



Benjamin v Chief Justice of the Republic of Kenya (CJ) & another; Judicial Service Commission (JSC) & 13 others (Interested Parties) (Constitutional Petition E196 of 2021) [2022] KEHC 10072 (KLR) (Constitutional and Human Rights) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E196 OF 2021

GMA DULU, J WAKIAGA & WM MUSYOKA, JJ

JULY 25, 2022

IN THE MATTER OF APPOINTMENT OF JUDGES TO SUPERIOR COURTS

AND

IN THE MATTER OF GAZETTE NOTICES NOS. 5233-5235 OF 3 RD JUNE 2021

AND

IN THE MATTER OF ARTICLE 166(1) OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 47, 50,

73, 75, 129, 130, 131, 132, 159, 160, 165, 166, 168, 171, 172, 232, 248, 258

AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND IN THE MATTER OF VIOLATION OF THE RIGHT TO NON-

DISCRIMINATION

BETWEEN

MAGARE GIKENYI J BENJAMIN PETITIONER

AND

CHIEF JUSTICE OF THE REPUBLIC OF KENYA (CJ) 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND



JUDICIAL SERVICE COMMISSION (JSC)	INTERESTED PARTY
GEORGE VINCENT ODUNGA	INTERESTED PARTY
JOEL MWAURA NGUGI	INTERESTED PARTY
WELDON KIPYEGON KORIR	INTERESTED PARTY
AGGREY MUCHELULE OTSYULA	INTERESTED PARTY
EVANS MAKORI KIAGO	INTERESTED PARTY
JUDITH ELIZABETH OMANGE CHERUIYOT	INTERESTED PARTY
KENYA JUDGES & MAGISTRATES ASSOCIATION (KMJA)	INTERESTED PARTY
CHIEF REGISTRAR OF THE JUDICIARY (CRJ)	INTERESTED PARTY
LAW SOCIETY OF KENYA (LSK)	INTERESTED PARTY
KATIBA INSTITUTE (KI)	INTERESTED PARTY
INTERNATIONAL COMMISSION OF JURISTS (ICJ) KENYA	INTERESTED PARTY
KENYA HUMAN RIGHTS COMMISSION (KHRC)	INTERESTED PARTY
TRANSPARENCY INTERNATIONAL (TI) KENYA	INTERESTED PARTY

JUDGMENT

Introduction

1. In 2019, the 1st interested party recommended 41 persons, to the President of the Republic of Kenya, for appointment as Judges. The President did not make the appointments, leading to the filing of Nairobi High Court Petition No. 369 of 2019, Adrian Kamotho Njenga vs. Attorney General & 3 others (Interested Parties) [2020] eKLR, in which the court, on 6th February 2020, made the following declaratory orders: that the President was constitutionally bound by the recommendation made by the 1st interested party, in accordance with Article 166(1), as read with Article 172(1)(a), of *the Constitution* of Kenya, on the persons to be appointed as Judges; that the failure by the President to appoint the persons recommended violated *the Constitution* and the Judicial Service Act, No. 1 of 2011; and that the continued delay to appoint the persons recommended was a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of *the Constitution*.
2. The President did not act on the orders made on 6th February 2020, leading to the filing of Nairobi High Court Constitutional Petition No. 206 of 2020 Katiba Institute vs. President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested parties) on 22nd June 2020. The orders sought in that petition were, inter alia: that an order of prohibition stopping the President, his agents or anyone whatsoever, from appointing, gazetting or swearing in a partial list of the 41 nominees, contrary to the recommendation of the 1st interested party herein; an order of prohibition stopping the 1st respondent herein and the 1st interested party herein, their agents or anyone whatsoever, from assigning duties to the Judges appointed from a partial list of 41 nominees contrary to the recommendation of the 1st interested party herein; an order of Mandamus compelling the President to appoint all 41 persons recommended for appointment as Judges within 7 days of the order; and a declaration that,



if the President defaulted, all 41 persons recommended for appointment as Judges be deemed duly appointed as Judges to the respective superior courts for which they were recommended.

3. On 3rd June 2021, the President gazetted 34 of the nominees for appointment and left out 6, as, unfortunately, 1 of the nominees had passed on, whereupon the instant petition was filed. Thereafter, judgment, in Nairobi High Court Constitutional Petition No. 206 of 2020, was delivered on 21st October 2021, and the following orders were made: a Mandamus order directing the President to appoint the remaining 6 nominees as Judges to their respective courts, within the next 14 days; upon the lapse of the 14 days, without the President having made the appointments, a presumption to arise that his power to make the appointments had expired and his office become functus, so far as the appointments were concerned, and the 6 nominees to be deemed duly appointed, effective from the date of default; and subsequent to their being deemed appointed, the 1st respondent herein, in conjunction with the 1st interested party, be at liberty to take all necessary steps to swear the 6 Judges.

The Petition

4. The petition herein, dated 5th June 2021, was filed on 6th June 2021. There are two petitions on record, both dated 5th June 2021, but, for the purpose of this judgment, we shall treat the petition, whose prayers run from (a) to (m), to be the principal petition.
5. It was filed simultaneously with a Motion, of even date, seeking conservatory orders. Directions were given on 16th June 2021, dispensing with the Motion, striking out the 3rd and 4th respondents and the 15th to 48th interested parties, and referring the matter to the 1st respondent for empanelment of a multi-Judge bench, whereupon the matter was referred to us, by an order of the 1st respondent of 21st June 2021, having been empaneled previously in Nairobi High Court Constitutional Petitions Nos. 206 of 2020 and E246 of 2020, which turn or turned on the same or similar issues.
6. The petition seeks the following reliefs:
 - a) a declaration that the action by the President of the Republic of Kenya HE Uhuru Muigai Kenyatta of purporting to gazette/appoint a partial list of persons to be appointed Judges of the superior courts, contrary to the full list of nominees as recommended by the 1st interested party, as shown in the Gazette Notice Nos. 5233, 5234 and 5235 of 3rd June 2021, is unconstitutional, ultra vires and, therefore, invalid, null and void ab initio;
 - b) that to correct the anomaly, in order (a) above, a declaration is hereby made that the persons recommended by 1st interested party and left out by the President, that is Hon. Justice George Vincent Odunga, Hon. Prof. Justice Joel Mwaura Ngugi, Hon. Justice Weldon Kipyegon Korir, Hon. Justice Aggrey Muchelule Otsyula, Hon. Evans Makori Kiago and Hon. Judith Elizabeth Omange Cheruiyot are deemed to have been duly gazetted and/or appointed within the meaning of Article 166(1) of *the Constitution*;
 - c) a declaration that all 40 Judges/nominated persons for appointment as Judges of the superior courts, as presented by the 1st interested party in 2019 nominations/recommendations have been gazetted/appointed within the meaning of Article 166(1) of *the Constitution*;
 - d) an order of Judicial Review by way of Mandamus compelling the 9th interested party, together with the 1st and 3rd respondents, and other respondents and any other party involved in swearing in of Judges do make arrangements to swear Hon. Justice George Vincent Odunga, Hon. Prof. Justice Joel Mwaura Ngugi, Hon. Justice Weldon Kipyegon Korir, Hon. Justice Aggrey Muchelule Otsyula, Hon. Evans Makori Kiago and Hon. Judith Elizabeth Omange



Cheruiyot into their respective positions which they applied for and were recommended immediately but not later than 14 days;

- e) an order of Judicial Review by way of Mandamus compelling the 1st interested party to allocate duties to the 6 judicial officers as contemplated in (d) above within 30 days;
 - f) an order of Judicial Review by way of Mandamus compelling the 1st interested party to change their paygrade to correspond to the recommended positions as soon as practicable but not later than 30 days from date of this judgment;
 - g) a declaration that the action of the President of the Republic of Kenya HE Uhuru Muigai Kenyatta, of leaving out Hon. Justice George Vincent Odunga, Hon. Prof. Justice Joel Mwaura Ngugi, Hon. Justice Weldon Kipyegon Korir, Hon. Justice Aggrey Muchelule Otsyula, Hon. Evans Makori Kiago and Hon. Judith Elizabeth Omange Cheruiyot from appointment/gazettement and swearing, contrary to court rulings and the recommendation of the 1st interested party, is discrimination and degradation of their dignity, and is against, inter alia, Articles 27 and 28 of *the Constitution*;
 - h) an order of compensation for psychological and other forms of suffering to the affected 6 judicial officers/Judges as result of the actions of the President and the respondents as contemplated in (g) above;
 - i) a declaration that the 6 judicial officers/Judges/magistrates have been condemned unheard by the President and the respondents contrary to Article 47 of *the Constitution* on fair administrative action;
 - j) a declaration that HE Uhuru Muigai Kenyatta has failed Chapter 6 of *the Constitution* on leadership and integrity through the above impugned decisions of omissions and commissions;
 - k) an order of Judicial Review by way of Mandamus to the President to perform his duties according to the laws and Constitution and protect, defend this Constitution as per the oath of office he took;
 - l) any other order or/and modification of petitioner's prayers, which this honourable court may deem fit so as to achieve the objectives of justice for majority of Kenyans; and
 - m) costs of this petition to be borne by the respondents.
7. The petition is supported by the affidavit of Dr. Magare Gikenyi J Benjamin, the petitioner, which was sworn on the same date. His main concern is that the President appointed 34 out of the 40 nominees as Judges of the superior courts, leaving out 6 of them. He deposes that there was no room for sherry picking once a list of nominees was forwarded to the President by the 1st interested party. He avers that the 6 have been discriminated against contrary to Article 27 of *the Constitution* of Kenya. He states that the continued delay to appoint the 6 was unconstitutional. He contends that all the Judges had legitimate expectation of being appointed following their nomination. He deposes that, being a medical doctor, he understands that the affected judicial officers have suffered Post Traumatic Stress Disorder by the actions of the President and the respondents.
8. There was no response from the 1st respondent.
9. The 2nd respondent opposed the petition, by way of an affidavit, sworn by Kennedy Kihara, on 21st July 2021. He deposes that there are three other cases at the High Court, being Nairobi High Court Constitutional Petitions Nos. 206 of 2020, E246 of 2020 and E199 of 2021, all on the same subject-matter. He also cites Nairobi High Court Petition No. 369 of 2019, where an application is



pending, and also where the issues on appointment have been determined. An issue of estoppel, in the circumstances, would arise, according to him. He also cites a pending appeal at the Court of Appeal, arising from Nairobi High Court Petition No. 369 of 2019, being Civil Appeal No. 286 of 2020. He argues that the instant matter is sub judice.

10. There were no responses from the interested parties.

The Submissions

11. The petition was canvassed through written submissions. By the time of the preparation of this judgment we were only able to get, from the record, written submissions by the petitioner and 10th interested party.
12. The petitioner submits that the swearing in of the 34 Judges on 4th June 2021, leaving out the 6, was contrary to the finding in Nairobi High Court Petition No. 369 of 2019, that the President is bound by the recommendations of the 1st interested party, and ought not to have left out any of the nominees. He also submits that the 6 left out be deemed to have been appointed and gazetted, and should start working as Judges of the respective courts to which they were appointed. He submits further that the 6 nominees have been condemned unheard, contrary to the provisions of Article 47 of *the Constitution*, and cites *Republic vs. Chuka University, ex parte Kennedy Omondi Waringa & 16 others* [2018] eKLR. He further submits that the 6 nominees were discriminated against, and cites *Masai Mara (Sopa) Limited vs. Narok County Government* [2016] eKLR. He also submits that the 6 nominees had a legitimate expectation of being gazetted, sworn in and appointed as Judges. He cites *Oindi Zaiippeline & 39 others vs. Karatina University & another* [2015] eKLR and *Communication Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* Supreme Court Petition No. 14 of 2014 to support his contention. He further submits that the human dignity of the nominees was violated, contrary to Article 28 of *the Constitution*, and he cites *Republic vs. Kenya National Examinations Council & Anor Ex parte Audrey Mbugua Ithibu* (2014) eKLR. He submits further that the 6 affected judicial officers may have suffered immensely, for being subjected to public ridicule, and that there is need for compensation to be paid to them, as deterrence of future violations. He proposes a global of Kshs. 9,000,000.00 for each judicial officer, and relies on *VMK vs. Catholic University of Eastern Africa* [2013] eKLR, *Geeta Joshi vs. Pandya Memorial Hospital* [2019] eKLR, *O'Pejeta Ranching Limited vs. David Wanjohi Muhoro* [2017] eKLR and *Jonathan Spangler vs. Centre for African Family Studies (CAFS)* (2017) eKLR. The petitioner submits that he has made a case for the orders sought.
13. The 10th interested party submits in support of the petition, that the President and the respondents violated Article 10 of *the Constitution*, and has cited *Salaries and Remuneration Commission & another vs. Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)*[2020] eKLR, *Katiba Institute vs. President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)* [2020] eKLR and *Zuma vs. Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21)[2021] ZACC 28 (17 September 2021). It is also submitted that the actions of the respondents exemplify an unconstitutional state of affairs, and their failure to facilitate the appointment and swearing in amounts to a generalized violation of constitutional rights under Articles 27, 47 and 48 of *the Constitution*. It is submitted further that the legitimate expectation of the 6 was violated, and *Republic vs. Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO* [2019] eKLR is cited in support.



Analysis and Determination

14. We now consider the prayers sought in the instant petition, as against the orders in the judgments delivered in the various petitions related to this matter.
15. In our view, prayers (a) and (j) of the instant petition have already been determined by orders (a) and (b) in the judgment of 6th February 2020, in Nairobi High Court Petition No. 369 of 2019, which state:
- (a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st Interested Party in accordance with Article 166(1) as read with Article 172(1)(a) of *the Constitution* on the persons to be appointed as Judges;
- A declaration be and is hereby issued that the President’s failure to appoint the persons recommended for appointment as Judges violates *the Constitution* and the Judicial Service Act...”
16. With regard to prayers (b), (c), (d) and (k) of the instant petition, in our view, the four prayers have been addressed by orders (a) and (b) of the judgment delivered, on 21st October 2021, in Nairobi High Court Constitutional Petition No. 206 of 2020, which state:
- “(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...”
17. As regards prayers (e) and (f) of the instant petition, on assignment of duties and change of paygrade, we state that that issue was before the court in Nairobi High Court Constitutional Petition No. 206 of 2020, and was resolved in terms, that upon the court deeming the 6 duly appointed and sworn in, the 1st interested party would be within its powers to assign them duties and to deal with the issue of their remuneration. That matter is the subject of the appeals at the Court of Appeal, in Civil Appeals Nos. E88 of 2022 and E110 of 2022, and there is an order of stay of execution of the orders made in Nairobi High Court Constitutional Petition No. 206 of 2020, granted, on 19th November 2021, in Civil Application No. E365 of 2021, *Attorney General vs. Katiba Institute & Others*. Consequently, the matter is sub judice, and we are unable to say anything beyond what we have stated so far.
18. We hold the view that any orders, made by this court at this stage, against the 1st interested party, would be in vain as there is already a stay order against execution of the judgment. In *B vs. Attorney General* [2004] eKLR, it was stated that a court does not make orders in vain, otherwise it would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people. Secondly, the 6 nominees have not been appointed to the respective offices to which they have been nominated, and, as a consequence no order can be made at



this stage, based on the doctrine of ripeness, which prohibits the courts from exercising jurisdiction over a cause until an active controversy is presented.

19. Prayers (g), (h) and (i) of the instant petition were not addressed in the judgments in Nairobi High Court Petition No. 369 of 2019 and Nairobi High Court Constitutional Petition No. 206 of 2020, and, it is our considered view, that these are the only issues available for consideration and determination in this judgment.
20. Regarding prayers (g) and (i) of the instant petition, we are of the view that the 6 nominees were treated differently from the other nominees, and that that amounted discrimination. We take the view that the President is bound by the national values and principles enshrined in Article 10 of *the Constitution*, and, as it was found in Nairobi High Court Petition No. 369 of 2019 and Nairobi High Court Constitutional Petition No. 206 of 2020, and on which appeals are now pending before the Court of Appeal, that in failing to appoint the 6 nominees the President violated *the Constitution*, it is our finding that 6 nominees were not subjected to fair administration action, as stipulated in Article 47 of *the Constitution* of Kenya 2010 and the provisions of Fair Administrative Actions Act, No. 4 of 2015. It is further our finding that having been nominated and recommended by the 1st interested party for appointment into the respective courts, the 6 nominees had a legitimate expectation that they would be so appointed. See *Kenya Revenue Authority vs. Universal Corporation Ltd* [2020] eKLR.
21. Regarding prayer (h) of the instant petition, on compensation, we find guidance in *Edward Akongo Oyugi & 2 others vs. Attorney General* [2019] eKLR, where the court stated the principles on compensation, with respect to violation of human and constitutional rights. It was said that human rights are owed to persons as a matter of human dignity and should be honoured no matter what form of government. The court stated as on the same:

“ 110. It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

111. Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Court. The following principles clearly emerged from decided cases;

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
- iii. This remedy would be available when it is the only practicable mode of redress available;
- iv. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of Sovereign immunity would be inapplicable.



112. Arriving at the award of damages is not an exact science. I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.

113. It is convenient to add that an award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional rights and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.”

22. Whereas we agree with the position stated above, we take the view that the issue of compensation is specific to the 6 nominees individually, and the claim for compensation ought to be specifically pleaded and proven, as was stated in *Maureen Wanjiru Mwangi vs. Blue Sea Energy Limited* [2020] eKLR, and each of the 6 nominees ought to testify in proof of the damage suffered by them individually as a result of the violation of their rights. In the instant petition, the petitioner pleads on their behalf, that they have suffered psychological and other forms of trauma, but he did not adduce any evidence to prove the alleged damage or suffering, and, therefore, this court, without specific proof of what each has suffered, is unable to make any pronouncement on compensation.

Disposal

22. On the whole, we find that the petition is not merited, except to the limited finding on discrimination. We accordingly, therefore, dismiss the petition. On the issue of costs, we take the view that, this being a constitutional petition for enforcement of legitimate rights on behalf of the public, to condemn the petitioner to pay costs would not be in the best interests of advancing constitutionalism, and, therefore, let each party bear their own costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF JULY 2022

G.A. DULU

JUDGE

J. WAKIAGA

JUDGE

W. MUSYOKI

JUDGE

