Okoiti v Commission & 7 others; Judicary & another (Interested Parties) (Petition 361 of 2018) [2021] KEHC 59 (KLR) (Constitutional and Human Rights) (23 September 2021) (Judgment)

Okiya Omtatah Okoiti v Judicial Service Commission & 6 others; Judicary & another (Interested parties) [2021] eKLR

Neutral citation: [2021] KEHC 59 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 361 OF 2018

JA MAKAU, J

SEPTEMBER 23, 2021

IN THE MATTER OF ARTICLES 3(1), 22(1) & (2) (C), 48, 50(1), AND 258(1) & (2)(C) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 1(1), 2(1), (2) & (3), 3(1), 4(2), 10, 73, 75, 129, 153(4)(A), 159(1) & (2)(B), 160(1), 232(1)(G), AND 259(1) & (3) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 47, 48, AND 50(1) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED VIOLATION OF SECTION 125(1) (A), (B), (C) &(D) & (3) OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT CHAPTER 387 OF THE LAWS OF KENYA

IN THE MATTER OF THE CAPTURE BY VESTED INTERESTS AND THE REDUCTION OF THE NATIONAL ENVIRONMENT TRIBUNAL TO A KANGAROO COURT THROUGH THE IRREGULAR AND UNLAWFUL APPOINTMENTS OF MEMBERS OF THE TRIBUNAL

IN THE MATTER OF THE CONSTITUTIONAL AND STATUTORY VALIDITY AND COMPETENCE OF THE NATIONAL ENVIRONMENT TRIBUNAL COMPOSED OF MOHAMMED BALALA, CHRISTINE MWIKALI KIPSANG, ANDREW BAHATI MWAMUYE, AND WAITHAKA NGARUIYA

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

CABINET SECRETARY, ENVIRONMENT AND NATURAL RESOURCES ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

MOHAMMED BALALA ..... 4TH RESPONDENT

CHRISTINE KIPSANG ..... 5TH RESPONDENT

ANDREW BAHATI MWAMUYE ..... 6TH RESPONDENT

WAITHAKA NGARUIYA ..... 7TH RESPONDENT

NATIONAL ENVIRONMENT TRIBUNAL ..... 8TH RESPONDENT

AND

JUDICARY ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

JUDGMENT

PETITION

1. The petitioner through a Petition dated 22nd October 2018 supported by affidavit sworn by Okiya Omtatah Okoiti on even date seek the following reliefs:-

    i. A declaration that the Judicial service Commission, the 1st respondent, failed to exercise its constitutional mandate in the current composition of the National Environment Tribunal.

    ii. A declaration that by failing to act on the grievances raised in the Petitioner's letter of 25th May 2018, which was addressed to it and to the Chief Justice, the Judicial Service Commission violated articles 47 and 172(1)(c) of the Constitution.

    iii. A declaration that by handpicking and appointing the 4th, 5th, 6th and 7th respondents without subjecting them to competitive recruitment, with provision for advertisements, interviews, public participation, and vetting, the 2nd respondent violated articles 1, 2, 3(1), 10, 27, 47, 73(2)(a), 75(1), 129, 153(4)(a), 232(1)(g) and 259(1) of the Constitution and, therefore, the appointments are invalid, null and void ab initio.

    iv. A declaration that by appointing Mr Mohammed Balala (the 4th respondent), who was unqualified for the appointment under the affected provision of the law, the 2nd respondent violated section 125(1)(c) of the EMCA and articles 1, 2, 3(1), 10, 27, 47, 73(2)(a), and 232(1)(g) of the Constitution and, therefore, the appointment is invalid null and void ab initio.

    v. A declaration that by appointing Ms Christine Mwikali Kipsang (the 5th respondent), Mr Andrew Bahati Mwamuye (the 6th respondent), and Mr.

Waithaka Ngaruiya (the 7th respondent), who were unqualified for the appointment under the affected provision of the law, the 2nd respondent violated section 125(1)(d) of the EMCA and articles 1, 2, 3(1), 10, 27, 47, 73(2)(a), and 232(1)(g) of the Constitution and, therefore, the appointments are invalid, null and void *ab initio*.

vi. A declaration that by accepting his unlawful, illegal and, therefore, unconstitutional appointment, Mr Mohammed Balala violated section 125(1)(c) of the EMCA and articles 1, 2, 3(1), 10, 27, 47, 73(2)(a), and 232(1)(g) of the Constitution.

vii. A declaration that by accepting their unlawful, illegal and, therefore, unconstitutional appointments, Ms. Christine Mwikali Kipsang, Mr. Andrew Bahati Mwamuye, and Mr Waithaka Ngauriya violated section 125(1)(d) of the EMCA and articles of 1, 2, 3(1), 10, 47, 73(2)(a), and 232(1)(g) of the Constitution.

viii. A declaration that, as currently constituted, the National Environment Tribunal is unconstitutional to the extent that it does not meet the standards of independence expected of an organ of the Judiciary under the Constitution.

ix. A declaration that all decisions made by the currently unconstitutionally constituted National Environment Tribunal are invalid, null and void for having been made without jurisdiction.

x. A declaration that the rights of the petitioner to a fair trial were violated to the extent that he was compelled to appear before the unconstitutionality constituted National Environment Tribunal.

xi. An order quashing gazette Notice No 8745 of 26th October 2016 which announced the appointments to the National Environment Tribunal of the 4th, 5th, 6th, and 7th respondents.

xii. An order that the costs of this suit be provided for.

xiii. Any other relief the court may deem just to grant.

Respondents Response

The 1stRespondent's Response

2. The 1st respondent filed a replying affidavit sworn by Benard O Ochieng dated 24th May 2019 in opposition of the petitioner's Petition.

The 2nd and 3rd Respondents' Response

3. The 2nd and 3rd respondents filed grounds of opposition dated 3rd December 2018 setting out ten (10) grounds in opposition.

The 4th Respondent's Response

4. The 4th respondent filed Notice of Preliminary objection dated 30th October 2018 being as follows:-

a. That the substratum and the prayers sought in this Petition involve matters relating to the Respondent, in judicial proceedings before it.

b. That by virtue of article 169 (1) (d) of the Constitution, the Tribunal is recognized as a subordinate court within the judicial system and is required, under article 160(1) of the Constitution, to be independent and free of control or direction of any person in the exercise of its judicial authority.

c. That the petitioner is a party before the Tribunal in *Okiya Omtatah v NEMA & 8 others* and has appeared on several occasions before the panel of the 8th respondent for arguments on a number of interlocutory applications and has also given evidence in support of his Appeal NET 200 of 2017 filed before the National Environment Tribunal: The case is concluded and scheduled for judgment. This Petition is intended to interfere with the independence of the Judicial authority of the National Environment Tribunal by the Petitioner who seeks to control the conduct of the Tribunal and give directions on proceedings before it by derailing the delivery of judgment in NET 200 of 2017 in which he is the appellant contrary to article 160(1) of the Constitution.

d. That in addition, the petitioner is a busy body seeking to affect the status of other cases handled by the Tribunal to which he is not a party (refer the list of cases attached to the Petition.)

e. That this Honourable Court lacks jurisdiction to hear and determine this Petition as the 4th respondent alongside the 5th, 6th, 7th and 8th respondent all enjoy legal and constitutional immunity from legal action when exercising judicial authority.

i. Article 160(5) of the Constitution reads as follows:-

"(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

ii. This is buttressed by the provisions of section 6 of the *Judicature Act* (cap.8)

"No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of..."

iii. Section 133(1) of the Environment Management and Coordination Act, 1999 supports immunity

"(1) The Chairperson or other members of the Tribunal shall not be liable to be sued in a civil court for an act done or omitted to be done or ordered to be done by them in the discharge of their duty as members of the Tribunal, whether or not within the limits of their jurisdiction, provided they, at the time, in good faith, believed themselves to have jurisdiction to do or order the act complained of..."

iv. That the Petition filed offend clear provisions of articles 160(1) and 160(5) of the Constitution of Kenya 2010.

v. That the Petition filed also offends clear provisions of section 133 of the Environment Management and Coordination Act 1999 as well as section 6 of the Judicature Act.

vi. That in the circumstances, the Petition should be dismissed with costs.

5. The 4th respondents further filed Notice of Motion dated 30th November 2018 seeking that the Petition dated 22nd October 2018 by the Petitioner/Respondent be struck out with costs.

The 5th Respondent's Response

6. The 5th respondent similarly filed a Notice of Preliminary Objection dated 7th March 2018 setting out three grounds of objection being as follows:-

a. That the Petition and Notice of Motion both dated 22nd October 2018 and filed in this Honourable Court, offend Article 160(5) of the Constitution of Kenya, section 133 of the Environmental Management and Co-ordination Act (Act No 8 of 1999) Cap 387 Laws of Kenya, section 6 of the Judicature Act which *inter alia* provide immunity to the 4th, 5th, 6th, and 7th respondents from civil suits in the course of their duty as members of the 8th respondent.

b. That the petitioner is estopped from invoking the jurisdiction of this Honourable Court having subjected himself to the jurisdiction of the 8th respondent in; (NET. Appeal No 200 of 2017, *Okiya omtatah Okoiti & another v the National Environment Management Authority & 8 others*), (NET 113 of 2013 *Maraba Lwatingu Residents Association, Anderew Omtatah Okoiti & Oyugi Neto Agostino (suing as Registered Trustees of Kenyans for Justice and Development (KEJUDE) Trust) Nashoro Amis, Mus Rodenyo, Wycliffe Olumasai & 500 others v National Environment Management Authority*, *Lake Victoria North Water Services Board, Attorney General & County Government of Kakamega* and thereby failing to raise in limine and as a matter of course, the point of the 8th respondent's jurisdiction or any other objection for that matter as provided for under Rule 9 of the National Environmental Tribunal Procedure Rules, 2003.

c. That the Petition and Notice of Motion application dated 22nd October 2018 as filed, are an abuse of Court process having been field inordinately late considering the 4th, 5th, 6th and 7th Respondent's statutory tenure of three (3) years at the 8th Respondent.

The 6th Respondent's Notice Preliminary Objection

7. The 6th respondent filed Notice of Preliminary Objection setting out three (3) grounds of objection being:-

a. That the petitioner/applicant's Notice of Motion Application dated 22nd October, 2018 (and by extension the Petition dated 22nd October, 2018) is fatally defective and bad in law.

b. That this Honourable Court lacks the requisite power and jurisdiction to hear and determine the petitioner/applicant's Notice of Motion application dated

22nd October, 2018 (and by extension the Petition dated 22nd October, 2018) and /or grant the prayers sought therein.

c. That the prayers sought in the petitioner/applicant's Notice of Motion Application dated 22nd October, 2018 are manifestly unconstitutional, illegal and incapable of being issued against the Public Interest.

7th Respondent's Preliminary Objection

8. The 7th respondent filed Notice of Preliminary Objection dated 3rd October 2018 setting out three grounds of objection being:-

a. Article 160(5) of the Constitution of Kenya protects the 4th, 5th, 6th and 7th respondents as members of the Judiciary from any action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

b. Section 133 of the Environment management and Co-ordination Act (Act No. 8 of 1999) protects the Chairperson and members of the national Environment Tribunal from any civil suit for any act or omission done or ordered to be done by the Chairperson and members of the Tribunal whether or not within the limits of their jurisdiction provided they believed to be acting in good faith.

c. Section 6 of the Judicature Act further protects the 4th, 5th, 6th and 7th respondents from being sued in a civil Court for any act done or ordered by them in the discharge of their judicial duties, whether or not within the limits of their jurisdiction, provided at the time of the act or order they, in good faith believed to have jurisdiction to do or make the orders complained of.

The 1st Interested Party's Response

9. The 1st interested party filed reply to the Petition dated 28th November 2018 urging the Petition is bad in law, fatally defective and an abuse of the court process. The Interested Party further averred that under article 160 of the Constitution, the Judiciary is only subject to the Constitution and the law and shall not be subject to the control or direction of any person or authority and the orders sought in the Petition are unconstitutional, null and void.

Petitioner's Response

10. The Petitioner filed supplementary affidavit sworn by Okiya Omtatah Okoiti on 27th May 2019 in response to the 4th, 5th, 6th and 7th respondents' Notice of Preliminary Objection and response to responses by the 2nd and 3rd respondents grounds of opposition; and the 4th respondents Notice of Motion.

BRIEF BACKGROUND

11. The 2nd respondent appointed the 4th, 5th, 6th and 7th respondents to serve as members of the 8th respondent for a term of three (3) years with effect from 21st October 2016 by a gazette notice number 8745 published in the Kenya gazette of 26th October 2016.

12. On 17th July 2017, the three (3) year tenure of the 8th respondent's Chairperson, Dr Jane Dwasi, lapsed and by a letter dated 10th April 2017, she requested for renewal of her contract.

13. The letter dated 10th April 2017 was placed before the JSC Human Resource Management Committee in a meeting held on 6th June 2017 whereby it was resolved that a confidential report by the 2nd Respondent be filed to assist in evaluation of her performance during her tenure.

14. The day to day operations of the 8th respondent had stalled in the absence of a Chairperson. Consequently, the issue of renewal of the contract was tabled before the committee on 21st June 2017 and it was resolved that Dr. Jane Dwasi, be appointed as a Chairperson of the 8th Respondent for a further period of three (3) years.

15. On 29th June 2017, before the findings of the committee were submitted to the full JSC for approval, the 4th, 5th, 6th and 7th respondents lodged a complaint against Dr. Jane Dwasi.

16. On 2nd August 2017 and 31st August 2017, the JSC deliberated on the complaint vis-à-vis the recommendation and it was resolved that Dr. Jane Dwasi, be appointed for an interim term of one (1) year as the JSC finalized on the hearing of the complaint to ensure the operations of the tribunal (8th respondent) were not disrupted as well as to give time for the JSC to recruit a replacement.

17. By a letter dated 5th September 2017 addressed to the 2nd respondent, the JSC requested for the gazettement of Dr Jane Dwasi, for a period of one (1) year. However, by a letter dated 25th September 2017 the 2nd respondent declined to gazette the 1st respondent's appointment to the Tribunal and requested the JSC to nominate another candidate.

18. By letter dated 5th October 2017, the 1st respondent wrote to the Ministry of Environment and National Resources indicating that the appointment of Dr. Dwasi for a period of one (1) year was on an interim basis and was to ensure that she concludes on the part heard matters. Further, that the Ministry did not have any powers under the law to reject, approve or vet the nominee of the JSC and the Minister's only role was to appoint by issuing a gazette notice.

19. The members of the 8th respondent proceeded to appoint the 5th respondent as the acting Chairperson, purportedly in accordance with section 125(8) of the Environment Management and Coordination Act 12. The constitutionality of the amendments has been challenged in Petition 251 of 2017 (as consolidated with Petition 268 of 2017) Katiba Institute & 3 others vs. The Honourable Attorney General & 10 others. The consolidated Petitions are pending hearing and determination before this honourable Court.

20. The Petitioner has litigated before the Tribunal over the past 4 years. At no point did the Petitioner ever attack the Tribunal's competence to adjudicate the matters he lodged before it. The Petitioner has also made several applications before the Tribunal for various orders. He has appealed some of those orders to the High Court.

21. At the time of lodging the Petition, the Petitioner has a pending appeal before the Tribunal – *Okiya Omtatah Okoiti v National Environmental Management Authority and 7 others* (NET 200 of 2017). After filing the appeal, the petitioner filed this Petition seeking various orders against the Tribunal.

ANALYSIS AND DETERMINATION

22. I have carefully considered the Petition, grounds in opposition, Notice of Motion, Notice of Preliminary Objections and supplementary affidavit in response and all parties rival submissions and from the aforesaid the following issues arise for consideration:-

    a. Whether the Petition is *Res Judicata.*

b. Whether the national Environmental Tribunal is validly appointed and constituted.

c. Whether Petition is an abuse of Court process.

d. Who should bear the costs of the Petition.

A. Whether the petition is *Res Judicata*.

23. In the instant Petition the respondents averred that it is undisputed facts in the instant pleadings, that the petitioner has severally litigated before the 8th respondent, "The National Environment Tribunal," (hereinafter referred to "The Tribunal") and has thus subjected himself to the jurisdiction of The Tribunal. It is further stated at the same time of lodging the instant Petition, the petitioner had a pending appeal before The Tribunal to wit:- *Okiya Omtatah Okoiti v National Environment Management Authority & 8 others* (NET 2008 of 2017).

24. It is respondents' assertion that the petitioner filed the instant Petition with sole motive of restricting or stopping or disparaging of the authority of The Tribunal. It is noted in the instant Petition the petitioner has failed to raise in limine and as a matter of concern and urgency, the point of The Tribunal is jurisdiction/competence or any other objection regarding The Tribunal's composition as provided by law.

25. The respondents submit that the Petition herein is res judicata as the Petitioner had previously raised the same issue which was exhaustively and conclusively determined by a court of competent jurisdiction.

26. The principle of *res judicata* bars the Court from determining a matter by the same parties or those acting on their behalf, over the same issue or subject matter where an issue has been determined by a court of competent jurisdiction.

27. Section 7 of the *Civil Procedure Act* clearly provides:-

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

28. On the issue of *res judicata* respondents have placed reliance in the case of Malindi *Okiya Omtatah Okoiti v KPLC & 6 others & 4 Interested Parties*, where the Environment and Land Court determined the same issues that have been outlined in this Petition and held that the mode of appointment of the Members of The Tribunal does not vitiate its independence.

29. Further on issue of *res judicata* respondents have placed reliance in decision of Court of Appeal in the case of *Juma Nymawi Ndungo and 5 others v The Attorney General; Mombasa Law Society (Interested Party)* , where at para 73 held that *res judicata* has the following four (4) components:-

a. The existence of a previous suit in which the same Subject Matter was in issue;

b. the Parties to the Suit are the same or are litigating under the same title;

i. The title of Malindi ELC Petition No. 14 of 2017 Okiya Omattah Okoiti v KPLC and 6 Others; 4 Interested Parties was

"In the Matter of the Constitutional validity of Environmental Impact Assessment Reports issued under the Environmental Management and Co-ordination Act Cap 387 and the jurisdiction of the National Environment Tribunal to entertain Proceedings filed in defense of Articles 42, 69, 70 and 71 of the Constitution of Kenya 2010."

30. In Petition No. 14 of 2017, the petitioner joined the Attorney General as the 6th respondent and the National Environmental Tribunal as the 4th interested party. The same Parties have been joined in the instant Suit as the 3rd and 8th respondents, respectively.

31. It is noted that a competent Court heard and determined the matter in issue and;

i. The Honourable Justice Olola determined in Petition No. 14 of 2017 that the Environment and Land Court was competent to hear and determine the issues raised under article 162(2) of the Constitution of Kenya or any other law applicable in Kenya relating to Environment and Land including section 13(1) and 92) of the *Environment and Land Court Act* of 2011.

ii. Section 129 of the Environmental Management and Coordination Act 1999 gives rise to the jurisdiction of the National Environment Tribunal. The long title of this Act is as follows:

"An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and matters connected therewith and incidental thereto."

Any issue on the independence of The Tribunal is to be heard and determined within the jurisdiction of the Environment and Land Court.

iii. The following was the court's contention in Petition No 14 of 2017:

"50. The contention by Mr Omtatah, the petitioner herein, that Tribunals cannot be independent given their mode of appointment was neither supported by evidence nor bylaw."

32. The petitioner herein has raised once again in fresh suit after the Environment and Land Court in Malindi issued a Ruling striking out Petition No. 14 of 2017, the same issues in a fresh suit by concocting new allegations and reintroducing the issues that were previously determined in the Environment and Land Court, Ruling dated 21st March, 2018. I find that notwithstanding the issues that the petitioner has listed in the Petition herein, the main issue relates to the establishment and independence of the National Environmental Tribunal.

33. Similarly the element of what amounts to *res judicata* was clearly set out in the *ELC case No 160 of 2019 Pangaea Holidngs LLC & Another vs. Hacienda Development Ltd & others* . The Court in citing the Court of Appeal case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR* held that:-

"Thus for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms;

a. The suit or issue was directly and subsequently in issue in the former suit.

b. The former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issues was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

34. Having considered all that requirements to be satisfied for a matter to be said to be Res Judicata, I find that the 1st element is satisfied, as the issues in Malindi ELC Petition No 14 of 2017 in which the issues raised thereto are same issues that are raised in this Petition. The 2nd and 3rd elements are satisfied in the Petition following joinder of the National Environment Tribunal as the 4th interested party, and the Attorney General as the 6th respondent. These parties have also been joined in this Petition as the 8th respondent and 3rd respondent respectively. The 4th and 5th elements are satisfied in that the Environment and Land Court at Malindi (Justice Olola) issued a ruling striking out the Petition. The ELC was competent to hear and determine the issues under article 162(2)(b) of the Constitution and section 13 (1) and (2) of the Environment and Land Court Act 2011.

35. In view of the foregoing, I find that this Petition is *res judicata* and petitioner should be barred from re-litigating the issues herein as the same were heard and determined by a court of competent jurisdiction. The Petitioner is simply seeking to re-open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided on by the court in those cases. I find that the case was heard and final decision made and no party should be allowed to engage in continues litigation over the same subject matter whether is piece-meal or not.

B. **WHETHER THE NATIONAL ENVIRONMENTAL TRIBUNAL IS VALIDLY APPOINTED AND CONSTITUTED.**

36. The Tribunal is established under section 125 of the Environmental Management and Coordination Act. The appointment of majority of the members of the Tribunal was predominantly a preserve of the parent ministry (the 2nd respondent in this case) whereas the role of the former Judicial Service Commission was limited to nomination and or recommendation of the Chairperson of the Tribunal. However the provision which was enacted in 2000 is in conflict with the provisions of article 172 of the Constitution and must be read in conformity with the Constitution as required by section 7 of the Sixth Schedule of the Constitution.

37. The Appointment of 4th – 7th respondents on 25th May 2018 was contrary to the Constitution and all the members of the Tribunal should have been appointed only on the recommendation of the Judicial Service Commission.

38. It should be noted and appreciated that the statutory framework governing the 8th respondent is yet to be amended to accord with the new constitutional order and as currently existing limits the 1st respondent's role to appoint the Chairperson of the National Environment Tribunal. Upon expiry of the three (3) year tenure of the 8th respondent's Chairperson (Dr. Jane Dwasi), she requested for renewal of her contract by a letter dated 10th April 2017.

39. In a meeting held on 6th June 2017, the 2nd respondent deliberated on a complaint raised by the 4th to 7th respondent's herein as members of The Tribunal (appointees of the 2nd respondent) against the way Dr. Jane Dwasi, was running and managing the affairs of The Tribunal. It was resolved that a hearing be conducted to interrogate the complaints raised, as the operations at The Tribunal had stalled in the

absence of a Chairperson, the 1st respondent recommended that Dr. Jane Dwasi, be appointed for an interim period of one (1) year to allow her to finalize part heard appeals, that were pending before The Tribunal and allow the 2nd respondent to competitively recruit a replacement.

40. The 1st respondent pursuant to section 125(1) of the Environmental Management and Coordination Act, requested the 2nd respondent for the gazettement of Dr. Jane Dwasi for an interim period of one (1) year by its letter dated 5th September 2017. However, the 2nd respondent frustrated the 1st respondent's efforts to discharge its constitutional and statutory mandate and declined to gazette the said Dr. Jane Dwasi.

41. Section 125 of the Environmental Management and Coordination Act provides:-

"(1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members:-

a. A person nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the Environment and Land Court of Kenya;

b. An Advocate of the High Court of Kenya nominated by the Law Society of Kenya

c. A lawyer with professional qualifications in environmental law appointed by the Cabinet Secretary; and

d. Three persons with demonstrated competence in environmental matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.

(2) All appointments to the Tribunal shall be by name and by Gazette Notice issued by the Cabinet Secretary."

42. From the aforesaid it is clear that there is a clear-cut distinction on appointing authority and a recommending authority. It is my view that when recommending authority recommends person for appointment, then the recommendation is not subject to review, reconsideration and second guessing by the appointing authority, in which case the appointing authority cannot decline to discharge his/her duty.

43. To buttress the above reliance is placed in *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties*) and in upholding its dictum in , it held that:-

> "We entirely agree with the above proposition of the law, that once the 1st Interested Party makes recommendations, the President has no other option but to formalize the appointments. He cannot change the list, review it or reject some names. He cannot even decide who to appoint and who not to appoint. He must appoint the persons as recommended and forwarded to him by the 1st Interested Party."

44. Looking at article 169 of the Constitution, then it can be deduced that the Constitutional intent is that members of the 8th respondent are to be nominated/recommended for appointment by the JSC. Although section 125 of the Environmental Management and Coordination Act has vested the mandate of appointing the other four other members of The Tribunal by the 2nd respondent, this

provision has to be read in conformity with provisions of the Constitution. It is trite law that in any event of a conflict between Statute and the Constitution, the provisions of the Constitution shall prevail.

45. Further it is noted that section 7 of the Sixth Schedule, of Constitution 2010 inter alia provides that:-

> " All law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

46. Reliance in support of the above is placed in the case of *Timothy Njoya & 17 others v Attorney General & 4 others (2013) eKLR* whereby Justices Warsame and Korir observed as follows:-

> " The transitional clauses in the Constitution, and in particular, Section10, save the life of the current Parliament, but makes no mention of the terms and benefits of the members of the National Assembly. The National Assembly Remuneration Act applies with regard to the remuneration of the members of the national Assembly by virtue of section 7 of the Sixth Schedule. The Act however must be read in a manner that conforms to the Constitution as a whole. As such, the national Assembly Remuneration Act must be read with alternations necessary to bring it into conformity with the Constitution." (Emphasis added)

47. I have no doubt that our constitution is transformative in nature and that this Honourable Court has a significant role to play in interpretation of the Constitution as a custodian of the Constitution. I further observance that although The Tribunal contemplated under article 169 of the Constitution, fall within the Judiciary, the transition is not self-executing and requires legislative intervention under article 169(2) of the Constitution.

48. Parliament has not enacted any legislation conferring jurisdiction, functions and powers on The Tribunals established under Articles 169(1) of the Constitution. In a Petition filed before this Honourable Court Petition No. 197 of 2018; *Okiya Omtatah v JSC & others* the failure by the National Assembly to enact the transit the tribunals to the JSC was challenged, having heard the parties, the Court confirmed the position as follows:-

> " There is no doubt that most of the disputes handled by the local tribunals involve the executive. As such, the executive has an obvious advantage given that it is the one responsible with the appointment and removal of the members. In such circumstances, the executive ought not to be the appointing authority. Instead, that duty ought to be undertaken by an independent entity. As said justice should not only be done, but should also be seen to be done. It is worth-noting that such a state of affairs where the Executive overreaches and takes over the mandate of the Judiciary infringes on the independence of the Judiciary. The converse is the remedy. Since the local tribunals are subordinate Courts, ought to be managed by the Judiciary through JSC. In doing so, the constitutional dictates shall be achieved. Needless to say, there will be transparency in the appointments of members. The removal of members will also be done in accordance with the Constitution and the law. In sum, there will be compliance with the Constitution.

49. I find that notwithstanding the lack of enabling legislative framework, the 2nd respondent could only appoint the 4th to 7th respondents on recommendation by the JSC. Failure to do so, rendered the appointments unconstitutional, invalid, null and void. I therefore find that dispite the absence of an overarching legislation, the JSC has proactively taken measures to facilitate the transition of the

tribunals to the Judiciary to the extent possible within the prevailing legislative framework. Further in conforming with provision of the Constitution, the 1st respondent has set up a secretariat to manage the administrative services of the Tribunals. The secretariat is operative and complete with an acting Registrar of Tribunals.

50. The 1st respondent urge that the amendment scuttled the recruitment process, as members of the 8th respondent proceeded to appoint the 5th Respondent as acting Chairperson purportedly under section 125(8) of the Environmental Management & Co-ordination Act. It is further contended that the proper understanding of the effect of amendment is that the National Environment Tribunal which comprises of five (5) members will have three (3) members appointed by the Minister. This essentially means that the three (3) members can influence not only the election of the chairperson to the Tribunal but also the operations of the Tribunal, thus undermining the impartiality and/or independence of the Tribunal.

51. On the constitutionality of the amendment of section 125(1) of the Environment Management & Coordination Act, it has been challenged before this Honourable Court in Petition 268 of 2018 (as consolidated with Petition 251 of 2018) *Okiya Omtatah & 2 others v Attorney General & others*.

52. On issue regarding complaint by the 4th to 7th respondents, the 1st Respondent stated that the same was considered and by a letter dated 26th January 2018, the 4th to 7th Respondents, were informed that the complaint against the chairperson, Dr. Jane Dwasi, was dismissed as it lacked merit.

53. On the issue of alleged failure to consider the complaint by the petitioner against the 4th to 7th respondents, the 1st respondent submits that the 4th to 7th respondents are appointees of the 2nd respondent, the JSC has no disciplinary control over the said members to enable it to address the grievances raised. It is therefore stated that until the legislative framework is enacted to fully transit the 8th respondent to the JSC as intended by article 169 of the Constitution, the proper party to address the complaints was the 2nd Respondent. Therefore, the 1st respondent did not and has not violated the provisions of article 47 and 172 of the Constitution as alleged by the petitioner.

54. It is therefore clear that any such interference by the 1st respondent would amount to usurping the executive's statutory function and mandate. I further find that although the principle of separation of powers incorporates a system of check and balances, its ultimate object which is good governance would be annihilated by the interference by the JSC with respect to members of the Tribunal appointed by the 2nd Respondent. In Speaker of the *Senate & another v The Honourable Attorney General & 4 others,* Njoki, SCJ opined that:-

> " The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicia arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, (their) limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."

55. On issue of whether the Tribunal is validly appointed and constituted, the Tribunal is established and appointment as per EMCA. The petitioner herein has not sought to challenge the establishing Act

and as long as the Act is valid, then it follows the Tribunal remains valid until such a time where the Act shall be declared unconstitutional. The Tribunal is thus established with sanctity and force of law.

56. To buttress the proposition of constitutionality, reliance is placed in the case of *Council of County Governors v the Attorney General and another* (2017) eKLR, where it was held that there is a presumption of constitutionality of statutes.

57. All members of the Tribunal were, appointed by name and by gazette Notice issued by the Cabinet Secretary. The members satisfy the qualifications specified in section 125 (1) of the EMCA 1999. The members of the Tribunal duly elected the 5th Respondent as the Chairperson pursuant to section 125(5) of the EMCA 1999. The Tribunal is established under section 125 of the Environmental Management and Coordination Act 1999. Its establishment and appointment remain valid under the Act. Therefore, the Petitioner's attack on the validity of the Tribunal, its decisions, and mode of appointment holds no water until he demonstrates to this Honourable Court how the establishing Act is unconstitutional. The Tribunal is unimpeachable without evidence of such unconstitutionality.

58. In the instant Petition, petitioner contends that the mode of appointment and the Constitution of the Tribunal vitiate the Tribunal's independence. The petitioner's assertion is a wrong statement of the law as the Petitioner has not provided anything to show that the 4th respondent or any other member is unqualified to be a member of the Tribunal. Neither has he shown how the Independence of the Tribunal has been affected by reason of the Tribunal's membership. This erroneous statement of the law goes further and attacks the unblemished character of the 5th respondent as shown in the heading and body of the Petition: In the matter of the Capture by Vested Interests and the Reduction of the National Environment Tribunal to a Kangaroo Court through irregular and unlawful appointment of members of the tribunal (Emphasis added).

59. In the Petition, I note that the petitioner has failed to provide any evidence showing that the Tribunal has ever failed to discharge its duties under EMCA 1999. The Petitioner has not given any evidence showing that the High Court, under its supervisory jurisdiction (Article 165 of the Constitution), has reprimanded the members of the Tribunal for abandoning their duties in favour of the purported "vested interests". The Tribunal, I find is validly constituted and there is no evidence that its members have abandoned their mandate.

60. Further it is not in dispute that the appointment of members of the Tribunal was subject to the gazette notice No. 8745 of 2016 published on page 4396 of the Kenya Gazette Vol. CXVIII No. 132 issued by the Cabinet Secretary and they were all appointed by name. The members satisfied the qualifications specified in section 125(1) of the Act. The Petitioner is of the view that this mode of appointment and the Constitution of the Tribunal undermines the Tribunal's independence. There is no evidence advanced in support of the allegation therefore the Petitioner's assertion is legally flawed and without any basis.

61. I find no basis in the petitioner's contention that the respondents have violated the Constitution of Kenya for accepting a valid appointment for which they were qualified. It would be absurd if the appointments to the Tribunal would be held to be invalid just because the petitioner is not pleased with its appointees.

62. Section 106 of the Evidence Act is clear that he who alleges must prove. The Petitioner herein has based his claim on sensational drafting and failed to give sufficient and proper evidence in support of his allegations. The Petitioner has taken this court on a stroll and given nothing to support his allegations. A petition placed on air cannot stand. It is bound to fall. I find therefore the petitioner has failed to substantiate his contention that the Tribunal is not validly appointed and constituted.

C. **WHETHER THE PETITION IS AN ABUSE OF COURT PROCESS.**

63. The respondents have issued a Notice of Preliminary Objection on the grounds that the Petition herein is an abuse of the court process. The respondents rely on the case of *Muchanga investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 (2009) eKLR where the Court of Appeal whilst quoting the Nigerian case of *Sarak v Katoye* (1992) (NWL 9pt 264) held that:-

> " The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It is one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice...." The same court gave examples of the abuse of Judicial process to wit:
>
> a. Instituting multiplicity of actions on the same subject matter against the opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
>
> b. Instituting different actions between the same parties simultaneously in different courts even through on difficult grounds.
>
> c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a Respondent's notice.
>
> d. Where there is no ioti of law supporting a court process or where it is premise d on frivolity or recklessness."

64. Further reliance is placed in the case of *Satya Bharma Gandhi v Director of public Prosecutions and 3 others* (2018) eKLR, para 22, where it was held that at any rate, abuse of Court process fortifies the plea of res judicata.

65. In support of the argument that the Petition herein is an abuse of the Court process the respondents contend that the Petitioner herein made similar claims in Malindi ELC Petition No 14 of 2017 *Okiya Omtatah Okoiti v KPLC and 6 others; 4 Interested Parties*. It is worthy to note that the aforesaid Petition was struck out for lack of evidence and lack of supporting law. The petitioner has resurrected the same issue regarding the independence and appointment of the members of the Tribunal in this Petition, with a view to secure failed victory in the past.

66. In the instant Petition, the petitioner has failed to disclose to this Honourable Court the existence of the former case and in fact in paragraph 86 of his Petition on cases related to the Petition he states that there is no pending case over the same subject matter yet he should have disclosed the Malindi ELC Cause in the spirit of disclosure to the Court. It is trite that a patty is under a duty to disclose to the court all relevant information even if it is not to his advantage. Further the petitioner has severally subjected himself to the jurisdiction of The Tribunal and has benefited from The Tribunal's rulings/ decisions. For example in NET. Appeal No 200 of 2017, *Okiya Omtatah Okoiti & another v the National Environment Management Authority and 8 others*). (NET 113 of 2013 *Maraba Lwatingu Residents Association, Andrew Omtatah Okoiti & Oyugi Neto Agostino (suing as Registered Trustees of Kenyan for Justice and Development (KEJUDE) Trust) Nashoro Amis, Mus Rodenyo, Wycliffe Olumasai & 500 others v National Environment Management Authority, Lake Victoria North Water Services Board, Attorney General & County Government of Kakamega* and thereby failing to raise in limine and as a matter of course, the point of the 8th Respondent's jurisdiction or any other objection for that matter as provided for under Rule 9 of the National Environmental Tribunal Procedure Rules, 2003.

67. Further it is contended that the petitioner has chosen to depart from the principle of judicial independence by interfering with the liberty of the Judges of the Tribunal to hear and determine cases that fall within their Jurisdiction. The Principle of Judicial Independence was explicated upon in Civil Application 11 and 12 of 2016 *Kalpana H Rawal and 2 others v Judicial Service Commission and 3 others* [2016] eKLR, as follows:-

> "
>
> "(14) The parity rule in the standing of decisions emanating from the different Judges on superior Court Benches, learned counsel urged, is a meritorious one of principle, which assumes that Judges honestly and dutifully perform their conditionals 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 Beauregard* [1986] 2 SCR 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.""

68. Further it is urged and noted that the subject of the Petition is the term of the Tribunal, which ended on 20th October, 2019. The Petition has been overtaken by events and the Petitioner that notwithstanding wants the Court to engage in a mere academic exercise. The Members of the Tribunal were reappointed in November 2019 and this appointment is not subject to challenge in the instant Petition. The Petition is now moot.

69. In addition to the above it is submitted that the Petitioner in appearing before The Tribunal, he did not raise any objection in limine as to the jurisdiction/composition/validity of the Tribunal and it is only when matter do not go in his favour that he seeks to attack The Tribunal rather than to appeal at ELC Court. This is an abuse of the judicial process. The Petitioner is trying to curtail the administration of justice using court process. In the same case of *Muchanga Investments Ltd v Safairs Unlimited (Africa) ltd and 2 others* (*Supra*) the Court of Appeal held that;

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive."

70. It is further urged that the petitioner's case is mala fides and is not brought with any proper motive. It is contended that the Petitioner is playing lottery with the judicial system and should not be allowed to squander judicial time. Further, the Petition has been overtaken by events having been brought too late in the day. The Appointments were made in 2016, the petitioner sought to bring this Petition in 2018 when The Tribunal's term was about to end. This borders on ulterior motives as all along as he continued appearing before The Tribunal, he did not raise any issue.

71. In *Black Law Dictionary,* a "moot case" is defined as "a matter in which a controversy no longer exists, a case that presents only as an abstract question that does not arise from existing facts or rights" and as a verb, as meaning "to render a question as of no practical significance."

72. In the instant Petition, the petitioner seeks various declarations among them declarations that the appointments of the 4th, 5th, 6th and 7th respondents were invalid, a declaration that the appointees violated the Constitution by accepting the appointments, a declaration that the tribunal as currently constituted is unconstitutional, a declaration that all the decisions made by the currently constituted Tribunal are invalid, null and void for being made without jurisdiction, a declaration that the rights of the Petitioner to a fair trial were violated to the extent that he was compelled to appear before the tribunal among other declarations. He also sought an order quashing gazette Notice No.8745 of 26th October 2016 which announced the appointments to The Tribunal. The said prayers if granted, would be of no effect as the subject matter is spent.

73. It is clear that proceeding to quash the said gazette Notice would be of no effect or value as the same has already been spent. The issue of controversy is over. Issuing of the said declarations is also of no practical value. The petitioner seeks declarations against The Tribunal appointed in 2016 and not the current tribunal which was reappointed. I find where a case is moot it serves no useful purpose and there is no justification for Court to be moved to hear and determine the same as it presents no limine contravening and no party can be prejudiced if the same, is terminated once it becomes moot.

74. I find the Petition herein has been overtaken by events and would amount to an academic exercise to issue orders sought and the Petition should in my view be dismissed as there remains no unresolved justifiable controversy. The suit is a mere wastage of courts valuable time. I am alive to the fact that the Constitution of Kenya 2010 gives everyone a right to appear in court seeking protection of rights, but this right should not be abused by busy bodies playing lottery with court's judicial system and wasting precious court time.

75. From the aforesaid I am satisfied that the respondents have sufficiently demonstrated that this Petition is an abuse of the court process and should be dismissed.

D. WHO SHOULD BEAR THE COSTS OF THE PETITION.

76. It is respondents contention that the petitioner has a history of incessantly instituting frivolous Petitions while slyly labelling them 'public interest litigation'.

77. In *Okiya Omtatah Okoiti v Communications Authority of Kenya and 14 others* [2015] eKLR, Justice Lenaola (as he then was) reprimanded the petitioner herein as follows and ordered him to pay costs:-

> " in my view, this court has a duty to protect the noble motive of public interest litigation from those who file claims out of mischief and less than genuine interest in the guise of protecting a public interest. The filing of false and frivolous public interest litigation which risk diverting the court's attention from genuine cases will not be entertained."

78. The instant Petition is noted herein turns out to have been field out of mischief with no genuine public interest. In fact, the petitioner is guilty of what he wrongly accuses the respondents; as acting on vested private interests. From the sensational language of the Petition to the repetitive abusive lodging of failed claims in this court, the petitioner should be ordered to pay the costs.

79. The Petitioner in opposing payment of costs sought reliance in case of *Kenya Human Rights Commission v Communication Authority of Kenya & 4 others [2018] eKLR* and *Biowatch Trust v Registrar Genetic Resources and 0thers* (CCT 80/08) [2009] ZACC 14."

80. The said case of *Kenya Human Rights Commission v Communication Authority of Kenya & 4 others* [2018] eKLR is distinguishable in that it contained a genuine public interest. In contrast, this Petition has no genuine public interest but is frivolous and vexatious. The case in my view does not aid the Petitioner's argument that he should not pay costs if unsuccessful.

81. It should further be noted that the Petition dies on its own sword by citing the *Biowatch Trust v Registrar Genetic Resources and others* (*supra*) whose holding exposes the petitioner's failure to satisfy the public interest element and in which was held that:-

> " There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigation that deserves censure by the court which may influence the court to order an unsuccessful litigation to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case.

82. Further I have found this Petition is an abuse of the court process and that it had further been overtaken by events yet the Petitioner continued to prosecute the same issue when the Petition had become an academic exercise. I find that there would be no injustice in awarding costs to the Respondents. This further would discipline the Petitioner and other parties who deliberately file cases unnecessary in abuse of the court process and further reduce probability of instituting such frivolous Petitions in the future.

83. Upon consideration of all the pleadings and parties submission, I find merits in the Preliminary Objection raised by the respondents.

84. The upshot is that the Preliminary Objections by 4th, 5th, 6th and 7th respondents are meritorious and are accordingly upheld. I make the following findings:-

    a. The Petition is res-judicata.

    b. The National Tribunal is validly appointed and constituted.

    c. The petition is an abuse of the court process.

    d. Costs are awarded to the respondents against the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF SEPTEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA