



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 404 OF 2019

IN THE MATTER OF ARTICLES 2, 10, 23, 27, 160 and 162 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE KENYA CITIZENSHIP AND IMMIGRATION REGULATIONS, 2012 MADE PURSUANT TO SECTION 59 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT (No. 12 of 2011)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

BETWEEN

JONATHAN MUNENE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY MINISTRY FOR INTERIOR AND

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

THE DIRECTOR OF IMMIGRATION SERVICES.....3RD RESPONDENT

AND

KENYA JUDGES WELFARE ASSOCIATION.....INTERESTED PARTY

JUDGEMENT

PETITION

1. The Petitioner filed a Petition dated 11th October, 2019 supported by Supporting Affidavit by the Petitioner sworn on the even date seeking the following reliefs:-

a) A declaration that the 1st Respondent's failure to include Judges of the High Court of Kenya and Judges of Courts of equal status in the Third Schedule of the Kenya Citizenship and Immigration Regulations, 2012 as persons entitled to hold diplomatic passports is arbitrary and unreasonable and amounts to discrimination against all persons serving as judges of the High Court of Kenya and Judges of Courts of equal status contrary to Article 27 of the Constitution of Kenya, 2010.

b) A declaration that the distinction and differentiation in treatment by the 2nd and 3rd Respondents of judges of the High Court of Kenya and Judges of Courts of equal status and judges of the Court of Appeal and Supreme Court is unconstitutional.

c) A declaration that the Third Schedule to the Kenya Citizenship and Immigration Regulations, 2012 is discriminatory to the extent that it subjects Judges of the High Court of Kenya and Judges of Courts of equal status to lesser benefits than judges of the Court of Appeal and Supreme Court.

d) A declaration that withdrawal of Diplomatic Passports hitherto issued to judges of the High Court of Kenya and Judges of Courts of equal status is in contravention of Article 160 of the Constitution of Kenya.

e) A declaration that withdrawal of access by judges of the High Court of Kenya and Judges of Courts of equal status to various Very Important Person (VIP) lounges across the Country with similar reciprocal arrangements in other jurisdiction is in contravention of Article 160 of the Constitution of Kenya.

f) That an order of mandamus do issue reinstating the Judges of the High Court and Courts of equal status to the rights and benefits previously enjoyed by them which includes but not limited to provision of Diplomatic pass ports to the Judges and their respective spouse(s).

g) That an order of Mandamus do issue to compel the 1st Respondent to immediately include Judges of the High Court and Judges of Courts of equal status and their spouses in the Third Schedule to the Kenya Citizenship and Immigration Regulations, 2012, and or otherwise restore to them and their spouses right to diplomatic passports.

h) Any other relief that this Court may deem just and expedient in the circumstances.

i) That the costs of this Petition be provided for.

PETITIONER'S CASE

2. The Petitioner's case is that vide legal notice No. 64 dated 15th June, 2012 the Hon. Minister of State for Immigration and Registration of Persons in exercise of the powers conferred by **Section 59 of the Kenya Citizenship and Immigration Act, 2011** made the **Kenya Citizenship and Immigration Regulations, 2012 ("the Regulations")** touching on, inter alia, persons entitled to hold diplomatic passports.

3. **Section 14 of the Regulations** provides as follows:-

"Persons entitled to hold diplomatic passports.

14. (1) *The persons occupying the offices or having status set out in the Third Schedule together with the members of their families specified, with respect to each category, shall be entitled, upon application, to be issued with diplomatic passports.*

(2) *The Cabinet Secretary may, where he considers it necessary, authorize the issuance of a diplomatic passport to a person who does not fall in any of the categories set out in the Third Schedule.*

(3) *The holder of a diplomatic passport shall, upon ceasing to hold the office or having the status specified in the Third Schedule, surrender the diplomatic passport.*

(4) *Any passport that has not been surrendered in accordance with paragraph (3) shall cease to be valid, with effect from the date of ceasing to hold the office or having the status specified in the Third Schedule."*

4. The Third Schedule to the Regulations provides a list of persons entitled to hold diplomatic passports as below:-

Third Schedule (r.14) Persons entitled to Diplomatic Passport

(1) *President and immediate family members*

(2) *Prime Minister and immediate family members*

(3) *Vice President/Deputy President and immediate family members*

(4) *Cabinet Secretary and spouse(s)*

(5) *Secretary to the Cabinet and spouse(s)*

(6) *Principal Secretaries and spouse(s)*

(7) *Speaker of National Assembly and the Senate and spouse(s)*

(8) *Chief Justice and spouse(s)*

(9) *Deputy Chief Justice and spouse(s)*

- (10) *Justice of Supreme Court and spouse(s)*
- (11) *Justices of Court of Appeal and spouse(s)*
- (12) *Attorney General and spouse(s)*
- (13) *Director of Public Prosecutions and spouse(s)*
- (14) *Solicitor General and spouse(s)*
- (15) *Controller of Budget and spouse(s)*
- (16) *Auditor General and spouse(s)*
- (17) *Governor of the Central Bank and spouse(s)*
- (18) *Clerk of the National Assembly and spouse(s)*
- (19) *Chief of the Kenya Defence Forces and spouse(s)*
- (20) *Service Commanders of the Kenya Defence Forces and spouse(s)*
- (21) *Director-General of the national Intelligence Service and spouse(s)*
- (22) *Inspector General of the national Police Service and spouse(s)*
- (23) *County Governor and spouse(s)*
- (24) *Aide-De-Camp to the President*
- (25) *Former Presidents and spouse(s)*
- (26) *Former Prime Minister and spouse(s)*
- (27) *Former Vice Presidents and spouse(s)*
- (28) *Foreign Service officer, Spouse and dependant children below the age of 19 years”*

5. The Petitioner state that prior to the Regulations coming into force, all judges of the Superior Courts, namely, Supreme Court, Court of Appeal, High Court and Judges of Courts of equal status to the High Court were routinely issued with diplomatic passports. Such judges are all ordained by the Constitution as Judges of Superior Courts under **Article 162 of the Constitution**.

6. It is Petitioner’s contention that resulting from the Regulations, the 3rd Respondent has denied the renewal of diplomatic passports upon their expiry to Judges of the High Court and Judges of Courts with equal status. Consequently and simultaneously, the concomitant Very Important Person (VIP) access to airports and airport lounges which was enjoyed by all superior court judges has been denied to judges of the High Court and Judges of Courts with equal status while the Judges are still in service.

RESPONDENTS CASE

7. The Respondents are opposed to the Petitioner’s Petition to challenging the decision of the 1st and 2nd Respondents not to include the Judges of the High Court and Judges of equal status in the Third Schedule of the **Kenya Diplomatic and Immigration Regulations, 2012** as persons entitled to hold Diplomatic Passport. The Respondents in opposing the Petition filed grounds of opposition dated 16th December 2019. The Respondents contend that:-

“a) That Article 160 of the Constitution does not confer any right to any of the Judges of superior Court to be issued with a diplomatic passport or preferential treatment but ensures independence of the Judiciary.

b) That Article 12(2) of the Constitution of Kenya states that “...a passport or other document referred to in clause 1(b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfied the criteria referred to in Article 24.”

c) That there is no right to a Diplomatic Passport under the Constitution as such there is no cause of action demonstrated by the petitioner.”

8. The Respondents in addition to the filing of grounds of opposition filed a Preliminary Objection dated 17th December 2019, urging that the

Petition as filed does not disclose a cause of action and that the High Court should invoke the doctrine of Constitutional avoidance and dismiss the Petition.

INTERESTED PARTY'S CASE

9. The Interested Party supports the Petition and opposes the Respondents' Preliminary objection and grounds of opposition. The Interested Party to buttress its position filed a Replying Affidavit in Support of the Petition sworn by Hon. Justice Alfred Mabeya on 12th February 2020 and filed on the even date and a Replying Affidavit in response to the Preliminary objection and grounds of opposition sworn by Hon. Justice Alfred Mabeya sworn on 12th February 2020 and filed on the same date.

SUBMISSIONS

10. The Petitioner filed submissions in support of the Petition dated 1st October 2020 together with a bundle of list of authorities of even date. The Respondents filed submission dated 24th November 2020. The Interested Party filed submissions dated 13th March 2020 together with bundle of list of authorities of even date.

ANALYSIS AND DETERMINATION

11. I have very carefully considered the Petitioner's Petition, supporting affidavits and annexures thereto, the Respondents grounds of opposition and preliminary objection; the interested party's Replying Affidavits and annexures thereto; Counsel rival submissions in support and in opposition of the Petition and from the aforesaid the following issues arise for consideration:-

a) Whether the Petitioner has locus standi to file this Petition?

b) Whether the Petition discloses a cause of action against the Respondents?

c) Whether the Respondents violated the petitioner's rights and freedom under Article 2, 10, 23, 27, 160 and 162 of the Constitution of Kenya 2010?

d) Whether the Judges of the high Court of Kenya and Judge of Courts of equal status have been unfairly discriminated?

e) Whether order sought by the Petitioner should issue?

A. Whether the Petitioner has locus standi to file this Petition?

12. In the instant Petition the Petitioner is described under paragraph 1 of the Petition as a Kenyan citizen and a law and order enthusiast who believes in the independence of Judiciary. The Petitioner herein filed this Petition on behalf of Judges of the high Court of Kenya and Judges of Courts of equal status who he avers have been discriminated against by 2nd and 3rd Respondents by being denied diplomatic passports while their counterparts, thus the justices of Court of Appeal and Supreme Court enjoy these benefits. Further, It is contended Judges of the High Court, Judges of Courts of equal status; Justices of Court of Appeal and Supreme Court have been denied access to VIP lounges at Airports within the country, a variation to their benefits contrary to the Constitution of Kenya 2010 without any reasonable justification.

13. The Petitioner urge that **Article 3, 10, 22, and 258 of the Constitution** of Kenya empower him to defend the Constitution by instituting Court proceedings where the Constitution has been contravened or is threatened with contravention.

14. In the instant Petition, the Respondents allege that the Petitioner has no locus standi to file this Petition on behalf of the Judges of the High Court of Kenya and Judges of equal status because his individual constitution rights have not been violated by the Respondents and neither has he suffered any personal harm as a consequence of the Respondents' actions. On that basis the Respondents urge this Court to dismiss this Petition on this ground.

15. The issue of **locus standi** is now well settled in our own jurisprudence which I note provides a broad approach that gives **locus standi** to **any member of the public** that is acting bona fide and has sufficient interest in instituting an action to redress a public wrong or injury. The broad approach not only ensures that courts fulfil their constitutional mandate, but also allows person with genuine grievances to access the seat of justice and enjoy the full measure of protection that they are entitled to under our liberal and progressive constitution.

16. The Court of Appeal had an occasion to consider the issue of **locus standi** in the case of **Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** in the following terms:-

"(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the

command in Article 258 of the Constitution, which provides that:

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention

(2) in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -

(c) a person acting in the public interest;.....”

17. Similarly in the case of *Sollo Nzuki v. Salaries and Remuneration Commission & 2 others* [2019] eKLR whose facts to a greater extent are similar to the case herein; a member of public filed a petition on behalf of High Court Judges and Judges of Courts of equal status on ground of discrimination in pay between judges appointed from “*outside the judiciary*” and those who “*were serving in the Judiciary*”, the court while citing various decisions held thus:-

“35. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person hold bona fide grounds for believing that the Constitution is under threat ought to be welcome....

36. In this case the Petitioner not only contends that there is not only a threat to the violation of the Constitution but that the Constitution has in fact been violated by the Respondents. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the petitioner’s case.” (Emphasis added)

18. Further *Article 22 and 258 of the Constitution* expressly provide that everyone has the right to institute court proceedings claiming that either “*a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened*” or “*the Constitution has been contravened or is threatened with contravention*” respectively. The Court proceedings as is provided may be instituted by:-

a) “a person acting on behalf of another person who cannot act in their own name;

b) A person acting as a member, or in the interest of, a group or class of persons;

c) A person acting in the public interest; or

d) An association acting in the interest of one or more of its members.”

19. It therefore follows that despite the liberal approach that is applied by the Court in determining whether a party has the requisite locus standi, and the provisions in the Constitution that support public interest litigation, the rule on locus standi is still relevant, and where it is evidently demonstrated that a party has completely no business in bringing a matter to Court, the matter will be dismissed by the court to prevent the abetment of abuse of its own process.

20. Further to the above it follows that where there is no evidence of bad faith or malice on part of a petitioner filing suit in the interest of public, an objection such as the one raised by the Respondents herein does not stand. This point was dealt with in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (*supra*) where the Court of Appeal stated:-

“(32)) It was submitted that the 1st respondent was actuated by bad faith and malice in filing the petition to challenge the appellant’s appointment as the chairperson of the Commission; that in failing to raise the alleged misconduct of the appellant before the selection panel or the Parliamentary Committee, the 1st respondent acted mala fides. There was no evidence or serious argument advanced to support that claim and we are therefore not persuaded that there was any reason why the 1st respondent would act in bad faith against the appellant.”

21. It is contended in the instant Petition, ***that Articles 2, 10, 23, 27, 160 and 162 of the Constitution*** have been violated and that the Respondents actions are arbitrary and unreasonable, and in view whereof the Petitioner cannot be faulted for instituting these proceedings against the Respondents since their actions are alleged to have adverse impact on the administration of justices and further it is in the public interest to ensure that state and public authorities in particular respect, uphold and defend the Constitution. In view of the above the Petitioner herein has the requisite locus standi to institute these proceedings as he has raised issue that is aimed at protecting the public’s interest and has demonstrated that he has bona fide grounds for believing that the Constitution is under threat. The Petitioner is not in any way shown to be motivated by malice or bad faith in filing this Petition. I find that the Respondents preliminary objection dated 17th December 2019 to be without merit and is dismissed. I direct that the Petition herein should proceed to determination on merits.

B. WHETHER THE PETITION DISCLOSES A CAUSE OF ACTION AGAINST THE RESPONDENTS?

22. The Respondents contend that the Petition does not disclose any reasonable cause for action. It is Respondents contention that the Petitioner alleges that the Respondents have violated ***Articles 2, 10, 23, 27, 160 and 162 of the Constitution***, without proof that the Respondents decision to deny the Judges of the High Court and Courts of equal status Diplomatic passport amounts to discrimination and an abuse of independence of the judiciary.

23. The Respondents through the preliminary objection dated 17th December 2019 aver that, the Petition herein discloses no cause of action; urging further issuance of Diplomatic passport is exercise of a discretionary power and not a right conferred by the Constitution and such this matter cannot be litigated before the Honourable Court as there is no violation demonstrated.

24. In determination of this issue this Court is called upon to consider whether the Petition herein raises triable issues, which can best be done by considering what is the overriding objective of the Constitution of Kenya, which in my view is to facilitate access to justice. The Constitution should be interpreted as provided under **Article 259 of the Constitution**. **Article 259 of the Constitution** obliges the Courts to promote **“its purposes; values and principles, advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permit the development of the law; and contribute to good governance.”** This gives the courts leeway to strike out suits, if they are satisfied that the suits are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and may prejudice, embarrass or delay a fair trial.

25. The Respondents contend that this Petition does not disclose a cause of action. The question for consideration is therefore what is a **“cause of action”**? **“A cause of action”** was clearly defined by Justice Havelock, as he then was, in **Carton Manufacturers Limited v Prudential Printers Limited [2013] eKLR** quoting **Drummond Jackson v British medical Association (1970) e WLR 688** as:-

“an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”

26. On the other hand, the terms **scandalous, frivolous, vexatious and an abuse of the Court process** were defined by Justice Munyao in **County Council of Nandi vs. Ezekiel Kibet Rutto & 6 others [2013] eKLR** as follows:

“A scandalous pleading in my view is a pleading that attempts to put the other party into bad light. It attempts disparage the other party to the proceedings. Such pleadings border on defamation. However, such disparaging words attributed to the other party must not be in issue in the suit. If they are in issue in the suit, then of course the words cannot be scandalous. They must be disparaging pleadings which are completely irrelevant to the proceedings in issue.

A frivolous pleading in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. For example if a litigant founds his cause of action on a law that has been repealed, then such pleading obviously lacks legal foundation and can be said to be frivolous.

A vexatious pleading in my view is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily, a frivolous pleading or a scandalous pleading. Its main quality is that it stands out as a pleading only aimed at harassing the other party.

A pleading that is an abuse of the process of court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situations where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons.”

27. It is clear from the foregoing definitions, it can be ascertained that a cause of action is a fact that provokes a person to institute proceedings against another; a scandalous matter is grossly disgraceful (or defamatory) and irrelevant; a frivolous matter lacks legal basis or merit; and a vexatious matter seeks to harass and annoy a party.

28. In the instant Petition, I find that a Petition cannot be perceived as scandalous, frivolous, vexatious or disclosing no reasonable cause of action since the Petitioner has presented the factual and legal basis upon which the present Petition is founded, and this Honourable Court has an obligation to uphold the values and principles of the Constitution by not only affording the Petitioner an opportunity to prove the mischief and unconstitutionality of the Respondents actions and omissions, but also the manner in which the Respondents actions and omissions have adversely impacted on the due administration of justice.

29. Further, Justice Havelock quoting **DT Dobie & Co Ltd vs. Muchina [1982] KLR in Commodity House Ltd vs. Simba Merchandising Co (K) Ltd & Another (2013)** stated that the Courts must be guided by principles in determining whether to strike out a suit:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of Justice ought not to act in darkness without the full facts of the case before it.” (Emphasis added)

30. The rationale of the above is to ensure that parties are not deprived of their right to a plenary trial unless the suit is totally unarguable and incontestably bad.

31. The Respondents contend the Minister under the relevant statute acted within the law by exercising the discretion conferred upon him which Respondents aver cannot be said to be a violation of the Petitioner’s rights under the Constitution. It is further urged that the Petitioner’s duty in a Constitutional Petition is to disclose, with reasonable precision, the right which he alleges has been infringed and the manner in which this right has been infringed and where the Petitioner fails to discharge such duty, the Petition is to be struck out for failure to disclose a cause of action worth being entertained by the Court.

32. The Petition herein does not fall under the category stated by the Respondents, as it has in my view disclosed with reasonable precision, the right which the Petitioner allege to have been infringed and in the manner in which the right has been infringed. The Petition does not qualify to be within the criteria that has been laid down for a suit to be deemed scandalous, frivolous, vexatious or an abuse of the Court

process to qualify to be struck out without being heard and more so. Since the Petition is a public interest litigation seeking to protect Constitutional values and principles. I therefore find that the Petitioner's Petition is not scandalous, or frivolous, nor vexatious or an abuse of Court process and the same discloses cause of action and in the interest of substantive justice and in view of the issues raised in the Petition the suit should be heard and determined on merits.

C. WHETHER THE RESPONDENTS VIOLATED THE PETITIONER'S RIGHTS AND FREEDOM UNDER ARTICLE 2, 10, 23, 27, 160 AND 162 OF THE CONSTITUTION OF KENYA 2010?

33. The Respondents under this sub-heading contend that the Petition herein has not been pleaded with precision as required in Constitutional Petitions as enunciated in the *Anarita Karimi Njeru case*. It is contended the Petitioner has not demonstrated the manner in which the said provisions were violated and the harm occasioned to him. It is Respondents contention that the issue of Diplomatic passport is neither expressly nor impliedly provided for by the Constitution and that it is conjured by statute under the discretion of the relevant minister under applicable law. It is urged that it's not a right but a privilege which can be curtailed by the discretion of the relevant Minister upon consideration.

34. The Respondents argue that **Article 160 of the Constitution** which has extensively been referred to by the Petitioner talks about Judicial independence to which the Respondents contend they do not see how the issuance of Diplomatic Passport affects the independence of the Judiciary.

35. The Respondents as regards the understanding of Judicial Independence sought to rely on the case of *Kalpana H. Rawal & 2 others vs. Judicial Service Commission & 3 others [2016] eKLR*, where the Supreme Court of Kenya held;

"The parity rule in the standing of decisions emanating from the different Judges serving on Superior Court Benches, learned counsel urged, is a meritorious one of principle, which assures that Judges honestly and dutifully perform their constitutional mandate of dispute resolution, without cowering to forces inclined to abuse their power, or to ingratiate their private predilections. He called in aid, for this principle, the Canadian case, Her Majesty The Queen v. Marc Beaugard [1986] 2 S.C.R. 56, in which the subject was thus elucidated:

"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."

36. The Respondents in relying in the above case submits that the issuance of the Diplomatic Passport has got nothing to do with the tenets of judicial independence. The Respondents argue that Judicial Independence has a lot to do with decision making of a judge and not what the Petitioner is trying to advance. The Respondents further contend the dispute before this Court is on Diplomatic Passport aspect which does form part of the Remuneration and benefit accrued by the Judges of Superior Courts. It is submitted that the alleged decision to deny the Judges of the High Court and Courts of equal status Diplomatic Passport doesn't affect the independence of the Judiciary and that there is no violation of the Petitioner's rights. The burden of proving so squarely falls on the part of the Petitioner. The Respondents aver that this was held so in the position in the case of the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR*, where the Court High Court held that:-

"It is our finding that the Petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the Petition and supporting affidavit, we have concluded that they did not provide adequate particulars of he claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011. Accordingly, the Petition did not meet the standard enunciated in the Anarita Karimi Njeru case."

37. The Respondents further aver that the Kenya Passport is issued to Kenya Citizens in accordance with the Constitution of Kenya, 2010 as provided for in the Kenya Citizens and Immigration, in which one has to formally apply for him or her to be issued.

38. The Respondents further state that by virtue of **Legal Notice No. 64 dated 15th June 2012, (the Kenya Citizenship and Immigration Regulations, 2012)** the Minister of state for Immigration and Registration of Persons made the Kenya Citizenship and Immigration Regulations, 2012 which in the **Third Schedule, set out persons eligible for issuance of diplomatic passports**. The Chief Justice and spouse, the Deputy Chief Justice and spouse, justices of the Supreme Court and Spouses and Justices of the Court of Appeal and Spouses. The Respondents state from that the Regulations has never been declared unconstitutional and neither has the Petitioner sought to declare the same unconstitutional because he knows the ministerial discretion to include such category of persons and exclude others.

39. The Respondents state further that the Judges of High Court and Judges of Courts of equal status were not included, as that is not a right conferred on any one, nor should it be assumed that all judges are entitled by such a privilege. The issuance of diplomatic passport is subject to policy considerations. In view whereof the Respondents contend that the exercise of a discretionary power of a minister ought not to be a subject of inquisition by the Court and the issuance of diplomatic Passport is not a legal right as alleged by the Petitioner.

40. The Respondents also contend that the Petitioner has submitted the Judges had a legitimate expectation that their diplomatic passports will be reviewed. The Petitioner in this regard referred to the case of *Henry Muthee Kathurima v Commissioner of lands & another [2015] eKLR* where the High Court held that: “

There cannot be a legitimate expectation without adherence to statutory or constitutional provisions. It has been held in several persuasive authorities, R. v. Devon County Council, ex parte Baker & Another [1995] 1 All. E.R. 73; R. v. Durham County council ex parte Curtis & Another, [1992] 158 LG Rev. R 241 (CA) and R. V. DPP ex p. Kebilene [1993] 3 WL 972, that no

legitimate expectation can override clear statutory provisions.”

41. It is further urged by the Respondents the **Kenya Citizenship and Immigration Regulations 2012** are and were not discriminatory as at the time they were formulated and enacted, the Judges of the High Court and Judges and Judges of Courts of equal status were in service of the Judiciary and due consideration must have been taken for the exemption.

42. To buttress the above proposition the Respondents referred to the case of **Kalpana H. Rawal v. Judicial Service Commission & 4 others [2015] eKLR**, where the Supreme Court held that;

“In our understand, one can only found a claim for discrimination if in the ordinary circumstances, she has been accorded some differential treatment or different standards have been applied to her as opposed to another person in similar circumstances. Such discrimination must be brought within the grounds stipulated under Article 27 (4) of the Constitution. In this regard, the Petitioner has not for instance demonstrated that since the memo, any other judge in a similar situation as herself, has not been issued with a retirement notice; or that there is a judge who is beyond 70 years and still serving, but has not been served with a retirement notice.”

43. The Respondents therefore submit that the Regulations are not discriminatory in any manner as there is reasonable distinction between Judges of the High Court and Judges of Courts of equal Status and the Judges of the Court of Appeal and Supreme Court.

44. The Respondents therefore submit that the Regulations are not discriminatory in any manner as there is reasonable distinction between Judges of the High Court and Judges of the Court of Appeal and Supreme Court. It is further Respondents contention that there was no constitutional violation as at the time Regulations were formulated.

45. It is noted that the Petition before this Honourable Court in its body refers to **Article 2, 10, 23, 27, 160 and 162 of the Constitution** as the legal underpinning of the Petition.

46. **Article 160(4) of the Constitution** provides that:

“the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge” (emphasis added)

47. The Constitution is not silence on the ring-fencing of the Judges on the **remuneration and benefits** which aims at ensuring that the Judges render their services and mandate independently and impartially, free from undue influence or wrong albeit any uncertainties, the future may hold. The Judicial independence therefore has everything to do with **remuneration and benefits** of the judges contrary to the assertion by the Respondents herein.

48. On the remuneration of Judges Hon. Justice Odunga in the case of **Sollo Nzuki v. Salaries and Remuneration Commission & 2 others (2019) eKLR** stated thus:

“Remuneration of judges, is one of the tenets of the independence of the judiciary and that is why the remuneration and benefits payable to, or in respect of, a judge is constitutionally ring-fenced and are not (sic) be varied to the disadvantage of that judge, and the retirement benefits of a retired judge are not (sic) be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

Independence of a judge requires that a judge carries out his/her mandate without having undue worries about how his/her post-retirement life will turn out. A judge whose post-retirement is uncertain is bound to be exposed not only to the vagaries and fragilities inherent in transient politics of the day but also to the proclivities of those in power with a view to being accorded a “soft landing” upon retirement. Accordingly, the remuneration, benefits and post-retirement benefits are tenets of the judicial independence package.” (Emphasis added)

49. Under **Article 160(4) of the Constitution** Judges include Judges of Supreme Court, the Court of Appeal, High Court and the Courts of equal status by virtue of **Article 162(2) of the Constitution** herein.

50. Under **Article 162 of the Constitution of Kenya** on the **system of Courts, the Supreme Court, Court of Appeal, High Court and Courts of equal status are classified as “Superior Courts” whose occupants hold the same status as judges of “Superior Courts.”** I noted the 2nd and 3rd Respondents by subjecting the Judges to disparity on their **remuneration and benefits**, through enactment and implementation of the **Kenya Citizens and Immigration Regulations, 2012**, which excludes Judges of the High Court, Judges of the Courts of Equal Status and their spouses from the list of persons that are entitled to Diplomatic Passports, and the refusal to grant **Some** Judges access to the VIP Lounges in the Kenyan Airports, the Respondents’ not only abdicated their constitutional and statutory mandate, but have also curtailed the Judges legitimate expectation to have their Diplomatic Passports issued and/or renewed, and to have access to the VIP Lounges in the Kenyan Airports.

51. **Article 1 of the Constitution of Kenya 2010** clearly delegates sovereign power to the Respondents (Parliament and the legislative assemblies in the county governments; and the national executive and the executive structures in the county governments), I find that they are under an obligation to perform their functions in accordance with the Constitution of Kenya, the **grund norm** of all Kenyan Law and, due to its importance, was enacted by way of a referendum, to allow the Citizens of Kenya to express their will. Failure to do so allows the Petitioner (and indeed anyone) to seek recourse under **Article 2 of the Constitution** which not only expects the Respondents to bow to the will of the Citizens of Kenya but also allows for the recall of. **Article 2 of the Constitution** states:-

“Any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

52. It is clear that with regard to Judges specially the High Court and Courts of Equal status, they have legitimate expectation to have their Diplomatic Passports issued and/or renewed, and to be granted access to the VIP Lounges in the Kenyan Airports. By virtue the provisions of **Article 47 (1) and (2) of the Constitution**, it’s clearly provided that:-

“1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

53. Further to the above **Section 5 and 6 of the Fair Administrative Action Act, 2015** clearly provides that:-

Section 5 of the Fair Administrative Action Act 2015, provides:-

“In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrative shall:

a) Issue a public notice of the proposed administrative action inviting public views in that regard;

b) Consider all views submitted in relation to the matter before taking the administrative action;

c) Consider all relevant and materials facts; and

d) Where the administrator proceeds to take the administrative action proposed in the notice;

i) give reasons for the decision of administrative action as taken;

ii) issue a public notice specifying the internal mechanisms available in the persons directly or indirectly affected by his or her action to appeal; and

iii) specify the manner and period within which such appeal shall be lodged (Emphasis added)

54. In addition to the above **Section 6 of the Fair Administrative Actions Act, 2015** provides:-

1) “Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with Section 5.

2) The information referred to in subsection (1), may include-

a) The reasons for which the action was taken; and

b) Any relevant documents relating to the matter.

3) The administrator to whom a request is made under subsection (1) shall, within thirty days after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.

4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reasons.

5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.” (Emphasis added)

55. In the instant Petition it is clear that in addition to the lack of an express invitation for public views for affected judges, **Article 47 of the Constitution** and **Section 5 and 6 of the Fair Administrative Action Act, 2015**, the Respondents are enjoined to either give written reasons or a statement for their decision to exclude Judges of the high Court, Judges of the Courts of equal status and their spouses from the list of persons that are entitled to Diplomatic Passports in the **Kenya Citizens and Immigration Regulations, 2012**, and for denying Judges of the Supreme Court (other than the Honourable Chief Justice), the Court of Appeal, the High Court and the Courts of Equal Status access to VIP Lounges in the Airports within the Republic of Kenya without any notice, explanation or reason whatsoever. I have no doubt in finding and hold that the 3rd Respondent’s failure to provide any reasons upon being questioned about the same matter is a clear demonstration that the decision to exclude Judges of the High Court and Courts of Equal Status from the list of persons that are entitled to Diplomatic Passport in the **Kenyan Citizens and Immigration Regulations, 2012** and access to VIP Lounges in the Airports within the Republic of Kenya was taken arbitrary and without good reasons or none at all.

56. I further find and hold that by further implementation of the above-mentioned Regulations and refusing to grant the Judges access to VIP Lounges in the Airports within the Republic of Kenya, the Respondent's promoted and encouraged discrimination and unfair treatment amongst the Judges in complete violation of **Article 27 of the Constitution** which provides:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(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.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

57. On the issue of discrimination the Interested Party seeks reliance in the case of **Sollo Nzuki v Salaries and Remuneration Commission & 2 Others [2019 eKLR** where Justice Odunga quoting **Nyarangi & 3 others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688**, stated as follows with regard to discrimination:-

“The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification... The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally, it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application 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 and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.” (Emphasis added)

58. I find from the aforesaid that the mere implementation of the Regulations and refusal to grant Judges access to VIP Lounges in the Kenyan Airports was not aimed at pursuing a legitimate aim and/or dealing with factual inequalities. If anything, the Respondents intention was to subjugate the Judges and entrench inequality, oppression and differential treatment since no reasons were given to justify the decision being made. Which is a clear case of violation of **Article 27 of the Constitution**.

59. From the foregoing I find that the Respondent have not only violated **Article 2, 10, 23, 27, 160 and 162 of the Constitution of Kenya** but also abdicated their constitutional and statutory mandate. In addition to this I find the Respondents actions are arbitrary, unreasonable, unjust, unwarranted, ill-advised, discriminatory and clearly unconstitutional, for which this Court has jurisdiction to reinstate the privileges, rights and freedoms that have arbitrarily been deprived of the different cadres of Superior Courts Judges and censuring the acts of the Respondents for express violation of the Constitution.

D. WHETHER THE JUDGES OF THE HIGH COURT OF KENYA AND JUDGE OF COURTS OF EQUAL STATUS HAVE BEEN UNFAIRLY DISCRIMINATED?

60. In this Petition, it is pleaded that vide **Legal Notice No. 64 dated 15th June 2012**, the Cabinet Secretary of State for Immigration and Registration of Persons published the **Kenya Citizenship and Immigration Regulations, 2012 (“the Regulations”)**. In the **Third Schedule of the said Regulations**, the Chief Justice, Justices of Supreme Court, Justices of Court of Appeal and their spouses were listed as persons entitled to Diplomatic Passports to the exclusion of Judges of the High Court and Courts of equal status and their spouses and the Chief Registrar of the Judiciary. In addition to the Judges of the Supreme Court with the exception of the Chief Justice, Court of Appeal, the High Court and Courts of equal status together with the Chief Registrar of the Judiciary have been denied access to the VIP Lounges in airports within the country by the 2nd Respondent without any notice, explanation or reasons, a benefit they were previously entitled to.

61. Under **Article 162 of the Constitution of Kenya** on the system of Courts, the Supreme Court, Court of Appeal, High Court and Courts of Equal Status are classified as **“Superior Courts”** whose occupants hold the same status as **“Judges of Superior Courts”**. The 2nd and 3rd Respondents in purporting to discriminate afford and or vary benefits entitled to by these judges, while in office, without any reasonable justification amounts to unfair discrimination contrary to **Articles 27, 160(4) and 162 of the Constitution of Kenya** which provide:-

Article 27(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.

Article 160(4):-

Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

Article 162:-

(1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*

(2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*

(a) employment and labour relations; and

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

62. The word “discrimination” and “unfair discrimination” was defined in the case of *Republic v. Kenya School of Law exparte Otene Richard Akomo Judicial Review Application No. 20 of 2020* (unreported), in which the Court defined the terms “discrimination” and “unfair discrimination” as follows:

In *Willis vs. The United Kingdom ECHR 2002 – IV the European Court of Human Rights* observed that discrimination means treating differently, without any objective and reasonable justification, person in similar situations ...

“Unfair discrimination” is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

63. The Court went on to lay down the test to be applied by courts in determining whether a claim based on “unfair discrimination” should succeed. It stated:

77. The test for determining whether a claim based on unfair discrimination should succeed was laid down by south Africa Constitutional Court in Harksen v Lane NO and Others {1997} ZACC 12 as:

a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-

i. Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

ii. If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focusses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (...of the ...Constitution).

64. I have reconsidered the pleadings herein and facts of this case and I find that the facts of this case meet the test laid down in *Harksen v Lane NO and Others (1997) ZACC 12*.

65. The first question for consideration is as follows:-

a) Does the provisions differentiate between people or categories of people?

66. The answer to the first question is in the affirmative, since Judges of the High Court and Courts of equal status are differentiated from Judges of Court of Appeal and Supreme Court in the Third Schedule of the Regulations contrary to *Articles 162 of the Constitution of Kenya* that classifies all of them as judges of “Superior Courts”.

67. The second question is as follows:-

b) Does the differentiation amount to unfair discrimination?

68. On considering the facts the answer to this question is also in the affirmative. The Superior Courts under **Article 162 of the Constitution of Kenya** include Judges of the Supreme Court, Court of Appeal, the High Court and Courts of equal status and not Judges of the Supreme Court and Court of Appeal only as intimated by the list of persons entitled to Diplomatic Passports in the Third Schedule of the Regulations, or only the Honourable Chief Justice as is intimated by granting him access into the VIP lounges to the exclusion of all the other Judges of the Superior Courts. I find in doing so, the 2nd and 3rd Respondents are affording different treatment to the Judges of the Superior Courts, being Judges in similar situation with same status, by affording the Judges of the Supreme Court and Court of Appeal more benefits without any reasonable justification. I further find and hold that this arbitrary conduct and law demeans the status of the Judges of the High Court and courts of equal status and denote them as inferior to or less deserving of respect than Judges of the Supreme Court and Court of Appeal.

69. The third question for consideration is as follows:-

c) Whether the provision can be justified under the limitation clause (Article 24 of the Constitution of Kenya 2010)?

70. As regards this question the burden of proof lies on the Respondents in justifying that the aforesaid discriminating treatment of Judges of the High Court and courts of equal status is justified under **Article 24 of the Constitution**. The Respondents have not demonstrated that the aforesaid discriminating treatment of judges of the High Court and Courts of equal status is justified by **Article 24 of the Constitution**. **Article 24(1) of the Constitution** provides that:-

“24. Limitation of rights and fundamental freedoms

(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) 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.”

71. The Respondents herein failed to demonstrate any justification or any provision of the law justifying discriminating treatment of the Judges of the High Court and Court of equal status and that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I therefore find and hold that the discrimination by the Respondents against the Judges of High Court and Court of Equal Status is unjustifiable, unlawful and unconstitutional.

E. WHETHER ORDER SOUGHT BY THE PETITIONER SHOULD ISSUE?

72. **Article 23(3) of the Constitution** grants this Honourable Court the authority to uphold and enforce the Bill of Rights, and allows it, to grant the following reliefs in any proceedings that are brought under **Article 22 of the Constitution**:

a) “a declaration of rights;

b) an injunction;

c) a conservatory order;

d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

e) an order for compensation; and

f) an order of judicial review.”

73. Further it is clear that under **Section 11 of the Fair Administrative Action Act, 2015**, it is provided that in proceedings for Judicial Review the Court may grant any order that is just and equitable, including an order:-

- a) “declaring the rights of the parties in respect of any matter to which the administrative action relates;
- b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
- c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;
- d) prohibiting the administrator from acting in particular manner;
- e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;
- f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;
- g) prohibiting the administrator from acting in a particular manner;
- h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;
- i) granting a temporary interdict or other temporary relief; or
- j) for the award of costs or other pecuniary compensation in appropriate cases.”

74. In the case of *Center for Rights in Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties) [2019] eKLR* – the Court was tasked to determine whether legislation that gave powers to the National Assembly to vary the retirement benefits of State Officers was repugnant to the Constitution. The Court held that;

“The question presented to this court is whether a retirement benefit which is an entitlement that has been lawfully earned can be taken away in the circumstances provided in section 4 (1) and (2) of the act. First, the impugned sections give the National Assembly the mandate of determining by a motion supported by not less than half of the members whether an entitled person shall be paid the benefits. To the extent that this section gives the National Assembly, which enacts the law the responsibility of determining the circumstances under which an entitled person would or would not be paid a retirement benefit, it offends the doctrine of separation of powers. This is because it confers to the National Assembly the role of legislating, interpreting and implementing the law. This provision creates a situation whereby when a question arises as to whether an entitled person should be paid, the same is referred back to the National Assembly to determine the question. Implementation of laws is a function of the executive while interpreting the law is a function of the judiciary. In our considered view, to extent that the impugned section confers to the National Assembly, a legislative body, the mandate of debating and determining whether the persons eligible for the retirement benefits qualify to be paid in accordance with the said provisions, it out rightly offends the doctrine of separation of powers which renders it constitutionally invalid. (Emphasis added)

75. I find that the only exception to the provision of **Article 160(4) of the Constitution** is provided for under **Article 168(6)** which outlines the variation to the **remuneration and benefits** payable to a Judge that has been suspended.

76. It is proper to consider what “**benefit**” is defined as. The **Black’s Law Dictionary 10th Edition at page 188** defines a “**benefit**” as:-

“...The advantage or privilege something gives or; a profit or gain.”

77. From the above it is clear the issuing of a Diplomatic Passport is indeed a privilege and therefore a benefit under **Article 160(4) of the Constitution of Kenya, 2010**. I find the impugned Regulation effectively varied the benefits due to the Judges of the High Court and Courts of equal status by excluding them from the list of persons entitled to Diplomatic Passport under the Third Schedule of the Regulations. I find this variation contrary to **Article 160(4) of the Constitution of Kenya** and therefore void as provided for under **Article 2 of the Constitution of Kenya, 2010**.

78. The Petitioners sought reliance on the above proposition from the case of *Olum and another v Attorney General [2002] 2 EA 508*, where it was stated that :-

“To determine the Constitutionality of a Section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

79. Similarly the Petitioner rely on the case of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR* where it stated that:-

“71. The South African Constitutional Court in Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216, 248 at paragraph 99 underscored the Court’s role to protect the integrity of the Constitution thus:-

“The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.”

72. I am duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.”

80. This Court no doubt is called upon to uphold the independence of the Judiciary and safeguard the sanctity of this institution by declaring the third Schedule of the Regulation unconstitutional in so far as it excludes Judges of the High Court and Courts of equal status as persons entitled to Diplomatic Passports; that the action by the 3rd Respondent in denying some of the Justices of Supreme Court, Court of Appeal and Judges of the High Court and Courts of equal status access to VIP Lounges at Airports within the Country is discriminatory and should be reinstated to the affected Judges.

81. The upshot is that the Petitioners Petition is meritorious and I proceed to make the following orders:-

a) The Respondents Preliminary Objection dated 17th December 2019 is without merits and is accordingly dismissed.

b) A declaration be and is hereby ISSUED that the 1st Respondent’s failure to include Judges of the High Court of Kenya and Judges of Courts of equal status in the Third Schedule of the Kenya Citizenship and Immigration Regulations, 2012 as persons entitled to hold diplomatic passports is arbitrary and unreasonable and amounts to discrimination against all persons serving as judges of the High Court of Kenya and Judges of Courts of equal status contrary to Article 27 of the Constitution of Kenya, 2010.

c) A declaration be and is hereby ISSUED that the distinction and differentiation in treatment by the 2nd and 3rd Respondents of judges of the High Court of Kenya and Judges of Courts of equal status and judges of the Court of Appeal and Supreme Court is unconstitutional.

d) A declaration be and is hereby ISSUED that the Third Schedule to the Kenya Citizenship and Immigration Regulations, 2012 in so far as it excludes Judges of the High Court and Courts of Equal Status as persons entitled to Diplomatic Passport is discriminatory to the extent that it subjects Judges of the High Court of Kenya and Judges of Courts of equal status to lesser benefits than judges of the Court of Appeal and Supreme Court.

e) A declaration be and is hereby ISSUED that withdrawal of Diplomatic Passports hitherto issued to judges of the High Court of Kenya and Judges of Courts of equal status is in contravention of Article 160 of the Constitution of Kenya.

f) A declaration be and is hereby ISSUED that withdrawal of access by judges of the High Court of Kenya and Judges of Courts of equal status to various Very Important Person (VIP) lounges across the Country with similar reciprocal arrangements in other jurisdiction is in contravention of Article 160 of the Constitution of Kenya.

g. An order of mandamus be and is hereby ISSUED reinstating the Judges of the High Court and Courts of equal status to the rights and benefits previously enjoyed by them which includes but not limited to provision of Diplomatic pass ports to the Judges and their respective spouse(s).

h. An order of Mandamus be and is hereby ISSUED compelling the Respondents to immediately include Judges of the High Court and Judges of Courts of equal status and their spouses in the Third Schedule to the Kenya Citizenship and Immigration Regulations, 2012, and or otherwise restore to them and their spouses right to diplomatic passports.

i) Costs of the Petition to the Petitioner and Interested Party.

Dated and Signed at Nairobi on this 11th day of February, 2021.

Delivered electronically at Nairobi on this 25th day of February, 2021.

.....

J. A. MAKAU

JUDGE