



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 311 OF 2019

OKIYA OMTATAH OKOITI.....PETITIONER

-VERSUS-

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. The Petitioner, Okiya Omtatah Okoiti, in his petition dated 6th August, 2019 is seeking the following reliefs:-

(i) A DECLARATION THAT:

- a. **Section 22(2) and (3) of the Statutory Instruments Act, 2013 is unconstitutional and, therefore, invalid, null and void.**
- b. **Legal Notice No. 113 of 31st July, 2019 is unconstitutional and, therefore invalid, null and void.**

(ii) AN ORDER:

- a. **QUASHING both Section 22(2) and (3) of the Statutory Instruments Act, 2013 and the Legal Notice No. 133 of 31st July, 2019.**
- b. **COMPELLING the respondent to bear the costs of this suit.**

(iii) Any other relief the court may deem just to grant.

2. In the petition, which is supported by an affidavit sworn by the Petitioner on the date of the petition, it is alleged that the Respondent, the Attorney General, herein has violated Articles 1, 2, 3(1), 4(2), 10(2), 47(1), 48, 50(1), 73, 75(1), 93(2), 94(4), 129, 131(2)(a), 159(1), and 259(1) of the Constitution.

3. The Petitioner brings the petition to challenge the Attorney General's alleged retrospective exercise of powers under Section 22(2) of the Statutory Instruments Act, 2013 ("S.I.A.") by issuance of a certificate vide Legal Notice No. 133 of 31st July, 2019 declaring that three statutory instruments which were not tabled before the National Assembly by the Central Bank of Kenya "**are not statutory instruments within the meaning of the Statutory Instruments Act, 2013.**" It is the Petitioner's case that said three legal instruments being Legal Notice No. 235 of 7th December, 2018; Legal Notice No. 72 of 31st May, 2019; and Kenya Gazette Notice No. 4849 of 31st May, 2019 which all related to the issuance of new Kenyan currency did not comply with Section 11(1) & (2) of the S.I.A. as they were not taken to the National Assembly within seven days of their publication. The Petitioner claims that he therefore has a legitimate expectation that the failure to comply with the provisions of the S.I.A. renders the instruments void.

4. The Petitioner terms the powers vested on the Respondent by Section 22(2) and (3) of the S.I.A. as unnecessary stating at paragraph 13 of his petition that "**if something is already a statutory instrument, then it is a statutory instrument and there is nothing like the Hon. General determining whether a statutory instrument is a statutory instrument**". The Petitioner further asserts that the impugned provisions are vague, incoherent and meaningless and therefore this Court should declare them invalid, null, and void under the legal doctrine of void for vagueness.

5. It is the Petitioner's case that there is no dispute as to whether the said notices are statutory instruments and the Respondent must explain why he determined that the notices are not statutory instruments, as statutory powers are meant to be exercised in a transparent manner. The Petitioner postulates that there is a difference between a statutory instrument which is issued in pursuit of specific powers granted under an Act of Parliament such as in this case and an instrument issued for general information to the public such as Legal Notice 9290 of 24th December, 2014 advising the public of the introduction of the Government Services Digital Payments Programme.
6. The Petitioner avers that the power of the Attorney General to declare that a statutory instrument is not a statutory instrument can only be exercised before the statutory instrument is published. Furthermore, it is posited that the power in Section 22(2) of the S.I.A. can only be engaged if a question is raised as to whether a particular legal notice is a statutory instrument. Further, that the powers conferred under Section 22(2) & (3) should be exercised before a statutory instrument is voided by Section 11(4) of the S.I.A. The Petitioner posits that once an instrument is voided, it ceases to exist and there is no dispute over it.
7. The Petitioner asserts that no question arose as to the validity of the notices until he himself brought it into question by his letter to the Clerk of the National Assembly dated 26th June, 2019 which was responded to 27th June, 2017. According to the Petitioner, it is against the principles of good governance and accountability for the Attorney General to claim that the three notices are not statutory instruments merely as a means to defeat the course of justice.
8. The Petitioner further contends that the general provisions of Section 22(2) & (3) of the S.I.A. cannot be used to overturn the definition of 'statutory instrument' which is provided under Section 2 of the Act. It is further asserted that the President is expressly forbidden by Articles 129 and 131(2)(a) of the Constitution, and Parliament is expressly forbidden by Articles 93(2) and 94(4) of the Constitution, from conferring on the Attorney General functions such as those under Section 22(2) & (3) of the S.I.A. because they violate Article 50(1) of the Constitution.
9. The Petitioner asserts that the Attorney General cannot resolve disputes that require the application of the law, as such disputes can only be decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. It is averred that according to Article 156 of the Constitution the Attorney General is neither a court nor an independent and impartial tribunal or body.
10. The Respondent filed a reply dated 28th August, 2019 to the petition in which it is asserted that the Respondent acted *intra vires* the provisions of Section 22(2) of the S.I.A. which provisions at all times enjoy the legal presumption of constitutionality and therefore his actions were lawful and constitutional.
11. The Respondent contends that an application of the plain and ordinary meaning of the words in the impugned provisions give a clear and unambiguous meaning and therefore the provisions cannot be unconstitutional on unsubstantiated claims of vagueness.
12. It is alleged that the Petitioner has not demonstrated with specificity any breach of the Constitution, and that the petition is not supported by any evidence of probative value. The Respondent contends that the Petitioner's challenge to the exercise of statutory powers is an improper invocation of the High Court's jurisdiction under Articles 165(3)(b) or (3)(d) of the Constitution.
13. The Respondent insists that the notices are not statutory instruments within the meaning of the S.I.A. and asserts that the Petitioner is using this petition as a basis to seek information from the Respondent.
14. The Petitioner filed a supplementary affidavit which he swore on 30th August, 2019, in which he claims that there is no evidence of a question arising as to whether the three notices were statutory instruments. The Petitioner further alleges that the impugned actions of the Respondent were a response to his petition in **Nairobi HC Petition No. 214 of 2019, Okiya Omtatah Okioti v The Central Bank of Kenya & 2 others** in which he disputes the constitutional and legal validity of the three notices which the Respondent says are not statutory instruments.
15. The Petitioner reiterates that the wording of the impugned provision of the S.I.A. is ambiguous, confusing, prone to be misunderstood, and vague to the extent that it does not state at what point the Attorney General is to exercise the said powers, and who is entitled to raise the question as to whether a statutory instrument is a statutory instrument.
16. The Petitioner asserts that the Respondent's statement that **"the provisions of Section 22(2) of the Statutory Instruments Act are manifestly in respect to questions as opposed to disputes"** is meritless as the High Court has jurisdiction to determine questions under Article 165(3)(d) of the Constitution.
17. The Petitioner claims that the Respondent cannot declare the notices not to be statutory instruments as such a decision can only be made by the Attorney General in exercising his advisory jurisdiction as the principal legal advisor to the Government under Article 156(4)(a) of the Constitution to advise regulation making authorities whether an administrative pronouncement they wish to publish in the Gazette, such as announcing a public holiday, is a statutory instrument. This advisory, he states, would be in response to a question by a regulation making authority as to whether or not the authority's intended pronouncement has the force of law. It is further contended that such a determination can only be made before gazetting of a statutory notice.
18. It is the Petitioner's averment that the exercise of any statutory power is done subject to the supervisory jurisdiction of the High Court to determine whether the exercise of such power violates rights and fundamental freedoms in the Bill of Rights, and whether any actions taken or decisions made are inconsistent with the Constitution.
19. It is further asserted that this Court should take into account the fact that Legal Notice No. 235 of 7th December, 2018 and Legal Notice No. 72 of 31st May, 2019 were published as Kenya Subsidiary Legislation Supplements of the Kenya Gazette. It is alleged that the Kenya Gazette Notice No. 4849 of 31st May, 2019 is a legal notice wrongfully published as a gazette notice, as it pronounces the law and was issued

to repeal or amend Legal Notice No. 17 of 18th January, 1995; Legal Notice No. 88 of 17th June, 1998; and Legal Notice No. 13 of 1st March, 2004, which can only be done by a legal notice.

20. The Petitioner accuses the Respondent of lack of transparency and accountability in the decision to issue the impugned Legal Notice No. 133 of 31st July, 2019 and asserts that the said Legal Notice was issued in a desperate and unlawful attempt to cover up for the fatal failures of the Cabinet Secretary for Finance and the Central Bank of Kenya to table the notices in Parliament as required by the law.

21. By way of written submissions dated 30th August, 2019, the Petitioner identifies the issues for the determination of the Court as jurisdiction of this Court to entertain the petition; whether there was public participation relating to the issuance of Legal Notice No. 133 of 31st July, 2019; whether Legal Notice No. 133 of 31st July, 2019 is unconstitutional, and therefore invalid, null and void; the constitutionality of Section 22(2) and (3) of the S.I.A.; whether the Respondent violated the Petitioner's legitimate expectations; and whether costs should be awarded.

22. On the question of jurisdiction, the Petitioner appreciates that as was held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1** jurisdiction is everything and without it a court has no power to make one more step. Also cited in regard to the issue of jurisdiction are the Supreme Court decisions in **Re the Matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011**; and **Samuel Kamau v Kenya Commercial Bank & 2 others [2012] eKLR**.

23. The Petitioner submits that this Court is vested with the jurisdiction to determine whether the issues complained of herein violates the provisions of the Constitution. He asserts that this Court is empowered under Articles 22(1) & (2)(c) & (d) and 258(1) & (2)(c) & (d) of the Constitution to hear and determine petitions as was pronounced in **Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016] eKLR**. The Petitioner buttresses this point by relying on the holding in **Cohens v Virginia 19 US 264 (1821)**.

24. It is the Petitioner's submission that there is no evidence to prove that Legal Notice No. 133 of 31st July, 2019 was subjected to public participation. Further, that there was no public participation in determining that the three notices were not legal instruments. The Petitioner places reliance on Articles 10, 4(2), 201(a), 232(1)(d), 73 and 47 of the Constitution, and sections 2, 4 and 5 of the Fair Administrative Action Act, 2015 on public participation, as well as the Guidelines for Public Participation in Policy Formulation, and Section 12 of the Public Service (Values and Principles) Act No. 1A of 2015. The Petitioner also relies on the case of **Republic v Ministry of Finance & another Ex-parte Nyong'o & 2 others [2007] 2 KLR 299**; **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission, Petition No. 294 of 2013**; **Nairobi Petition No. 318 of 2012, Law Society of Kenya v Attorney General**; and **Doctors for Life International v The Speaker National Assembly and others [2006] ZACC 11** where the courts determined that it was important to involve the public in the legislative process.

25. Although the Petitioner recognises that the Respondent has discretion as to how to achieve the objective of participation, he submits that the Respondent must ensure that there is a reasonable level of participation by the public. This submission is supported by the cases of **Minister of Health and another NO v New Clicks South Africa (Pty) Ltd & others [2006] (2) SA 311 (CC)**; **Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others**; **Robert N. Gakuru & others v Governor, Kiambu County** (citation not provided); **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**; and **In the Matter of the Mui Coal Basin Local Community [2015] eKLR**.

26. The decision of the Court of Appeal in **Dr. Christopher Ndarathi Murungaru v A.G. & another, Civil Application No. Nai. 43 of 2006 (24/2006)** is cited in support of the Petitioner's assertion that the people of Kenya have chosen the path of democracy and the rule of law and the courts must stick to that path. Consequently, the Court is urged to find Legal Notice No. 133 of 31st July, 2019 invalid, null and void *ab initio* and quash it.

27. On the third issue, the Petitioner submits that the Respondent lacked jurisdiction to invoke the powers under Section 22(2) of the S.I.A. as there was no question raised as to whether the three notices were statutory instruments or not. The Petitioner contends that the Central Bank of Kenya believed that it was issuing statutory instruments and the Attorney General cannot therefore assert otherwise.

28. The Petitioner contends that Section 22(2) of the S.I.A. can only apply "*if a question arises*" and according to Article 10 of the Constitution, the Respondent must disclose who raised the question. It is averred that no question arose concerning the statutory instruments until their legality was brought into question in **Petition No. 214 of 2019**, and therefore it would be against the constitutional principles of good governance and accountability to claim that the impugned legal notices are not statutory instruments in order to defeat the course of justice and rule of law.

29. It is urged that under Section 11 of the S.I.A. the Cabinet Secretary for the National Treasury & Planning and the Governor of the Central Bank of Kenya had joint and individual responsibility to table the legal notices before the National Assembly within stipulated time but they failed to do. The Petitioner opines that this Court cannot therefore breathe life into instruments that died upon the expiry of the set time. The Petitioner asserts that the Respondent has a duty to explain to the Court how the Central Bank of Kenya was meant to discharge its legal obligation regarding the issuance and withdrawal of currency notes without using statutory instruments.

30. The Petitioner asserts that the Attorney General has failed to give reasons for making the impugned declaration. Further, it is contended that the power under Section 22(2) of the S.I.A. as read with Article 156(4)(a) of the Constitution can only be invoked before the instrument in issue is gazetted. The Petitioner claims that the issue herein is the constitutionality or legal validity of the statutory instruments and not whether they are indeed statutory instruments. It is the Petitioner's position that Legal Notice No. 133 of 31st July 2019 is therefore invalid.

31. On the fourth issue, it is the Petitioner's submission that Section 22(2) of the S.I.A. is unconstitutional as it purports to vest the Attorney General with judicial powers contrary to Articles 50(1) and 159(1) of the Constitution. Further, that the provision is so vague that it renders itself meaningless and therefore invalid, null and void.

32. On the fifth issue, the Petitioner submits that he has a legitimate expectation that the Respondent would not act outside the law by taking administrative action that has adverse effects on the population.

33. As regards the issue of costs, the Petitioner cites the case of **Erick Okeyo v County Government of Kisumu & 2 others [2014] eKLR** and urges that he should be rewarded with costs for bringing this matter to attention of the public. It is the Petitioner's case that in the event that the petition is not successful, the Court should rely on the decision in the South African case of **Biowatch Trust v Registrar Genetic Resources & others (80/2008) [2009] ZACC 14** where it was held that although the general rule is that the unsuccessful litigant should be ordered to pay costs, the court should be cautious in awarding costs against litigants seeking to enforce their constitutional rights against the State.

34. The Respondent filed submissions dated 30th August, 2019, and submits that the issues for the determination of the Court are whether his decision is legal and the constitutionality of Section 22 of the S.I.A.

35. On the first issue, the Respondent asserts that the power under Section 22(2) of the S.I.A. is expressly conferred in the text of the statute, and that the impugned provision permits application of its plain ordinary meaning. The Respondent relies on the holding in **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR** to buttress his contention that he was justified to act on the strength of the said provision as it is *prima-facie* constitutional in the absence of a court determination to the contrary.

36. On the doctrine of the presumption of constitutionality of statutes, the Respondent cites the decisions in **Ndayanabo v Attorney General [2001] EA 495; Hamdard Dawakhana v Union of India & others [1960] AIR 554; Susan Wambui Kaguru & others v Attorney General & another [2012] eKLR**. Relying on the cited authorities, the Respondent contends that his action was premised on express conferment of discretion by legislation as contemplated under Article 156 of the Constitution and was lawful on the basis of applicable jurisprudence presuming constitutionality of statutory provisions.

37. On the matter of the propriety and *bona fides* of the Respondent's decision regarding the three legal notices, it is submitted that not all legal instruments are statutory instruments and the character and purpose of an instrument is what determines if it is a statutory instrument. Reliance is placed on the decision in **Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-Parte: Francis Andrew Moriasi [2019] eKLR** in support of the submission.

38. The Respondent submits that in accordance with Article 231(2) & (3) of the Constitution, the Central Bank of Kenya was exercising its constitutional function of issuing currency and it could not be controlled or directed by any person or authority. It is asserted that the Legal Notice 235 of 10th December, 2018 was a legal instrument issued to notify the public of the issuance of new currency by the Central Bank in the exercise of its constitutional function. Therefore, it is submitted that the notice is not legislative in character and therefore is excluded from parliamentary direction or control.

39. In regard to Legal Notice No. 72 of 31st May, 2019, it is submitted that the same was a legal instrument with the single purpose of notifying the public of the issuance of new currency notes and was not legislative in character. It is urged that Gazette Notice No. 4849 invokes the Constitution, and its issuance was merely to notify the public of the withdrawal of the old currency. It is therefore the Respondent's contention that the legal notices are not legislative in nature but administrative in character.

40. On the question as to who asked the Respondent to make a determination as to whether the legal notices were statutory instruments, the Respondent states that the issue was raised in the letter addressed to the Respondent by the Clerk of the National Assembly. It is further contended that the Petitioner cannot purport to have asked that question. Reliance is placed on the case of **Andrew Omtatah Okoiti v Attorney General & 2 others [2011] eKLR** for the proposition that an applicant must first demonstrate that a request for the information required was made to the State and the request was disallowed before moving the court. The Respondent denies the Petitioner's allegation that he acted in a manner that was not transparent stating that his decision was indeed disclosed and published vide Legal Notice No. 133 of 31st July, 2019.

41. On the second issue, the Respondent relies on the determination in **Geoffrey Adare v Attorney General & 2 others [2016] eKLR** to support his submission that Section 22 of the S.I.A. is so clear that it is not capable of varied interpretation and cannot therefore be declared unconstitutional on account of being vague.

42. In response to the Petitioner's allegation that Section 22(2) of the S.I.A. is contrary to Article 50(1) of the Constitution, it is submitted that it is clear that what the impugned Section addresses is a question whereas Article 50 is applicable in the context of a dispute.

43. I have carefully considered the substance of the petition, the responses, and submissions and conclude that the issues for determination in this matter are the jurisdiction of the Court; and the constitutionality of Section 22(2) & (3) of the S.I.A. Any other question arising will be arising in the context of those two issues.

44. The Respondent contends that the Petitioner's challenge to his exercise of statutory powers is an improper invocation of the High Court's jurisdiction under Articles 165(3)(b) or (3)(d) of the Constitution. The Petitioner, however, contends that the Court has jurisdiction under Article 165(3)(d) of the Constitution to determine his petition.

45. Article 165(3)(b) & (d) of the Constitution grants the High Court:-

“(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

- i. the question whether any law is inconsistent with or in contravention of this Constitution;
- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- iv. a question relating to conflict of laws under Article 191.”

46. The extent of the Court’s jurisdiction under the cited provisions was stated in **Juma Nyamawi & 7 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR**, where the Court cited with approval the decision in **A.O.O. & others v Attorney General & another [2017] eKLR** for the holding that:-

“68. [...] Article 165 (3) (d) (i) & (ii) of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the constitution...The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by the Constitution and must interpret it when a dispute so requires.”

47. Additionally, in the case of **Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR** it was held that:-

“38. Article 165(3) of the constitution confers on this court with very wide jurisdiction to deal with any matter that falls within its jurisdiction. That jurisdiction is not exhaustive given that Article 165(3) (e) states that the court can have any other jurisdiction, original or appellate, conferred on it by legislation. In terms of Article 165(3) (d) (ii), the court has jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the constitution. Article 23(1) also states that the court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. This jurisdiction is to be exercised in accordance with Article 165 of the Constitution. Article 23(3) of the constitution undoubtedly confirms the extent of the width of the jurisdiction of this court to grant appropriate relief.”

48. In **Republic v Secretary of the Firearms Licensing Board & 2 other Ex-parte: Senator Johnson Muthama [2018] eKLR**, the Court posited that:-

“25. On the arguments by the Respondents as regards this Court’s interference with the duties bestowed on other agencies of government, this issue was addressed in the landmark decision by the United Kingdom’s House of Lords in Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374, where it was held that it is no longer constitutionally appropriate to deny the Court supervisory jurisdiction over a governmental decision, merely because the legal authority for that decision rested on prerogative rather than statutory powers. Rather, that the Courts intervention should be governed by whether or not in the particular case the subject matter of the prerogative power is justiciable.”

49. It was further stated that:-

“28. In the present application the Applicant is challenging the exercise of the 1st Respondent’s statutory powers under the Firearms Act, and in particular alleging that his rights to fair administrative action have been infringed in the exercise of that power. This is thus a function and power that is not only amenable to judicial review, but is also justiciable, and therefore within the jurisdiction of this Court.”

50. The cited decisions demonstrate that the High Court has supervisory jurisdiction over the actions and decisions of government agencies established under the Constitution or under any statute. The High Court is granted the authority to review the actions and decisions to ensure that they are not only in accordance with the invoked statute, but that they are also in conformity with the Constitution.

51. The office of the Attorney General is established under Article 156 of the Constitution, which also outlines the functions and purpose of the office. The constitutional mandate of the Attorney General is further elaborated in the Office of the Attorney General Act, 2012. It goes without saying that the Attorney General must exercise his functions in accordance with the Constitution, and every decision made and action taken will be scrutinised against the provisions of the Constitution.

52. As already pointed out, the High Court is clothed with the constitutional authority to investigate the question as to whether a government agency or body has violated the Constitution, and therefore this Court is well placed to ascertain whether the decision by the Attorney General offended the provisions of the Constitution or statute. It is therefore my finding that on this particular aspect of jurisdiction this Court has the jurisdiction to hear and determine this petition.

53. However, there is another aspect of jurisdiction specific to this case which needs to be addressed by this Court. I am surprised that the parties and in particular the Respondent did not raise this issue. The question is whether these proceedings are an abuse of the court process.

54. In **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] eKLR**, the Court while discussing the concept of abuse of court process stated that:-

“The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.^[7] The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions 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 court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.^[8]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.^[9]”

55. The reasons why the concept of abuse of court process is important to the dispensation of justice was explained by Lord Bingham in *Johnson v. Gore Wood & Co.* [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72 (14th December, 2000) as follows:-

“It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter," 19 Civil Justice Quarterly, (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

56. It is unfortunate that the parties did not address this pertinent issue of abuse of the court process. In my view the instant petition is an abuse of the court process. For lack of a better word, I will term the petition as “*subversive litigation*.” The Petitioner surreptitiously seek to overturn the decision of the bench of three judges in the case of *Simon Mbugua & another v Central Bank of Kenya & 2 others* [2019] eKLR; *Nairobi HC Consolidated Petitions No. 210 & 214 of 2019*. It is necessary to reproduce that judgement at length in order to appreciate my observation. This is what the Court said:-

“The 2nd Petitioner contended that issuance of the new notes and coins did not comply with the Constitution and section 22 (1) of the CBK Act. The 1st Petitioner was silent on this issue.

142. The 2nd Petitioner contended that the bank failed to issue the requisite Legal Notice to release the new currency into circulation. He contended that *Legal Notice No. 235 of 7th December 2018*; *Legal Notice No. 72 of 31st May 2019*; and, *Gazette Notice No. 4849 of 31st May 2019* did not amount to the contemplated notices under section 22 (1) of the CBK Act. He further submitted that they violated *Articles 10, 47, 129, 153(4)(a), 210(a) and 232(1)(d)* of the Constitution as read with Sections 4, 5, 6, 7, 8 and 11 of the Statutory Instruments Act (hereafter *the SIA*) and Sections 3, 4 and 5 of the Fair Administrative Action Act.

143. He also submitted that in any case the above notices ought to be *statutory notices* under the SIA; and, that the 1st Respondent was required to fully comply with the Act including the preparation of a Regulatory Impact Statement and to forward the notices to Parliament for scrutiny. He argued that in the circumstances the legal notices are unconstitutional.

144. The 2nd Petitioner also challenged the constitutionality of Section 22(2) of the SIA which empowers the Attorney General to resolve any matter on whether a document is a statutory instrument. He said that the *Legal Notice No. 133 of 31st July 2019* which exempted the three notices from the provisions of SIA was unlawful.

145. All the Respondents submitted that the impugned notices are not statutory instruments. They relied on the Certificate issued by the 3rd Respondent in *Legal Notice No. 133 of 31st July 2019*.

146. We have studied the impugned notices. *Legal Notice No. 235 of 7th December 2018* is on the description of the new issue of coins whereas *Legal Notice No. 72 of 31st May 2019* is on the description of the new issue of the notes. *Legal Notice No. 4849 of 31st May 2019* is on the withdrawal of the old generation Kshs 1,000 notes and the cessation of the said notes to be legal tender. *Legal Notice No. 133 of 31st July 2019* is a Certificate by the 3rd Respondent exempting all the earlier three legal notices from the provisions of the SIA.

147. There was however a very significant development which we must first address. It was brought to our attention by the 2nd Petitioner and the Respondents that the 2nd Petitioner filed Nairobi High Court Constitutional Petition No. 311 of 2019 *Okiya Omtatah v AG* which is still pending. That suit challenges the constitutionality of Section 22(2) and (3) of the SIA and also the constitutionality of *Legal Notice No. 133 of 31st July 2019*.

148. In the instant consolidated petitions, there is no prayer to declare Section 22(2) and (3) of the SIA unconstitutional. As of now the two provisions above are still in force. They were the foundation of the certificate by the 3rd Respondent dated 31st May 2019 exempting the impugned three notices from the purview of the SIA. The 2nd Petitioner's contention on the three notices is thus without legal foundation.

149. The 2nd Petitioner further contended that even if the notices were not *statutory instruments* they still did not qualify as *notices* issued under Section 22(1) of the CBK Act. He posited that the 1st Respondent failed to issue *Legal Notices* under that section but instead issued them under Section 22(2) of the Act. In his view that was an incurable defect and accordingly the new currencies now in circulation are dummies and not legal tender.

150. The 2nd petitioner further took issue with the official launch and declaration by the 2nd respondent at the Narok Stadium on 1st June 2019 which purported to declare the new notes as legal tender.

151. In reply to that argument, all the Respondents submitted that the bank fully complied with the law in declaring the new currencies as legal tender.

152. Sections 22 (1) and (2) of the CBK Act provide as follows:

(1) *The Bank shall have the sole right to issue notes and coins in Kenya and, subject to subsection (4), only those notes and coins shall be legal tender in Kenya:*

Provided.....

(2) *The denominations, inscriptions, forms, material and other characteristics of the notes and coins issued by the Bank shall be determined by the Bank in consultation with the Minister, and shall be notified in the Gazette and in other media of public information likely to bring them to the attention of the public.*

153. We find that a *Legal Notice* ought to issue under Section 22(1) but a *Gazette Notice* under Section 22(2) would suffice. The place of a *Gazette Notice* was well explained by the Supreme Court in *Hassan Ali Joho and Another v. Suleiman Said Shahbal & 2 others* Petition No. 10 of 2013 [2014] eKLR:

[99] We are of the view that gazettelement (Section 76 of the Elections Act) is one of the mechanisms through which the State publishes information to the public. The public nature of elections demands that the outcome of the polling is shared with the public. This is done in various ways, but most importantly, through a Gazette Notice, which forms part of Government records. Further, public information thus published, can be adduced as evidence in a Court of Law, pursuant to the provisions of the Evidence Act (Cap. 80, Laws of Kenya). The purpose of the Gazette Notice, in view of the process detailed in this judgment, cannot be termed as the instrument of declaration of the election results.....

154. *Article 260 of the Constitution defines gazette as the “Kenya Gazette published by authority of the national government, or a supplement to the Kenya Gazette”. It also defines a document to include “electronic files”. The Constitution does not dictate the format that the gazette must take. It is clear to us that the gazette can then be published in hard copy or electronic copy.*

155. *A Gazette Notice is therefore a communication, announcement or publication by anyone including a private citizen, corporates, government, or any other entity to the general public through The Kenya Gazette which then forms part of Government records.*

156. *However, in view of the purpose of the notices and upon a closer look at the provisions of Section 22(1) and (2) of the CBK Act and in the unique circumstances of this case we find that notices under the two sub-sections can be issued under one notice and that the resultant notice can only be a Legal Notice which was the case in this matter.*

157. *With regard to the official launch at Narok Stadium and the media notices, press releases and speeches we find that section 22 (2) allowed the 1st respondent to notify the public through the Gazette and “in other media of public information likely to bring them to the attention of the public”. We accordingly find that the launch was lawful.”*

57. A reading of the decision clearly shows that the Court fully addressed and made findings on the constitutionality and legality of Legal Notice No. 235 of 7th December, 2018; Legal Notice No. 72 of 31st May, 2019; and Kenya Gazette Notice No. 4849 of 31st May, 2019. Although this petition appears to be targeted at the decision made by the Attorney General through Legal Notice No. 133 of 31st July, 2019 declaring that the said notices were not statutory instruments, the truth of the matter is that a finding in favour of the Petitioner will overturn the decision already made by a Court of coordinate jurisdiction in respect of the validity of Legal Notice No. 235 of 7th December, 2018; Legal Notice No. 72 of 31st May, 2019; and Kenya Gazette Notice No. 4849 of 31st May, 2019. This Court does not have jurisdiction to proceed in the manner the Petitioner wants it to do. I do not understand why the Petitioner decided to file a fresh case over an issue that could have been raised through an amendment in his petition challenging the legality of the new currency notes. In my view, the Petitioner’s actions amounts to an abuse of process and his petition is for dismissal on that ground alone.

58. I will, however, proceed to address the constitutionality of Section 22(2) & (3) of the S.I.A. least I be accused of determining this petition on technicalities. Section 22 of the S.I.A. empowers the Attorney General as follows:-

“22 .(1) Subject to subsection (2), every statutory instrument shall be published in the Kenya Gazette and shall be assigned a serial number as of the year in which it is made which shall be printed on the face of the statutory instrument.

(2) If a question arises as to whether statutory instruments under any provision of an enactment are statutory instruments the Attorney-General may, by certificate in writing, decide the matter.

(3) Every certificate under subsection (2) shall be published in the Gazette.”

59. The Petitioner calls into question the constitutionality of Section 22(2) & (3) of the S.I.A. It has already been established that this Court has the jurisdiction to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. It is, however, important to acknowledge at the outset the principle of constitutionality which connotes that all statutory laws and provisions are deemed to be constitutional until otherwise established. This principle has been stated in several decided cases, one of them being **Okiya Omtatah Okioti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR** where it was held that:-

“88. Indisputably, there exists a presumption as regards constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles. But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits.”

60. The burden of proof therefore lies on he who alleges the unconstitutionality of a statutory provision to demonstrate the alleged unconstitutionality. The Petitioner claims in his supplementary affidavit sworn on 30th August, 2019 that the impugned provisions are unconstitutional as they are vague, incoherent and meaningless, and that the *“conditional contradicts the premise.”* The Respondent’s reply is that the plain and ordinary meaning of the words in the impugned provision does not disclose any vagueness.

61. In the case of **Katiba Institute & another v Attorney General & another [2017] eKLR** it was held that when determining whether a provision is ambiguous and vague, the court must look at the effect of the ambiguity and vagueness. This is what the Court said:-

“71. [...] In our view, ambiguity or vagueness in statutory provision makes that provision void. A provision will be said to be void where when the average citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality.”

62. The Court cited with approval the holding in **Olum & another v Attorney General [2002] 2. E.A.** where the Constitutional Court of Uganda 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...”

63. In determining whether a legal provision is constitutional, one must also look at the words used in the provision itself, to determine whether the same are ambiguous. In the Court of Appeal case of **Abdi Sitar Yusuf v Attorney General & 2 others [2013] eKLR** the judges held that when courts are interpreting a statute they must give the words their ordinary and plain meaning. The Court further held that, even where the words themselves are ambiguous, the court may consider the context of the words.

64. The Petitioner claims that the controversy around Section 22(2) of the S.I.A. is that the phrasing is contradictory when read against Section 2 of the same Act. Section 2 sets out clearly and precisely what is to be considered a statutory instrument. Section 2 leaves no question in the mind of any reader as to what constitutes a statutory instrument. If an instrument has been tested against Section 2 of the Act and has been determined to be a statutory instrument, then it would lead any reasonable person to believe that the same is a statutory instrument.

65. The wording of Section 22(2) of the S.I.A. remains clear and precise in my mind. The provision expressly allows for a question to be raised as to whether a document is a statutory instrument. This provision is not vague in any way, and cannot be misconstrued or confuse anybody as to its meaning and purpose.

66. The Petitioner further claims that the impugned provisions are unconstitutional as they confer the Attorney General with judicial powers contrary to Article 50(1) & 159(1) of the Constitution.

67. According to Article 156(4) of the Constitution, the Attorney General shall be the principal legal adviser of the Government, and shall represent the national government in court or any other legal proceedings. Moreover, according to Section 5 of the Office of the Attorney General Act, 2012, the Attorney General is responsible for advising government ministries, departments, constitutional commissions and State corporations on legislative and other legal matters, including matters relating to the Constitution. The Attorney General also performs the function of drafting legislative proposals for the government; negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties; and representing the national government in all civil and constitutional matters.

68. The powers and responsibilities of the Attorney General have come into question in several litigations including **Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] eKLR** where it was held that:-

“56. It is notable in this respect that that the Office of the Attorney General is an office in the Executive arm of Government, and its functions of legal services as set out in Article 156 of the Constitution and section 4 of the Office of the Attorney General Act vis-à-vis Constitutional Commissions, State Corporations and other Governmental bodies is advisory. Advice is defined as the “guidance offered by one person, especially a lawyer, to another” (Black’s Law Dictionary, Ninth Edition at page 63)...”

69. It was additionally stated that:-

“24. It is notable in this respect that the Respondent is expressly granted two types of powers in this regard under the Office of the Attorney General Act. The first type of power is an executive power to provide directions and practice notes to officers to whom the Act applies. Section 18 provides for this power as follows:

(1) The Attorney-General shall exercise powers, issue directives or practice notes to any officer to whom this Act applies for the purpose of maintaining standards and uniformity.

(2) The directives or practice notes issued pursuant to subsection (1) shall be in such form and manner as the Attorney-General may determine.

25. The second power is an express legislative power to make regulations which is granted under section 32 of the Act as follows:

“The Attorney-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed or carrying out or giving effect to this Act.”

70. The role of the Attorney General was expressed in **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR** thus:-

“29. The Legislature, after enacting statutes becomes functus officio so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret.”

71. Reading Section 22(2) of the S.I.A. in isolation gives the impression that the provision bestows power upon the Attorney General to interpret and apply Section 2 of the Act hence usurping the role granted to the courts to interpret the laws of the land. Nevertheless, it is only after considering Section 22(1) that one will be able to understand that the power granted to the Attorney General by Section 22(2) is a projection of his constitutional mandate of being the principal legal adviser for the national government. The introductory words used in Section 22(1) are **“subject to subsection (2)”**, meaning that any action under Section 22(2) should precede any publication in the *Kenya*

Gazette. The question to the Attorney General should arise before publication in the Gazette and most probably originate from the maker of the instrument who is not sure if the instrument attracts compliance with the provisions of the S.I.A.

72. My understanding of Section 22 of the S.I.A. is that it does not allocate the Attorney General any powers beyond those granted to him by the Constitution. The provision gives power to the Attorney General to advise the Government and its agencies whenever a question arises as to whether a proposed document is a statutory document for the purposes of the S.I.A. That is a power which directly springs from the Constitution. As correctly submitted by the Attorney General, not all things published in the Kenya Gazette are statutory instruments for the purposes of the S.I.A. In that regard it was held in the case of **Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-Parte: Francis Andrew Moriasi [2019] eKLR** that:-

“26. From the definition given above of statutory instruments, and the powers granted to the Respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies....

27. There is no reference in the Circular dated 1st March 2018 to any statutory provision empowering the said Guidelines, or to indicate that the same were being made in exercise of any legislative powers. It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the Respondent, and that its purpose was clearly stated to be explanatory. It is therefore not a statutory instrument as envisaged by the Statutory Instruments Act, and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication.”

73. It is my finding and holding that Section 22 of the S.I.A. does not usurp judicial functions and neither is it vague. The power donated to the Attorney General therein squarely falls within the constitutional and statutory mandate of the Attorney General. The claim by the Petitioner that the said provision is unconstitutional is therefore without merit.

74. The question as to whether the Attorney General abused his powers by invoking Section 22 of the S.I.A. is a question that I will not answer. Doing so will amount to allowing the Petitioner to abuse the court process by seeking a second opinion on a matter already adjudicated by a panel of three judges.

75. For the reasons stated in this judgement I find that this petition lacks merit in its entirety. The petition is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi through video conferencing/email this 25th day of June, 2020.

W. Korir,

Judge of the High Court