

77. The position is clearly illustrated in Part F of the Petition where the Petitioner prays for the following: -

(a) A declaration be and is hereby issued that the decision contained in Gazette Notice No. 2529 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 inviting interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal while cases challenging the appointment of judges is/are pending is inconsistent with the rule of law, good governance, constitutionalism and otherwise undermines the independence of the 1st Respondent, the Judiciary and the powers and functions of the Office of Judge of the Court of Appeal.

(b) A declaration be and is hereby issued that the decision contained in Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 inviting interested and qualified persons to apply for appointment to Office of Judge the High Court while cases challenging the appointment of judges is/are pending is capricious, irrational, inconsistent with the rule of law, good governance, constitutionalism; and otherwise undermines the independence of the 1st and 2nd Respondents, the Judiciary and the powers and functions of the Office of a Judge.

(c) A declaration be and is hereby issued that the decisions contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 inviting interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court while unresolved disputes/cases challenging the appointment of judges is/are pending creates, promotes, perpetuates and/or taints the process of appointing judges with uncertainty, lack of accountability, inconsistency; and is otherwise oppressive, capricious, unreasonable, irrational, ill-advised undermines the Rule of Law and aids and/or abets the subversion of The Constitution of Kenya.

(d) A declaration be and is hereby issued that any consideration, evaluation, deliberation, process, review and/or interview conducted by the 1st Respondent of interested and qualified persons seeking to be appointed to Office of Judge of the Court of Appeal and Office of Judge of the High Court while unresolved disputes/cases challenging the appointment of judges is/are pending will not be fair or seen to be fair, legitimate, transparent and independent; and interferes with and/or undermines the integrity and independence of Judges.

(e) An order of certiorari be and is hereby issued quashing the decision contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 to the extent that it invites interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court by 4th April, 2022.

(f) An order be and is hereby issued prohibiting any invitation, consideration, evaluation, deliberation, process, review and/or interview of interested and qualified persons to be appointed to Office of Judge of the Court of Appeal and Office of Judge of the High Court by the 1st Respondent until all disputes and/or cases challenging the appointment of judges are lawfully, finally and conclusively resolved and determined.

(g) A conservatory order be and is hereby issued suspending the implementation and/or closure of the period for receiving applications pursuant to Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 to the extent that it invites interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court by 4th April, 2022.

(h) A conservatory order be and is hereby issued suspending any further action by the 1st Respondent including, invitation, consideration, evaluation, deliberation, processing, review and/or interview of applicants and/or applications for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court pursuant to the decision contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022.

(i) Any other relief and/or orders the Honourable Court deems appropriate and/or fit and just to grant.

(j) Costs of the petition be provided for.

78. The issues, therefore, raised in the instant Petition are distinctly different from the issues raised in Petition No. 369 of 2019 and Petition No. 206 of 2020.

79. This Court takes note that the instant Petition makes reference to Petition No. 369 of 2019 and Petition No. 206 of 2020 and the pending appeals. However, to this Court, the reference is to the extent of demonstrating the alleged unconstitutionality of the impugned decisions made on 11th March, 2022 and no more.

80. The Court further takes note that the impugned decisions made on 11th March, 2022 were not part of, and their constitutionality or otherwise, was not decided in Petition No. 369 of 2019 and Petition No. 206 of 2020. The impugned decisions gave rise to new causes of action.

81. Further, the gist of the instant Petition cannot be reasonably described as matters which were directly and substantially in issue in Petition No. 369 of 2019 and Petition No. 206 of 2020 or which ought to have been raised in the said Petitions since the impugned decisions were made years later after the institution of Petition No. 369 of 2019 and Petition No. 206 of 2020 and there was no way any one would predict that the 2nd Respondent will make the impugned decisions years later.

82. It is also to be noted that the impugned decisions were not solely challenged on the basis of Petition No. 369 of 2019 and Petition No. 206 of 2020, but there are several other grounds thereto as captured in Part D of the Petition.

83. From the findings and holding of the Supreme Court as referred to above, it now turns out that the inevitable conclusion is that the principles upon which doctrine of *res-judicata* rests have not been adequately demonstrated in this matter and as such, the doctrine is not applicable in this case.

Sub-Judice:

84. The contention surrounding the doctrine of *sub-judice* arose from the position that the instant Petition was *res-judicata* Petition No. 369 of 2019 and Petition No. 206 of 2020 and, hence, *sub-judice* Nairobi Court of Appeal Civil Appeal Nos. 286 of 2020 and E088 of 2022 respectively.

85. Having found that the instant Petition is not *res-judicata* Petition No. 369 of 2019 and Petition No. 206 of 2020, the contention based on the doctrine of *sub-judice*, cannot, therefore, stand.

86. As a result and for purpose of saving the limited judicial time, I will not venture into any further discussion of the *sub-judice* doctrine.

87. Having dealt with the doctrines of *res-judicata* and *sub-judice*, this Court hereby answers the second issue in the negative.

iii. Whether it is the High Court or the Employment and Labour Relations Court which has the jurisdiction over the instant proceedings:

88. I must admit that the issue of the jurisdiction of the High Court and Courts of equal status, on some aspects, has been unsettled. However, the Court of Appeal and the Supreme Court have variously dealt with the matter and hopefully all such thorny areas shall soon stand resolved.

89. Speaking on the jurisdictional tug-of-war between the High Court and the Employment and Labour Relations Court, the Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 **Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others** consolidated with Civil Appeal No. 139 of 2017 **County Government of Embu & Another vs. Eric Cheruiyot & 15 Others** (2022) KECA 15 (KLR) in a decision rendered on 8th February, 2022 had the following to say on the aspect of jurisdiction: -

36. *Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:*

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

37. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA.** relying, inter alia, on the above cited treatise by **John Beecroft Saunders** held as follows:

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

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito iustitiae.

39. The Supreme Court in **In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011** held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In **Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011**, the Supreme Court reiterated its holding on a court's jurisdiction. **In the matter of the Interim Independent Electoral Commission (supra)** at paragraph 68 of its ruling, the Supreme Court held 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 itself jurisdiction exceeding that which is conferred upon it by law.

90. The Court of Appeal went further and dealt with the issue of jurisdiction which had been raised impugning the Employment and Labour Relations Court.

91. The appellate Court laid the constitutional and legal foundation of the Employment and Labour Relations Court as follows: -

41. Article 162 of the Constitution provides for the establishment of the Employment and Labour Relations Court and its jurisdiction thereof. It reads as follows:

162. (1) The Superior Courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine dispute relating to-

a. employment and labour relations; and

b. the environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) ...

42. It is pursuant to the provisions of Article 162(2) of the Constitution that Parliament enacted the [Employment and Labour Relations Court Act, 2011](#).

43. The jurisdiction of the Employment and Labour Relations Court is provided for under section 12 of the [Employment and Labour Relations Court Act, 2011](#). The provisions of section 12(1) of this Act provides as follows: "

12.(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extend jurisdiction to the Court relating to employment and labour relations including-

a. disputes relating to or arising out of employment between and employer and an employee;

- b. disputes between an employer and a trade union;
- c. disputes between employers' organization and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employer's organization and trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between and employer's organization or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements." [Emphasis supplied]

92. In interpreting Section 12 of the Employment and Labour Relations Court Act, 2011, my Lordship and Ladyships stated as follows: -

44. Our interpretation of the provisions of section 12 of the [Employment and Labour Relations Court Act](#) is that the Employment and Labour Relations Court has jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) **but** the dispute between the parties must be related to their employment and/or touching on labour relations. This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the Court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. **However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act.** Our view is fortified by the preamble to the [Employment and Labour Relations Court Act](#), 2011 which provides that it is "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.

93. Applying Section 12 of the Employment and Labour Relations Court Act to the matters at hand, the Court of Appeal presented thus: -

45. In the two consolidated petitions filed before the Employment and Labour Relations Court at Kericho, **none of the petitioners demonstrated an existing employee-employer relationship with any of the respondents or with any public entity.** Eric Cheruiyot, the 1st Petitioner in the consolidated petitions, described himself as a registered voter in Kericho County. At the hearing of this appeal, Mr. Simiyu, learned counsel for Eric Cheruiyot conceded that indeed his client did not have an employee-employer relationship with any of the respondents but insisted that his client had a right under Article 22(1) of the Constitution to institute the petition and that the same Article conferred jurisdiction upon the Employment and Labour Relations Court to hear and determine the petition.

46. The 2nd, 3rd and 4th petitioners in the consolidated petitions (2nd to 4th respondents in the consolidated appeals) had separately tendered their one-month resignation notices from their respective positions which they held in the County Government of Embu. Their resignation notices were given in conformity with the provisions of section 43(5) of the [Elections Act](#), 2011. Their respective resignation notices dated 5th January 2017 and 6th January were accepted by the Governor, County Government of Embu; the respondents were asked to hand over their respective dockets to their appointed successors; they were cleared, and their respective dues processed. The resignation notices were to take effect on 5th February 2017 and on 6th February 2017 respectively. On 7th February 2017 when the resignations were to take effect, the respondents sought to revoke their separate letters of resignation upon learning of the interim court order issued by the trial court on 18th January 2017 barring the IEBC from disqualifying public servants from participating in the 2017 general election for not vacating office six months prior to the general election. By this time the one-month notice period had already lapsed, meaning that their respective resignation notices had already crystallized.

47. A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The *Black's Law Dictionary* (tenth Edition) defines resignation as follows:

The act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, often in the form of a written statement.

48. There was no evidence placed before the trial judge to show that the resignation by the 2nd to 4th respondents was involuntary. The 2nd to 4th respondents resigned voluntarily in compliance with a section of the law that was in force at the time. The 2nd to 4th respondents having resigned, their resignations having been formally accepted, their dues paid, and their respective positions filled meant that their resignation notices had already crystallized. There was nothing to go back to. The employee-employer relationship between the 2nd to 4th respondents and the County Government of Embu had already come to an end. **The Employment and Labour Relations Court ought to have arrived at this finding and immediately downed its tools.**

49. **In the absence of an employee-employer relationship, it is our considered view that the Court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact the High Court.** The establishment of the High Court is found at Article 165(1) of the Constitution. Under Article 165(3), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened. Under Article 165 (d)(i), the High Court has jurisdiction to determine whether any law is inconsistent with or in contravention of the Constitution.

50. The issues raised in the consolidated petitions, especially the issue relating to the constitutionality of section 43(5) of the [Elections Act, 2011](#) are the kind of issues contemplated under Article 165 (3)(d) of the Constitution determination of which would be within the exclusive constitutional mandate of the High Court. This is jurisdiction flowing directly from the Constitution, which the Supreme Court alluded to in the matter of *Interim Independent Electoral Commission (supra)* and *Samuel Kamau Macharia & another (supra)*.

51. The Constitution appreciates that there are matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction of the courts contemplated in Article 162(2) on the other hand, notwithstanding the fact that the latter courts enjoy the same status as the High Court. This Court in *Karisa Chengo & 2 others v Republic [2015] eKLR* held thus:

...The jurisdiction of the High Court as established under Article 165 of the Constitution is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two Courts contemplated in Article 162(2). It is therefore clear that the High Court no longer had the original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the ELRC Act and section 13 of the ELC Act. Conversely, the Courts contemplated in Article 162(2) of the Constitution cannot deal with matters reserved for the High Court.

52. This Court in the *Karisa Chengo* case (*supra*) held that **status of a court is not synonymous to jurisdiction**. In this context therefore, although the Employment and Labour Relations Court exercises the same power as the High Court in performance of its judicial functions, it has specialized jurisdiction and is not the High Court. It is important to point out that the finding of this Court in the *Karisa Chengo* case was upheld by the Supreme Court.

53. **Therefore, for want of an employer-employee relationship, we find and hold that the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded that conferred upon it by law, which renders its decision a nullity ab initio.**

92. From the above decision, which is binding on this Court, the Court of Appeal settled the issue of the jurisdiction of the Employment and Labour Relations Court. The Court of Appeal was very emphatic that the Employment and Labour Relations Court can only exercise jurisdiction in instances where there is an employer-employee relationship.

93. In the said cases, the Court of Appeal even declined to accord the Employment and Labour Relations Court jurisdiction in an instance where the Petitioners were challenging the validity of their letters of resignation on the grounds that the letters had been accepted by the employer and acted upon thereby extinguishing the employer-employee relationship. According to the Court of Appeal, any challenge thereof could only be taken up before the High Court.

94. Applying the foregoing to this matter, it is plain that there exists no employer-employee relationship between the Petitioner and any of the Respondents or Interested Parties. As such, and until such an employer-employee relationship exists, the jurisdiction of the Employment and Labour Relations Court cannot be invoked.

95. As the matters in the instant Petition are those preceding any employer-employee relationship, there is no way the Employment and Labour Relations Court can claim any legitimacy over the subject proceedings.

96. In sum, the second and third objections have no legal leg to stand and are for rejection.

97. The third issue is, hence, answered in the negative.

iv. The joinder of the 2nd Respondent:

98. The issue of the joinder of the 2nd Responder is fairly straight-forward for several reasons. First, the impugned decisions were made by the 2nd Respondent in her capacity as the Honourable Chief Justice of the Republic of Kenya. Second, the 2nd Respondent did not indicate in the Gazette Notices that she was acting on behalf of either the Judicial Service Commission or any other principal contrary to the submissions by Learned Counsel for the 2nd Respondent.

99. Third, in the circumstances of this case, the 2nd Respondent is the central party without which the Petition cannot stand. Lastly, there are specific prayers in the Petition seeking to impugn the impugned decisions contained in the Gazette Notices issued under the hand of the 2nd Respondent.

100. The challenge on the joinder of the 2nd Respondent in these proceedings cannot, therefore, stand.

v. Disposition:

101. Having found that none of the objections stand on the way of the Petition, the following final orders hereby issue: -

(a) The two Notices of Preliminary Objection dated 13th April, 2022 and the Notice of Preliminary Objection dated 12th April, 2022 be and are hereby dismissed.

(b) Costs to abide the outcome of the Petition.

(c) Parties shall take directions on the way forward.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 25th day of April, 2022.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Julie Soweto, Learned Counsel for the Petitioner.

Mr. Kanjama and **Miss Owano**, Learned Counsel for the 1st and 2nd Respondents.

Mr. Bitta, Learned Counsel for the 3rd Respondent.

Mr. Shadrack Wamboi, Learned Counsel for the 1st Interested Party.

2nd Interested Party.

Lovender – Court Assistant