Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) (Petition 206 of 2020) [2020] KEHC 9226 (KLR) (Constitutional and Human Rights) (17 December 2020) (Ruling)

Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 9226 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 206 OF 2020

GMA DULU, J WAKIAGA & WM MUSYOKA, JJ

DECEMBER 17, 2020

BETWEEN

KATIBA INSTITUTE ..... PETITIONER

AND

PRESIDENT OF REPUBLIC OF KENYA ..... 1ST RESPONDENT

PAUL KIHARA KARIUKI, ATTORNEY GENERAL ..... 2ND RESPONDENT

CHIEF JUSTICE OF THE REPUBLIC OF KENYA ..... 3RD RESPONDENT

AND

JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY

KENYA JUDGES AND MAGISTRATES ASSOCIATION ... INTERESTED PARTY

KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) KENYA ..... INTERESTED PARTY

RULING

1. The cause herein was initiated by the petitioner, via a petition, dated 19th June 2020, filed simultaneously, on 22nd June 2020, with a Motion of even date, alleging various violations of the Constitution of Kenya, 2010, and seeking various reliefs. The filings by the petitioner were responded to by the 1st respondent, the 2nd respondent and the 2nd interested party. The 3rd respondent, 1st

interested party and the 4th interested party did come on record, but filed no responses. The 3rd interested party did not appear.

2. Among the responses filed by the said parties were notices of preliminary objections, by the 1st respondent and the 2nd respondent. The 2nd respondent was the first to file his notice of preliminary objection, dated 13th July 2020, and founded on six (6) grounds, namely:

   (a) That the petition was bad in law to the extent that it was premised on enforcement of a judgment by another court of concurrent jurisdiction in Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others High Court Petition No. 369 of 2019, hereafter referred to as the Adrian Kamotho case;

   (b) That the issue of the recommendation of 41 persons by the 1st interested party for appointment as Judges of various superior courts was res judicata having been the subject of litigation in the Adrian Kamotho case;

   (c) That, in the alternative, the issue of the said recommendation, as set out in (b) above, was the subject of estoppel per rem judicatum;

   (d) That the petition was not justiciable, for being moot and speculative;

   (e) That the petition was based on inadmissible hearsay evidence, a newspaper article, that is of little probative value; and

   (f) That the court lacked jurisdiction to declare the 2nd respondent as incompetent and unfit to hold office.

3. The 1st respondent's notice of preliminary objection followed. It is dated 16th July 2020. It raises six grounds, as follows:

   (a) That the petition and the Motion were fatally incompetent for misjoinder of the 1st respondent, as that was contrary to Article 143(2) of the Constitution, which granted the 1st respondent absolute immunity from prosecution;

   (b) That that the petition and the Motion were fatally incompetent, by virtue of Article 165(6) of the Constitution, for the court; lacked jurisdiction to supervise superior courts of equal jurisdiction, as the issues raised in the petition and the Motion were the same issues in the Adrian Kamotho case;

   (c) That the petition and the Motion were sub judice for they seek to enforce the judgment in Adrian Kamotho case yet the 2nd respondent had lodged an appeal at the Court of Appeal against that judgment; and the petitioner was seeking orders similar to those granted in Adrian Kamotho case;

   (d) That the court had no jurisdiction to grant some of the orders sought as they were not known in law;

   (e) That the petition was speculative and moot and, therefore, it was not justiciable; and

   (f) That the petition and the Motion were frivolous, incompetent and an abuse of court process, to the extent that the petitioner seeks to enforce a judgment by way of a fresh suit.

4. After our empanelling as the bench to determine the petition, we directed that the two preliminary objections be disposed of first, by way of written submissions, to be highlighted. The petitioner, the 1st respondent, the 2nd respondent and the 2nd interested party filed written submissions, dated 2nd

November 2020, 19th October 2020, 21st October 2020 and 29th October 2020. The 3rd respondent, the 1st interested party, the 3rd interested party and the 4th interested party did not file any. We shall recite the written submissions in the following order: the 2nd respondent, the first respondent, the petitioner and the 2nd interested party.

5. In his written submissions, the 2nd respondent addressed the court on only one issue, that the cause was res judicata, on the basis that the cause herein was between the same parties, and argued that the current proceedings presented issues for adjudication that were either issues before or that ought to have been raised in Adrian Kamotho case, and was, therefore, res judicata. To support his case, the 2nd respondent cited decisions in Benjamin Koech vs. Baringo County Government & 2 others: Joseph C. Koech (Interested Party), Silas Make Otuke vs. Attorney General & 3 ors, Mombasa HC Pet. No. 44 of 2013 [2014] eKLR, John Florence Maritime Services Limited & another vs. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, Kamunye & Others vs. The Pioneer General Assurance Society Ltd [1971] EA 263, ET vs. Attorney General and Another [2012] eKLR.

6. On his part, the 1st respondent argued three points: that the petition and Motion were defective for his misjoinder since he enjoyed absolute immunity from civil suits by dint of Article 143(2) of the Constitution of Kenya, 2010; the court lacked jurisdiction to exercise supervisory authority over decisions of a superior court of equal status and had no jurisdiction to grant prayers that were unknown in law; and the petition and the Motion were sub judice.

7. With regard to the immunity of the 1st respondent, it is submitted that he is the President of the Republic of Kenya, who enjoyed absolute immunity from any proceedings against him for any actions done in his official capacity, by virtue of Article 143 of the Constitution. It is submitted that the petitioner has sued the 1st respondent for failure to appoint the persons nominated by the 1st interested party to various superior courts, and that the petitioner seeks, in his petition, to enforce the judgement of the court in Adrian Kamotho case, against the 1st respondent. It is submitted that the constitutional protection the 1st respondent enjoys, under Article 143 of the Constitution, is meant to enable him deliver on his mandate as such without the fear of being liable for his official actions. He has cited the decision, in Nixon vs. Fitzgerald 457 US 731 [1982], to support that contention. He cites Articles 1(3), 129 and 130 of the Constitution, to submit that the efficacy of the constitutional mandate exercised by the 1st respondent would be prejudiced or affected should the same be subjected to judicial scrutiny, hence the justification for according the 1st respondent absolute immunity. Julius Nyarotho vs. Attorney General & 3 others [2013] eKLR, hereafter referred to as the Nyarotho case, was cited to support that argument. It is submitted that the 1st respondent enjoys absolute immunity for any act done in his official capacity during his tenure in office, and cannot be sued as a party, either in civil or criminal proceedings, hence the petition herein, as it related to the 1st respondent, ought not to be entertained.

8. On the second issue, about this court lacking jurisdiction to exercise supervisory authority over courts of equal status, it is stated that the petition seeks to enforce the judgement given by the High Court in Adrian Kamotho case. It is submitted that, although the High Court does have supervisory authority, under Article 165(6) of the Constitution, over subordinate courts, that authority does not extend to superior courts. It is argued that once a court renders its decision in a matter, it thereafter owns the mechanisms of enforcing that decision through execution, and another court of equal status cannot be asked to enforce the decision of another court, as that would amount to supervising the court that made the decision. Robert Alai Onyango vs. Cabinet Secretary in charge of Health & 7 others [2017] eKLR, is cited to support that proposition. It is further submitted that the judgment sought to be enforced in this cause was declaratory and had no coercive effect, and it , therefore, not capable of being enforced, as held in Okiya Omtatah Okoiti vs. President of Kenya & 4 interested party; RE Kibwana &

4 others [2019] eKLR, to be hereafter referred to as the Okiya Omtata case. It is further submitted that the decision in Adrian Kamotho case did not mean that the appointment of Judges had crystallised, and the court cannot be moved again to make further declarations on the same issues.

9. On sub judice, the 1st respondent has cited section 6 of the Civil Procedure Act, Cap 21, Laws of Kenya, which states that no court ought to proceed with a cause in which the matter in issue is also directly or substantially in issue in previously instituted cause between the same parties or between parties under whom they claim litigating under the same title. He has cited the decisions in Republic vs. Registrar of Societies – Kenya & 2 others Ex parte Moses Kirima & 2 others [2017] eKLR and Kenya Planters Cooperative Union Limited vs. Kenya Cooperative Coffee Millers Limited & another [2016] eKLR to make the point that constitutional petitions are amenable to the sub judice rule. It is submitted that the petition herein seeks, in the main, to enforce the order in Adrian Kamotho case, where the 1st respondent had properly been sued through the 2nd respondent, and in which the 3rd respondent and the 1st interested party were also parties. It is stated that the 2nd respondent has appealed against the decision in Adrian Kamotho case at the Court of Appeal, and, therefore, the parties and the issues, in both the instant petition and the matter before the Court of Appeal, are the same. The argument made is that the petitioner is seeking to enforce a judgment of the High Court made in a case which is still pending judicial consideration in an appeal filed by the 2nd respondent at the Court of Appeal. The decision in Thiba Min. Hydro Co. Ltd vs. Joseph Karu Ndwiga [2013] eKLR, is cited to make the point that the High Court can take judicial notice of pendency of an appeal.

10. On the petition being moot and non-justiciable, the 1st respondent has cited the decision of the Supreme Court in Wanjiru Gikonyo & 2 others vs. National Assembly of Kenya & 4 others [2016] eKLR, where it was stated that a court of law ought to limit itself to determination of cases that present an existing or live controversy or dispute, and hence avoid cases that are speculative or academic. It is submitted that the issue raised in the petition herein is yet to ripen or crystallise as the same is still subject to an appeal. It is also argued that the petition is largely speculative, to the extent that it is founded on a fear that the 1st respondent plans to discriminatingly appoint a few of the Judges, the subject of these proceedings, to the exclusion of others, something that the petitioner objects to. It is submitted that the petitioner has not presented any credible evidence to support that contention, save for inadmissible hearsay evidence based on newspaper cuttings. He submits that is mere conjecture, which should render the petition and the Motion non-justiciable.

11. In its written submissions, the 2nd interested party identified four issues for determination, namely, the misjoinder of the 1st respondent in view of Article 143 of the Constitution, the High Court being invited to exercise a supervisory jurisdiction over courts of equal status, and the petition and Motion being sub judice and res judicata.

12. With respect to the joinder of the 1st respondent, it is argued that the cause in Adrian Kamotho case challenged the action or inaction of the 1st respondent, which amounted to a violation of the Constitution. The 2nd interested party cites Article 141(3) of the Constitution and the oath of office, as taken by the 1st respondent, as set out in the 3rd Schedule to the Constitution, to buttress its argument. It is submitted that the court made the orders in Adrian Kamotho case under Article 165(3) (b) (d) (ii) of the Constitution, and, therefore, disobedience of the orders amounted to a violation of the Constitution. It is stated that an application was made in Adrian Kamotho case, where the court ruled, at paragraph 58 of the ruling delivered on 30th July 2020, that it could not make an order directed at the 1st respondent as he was not a party to those proceedings, the instant cause named him as a party for that reason. It is further submitted that as the court in Adrian Kamotho case had found the 1st respondent to have had violated the Constitution, should it find that the 1st respondent was non-suited, it ought not to dismiss the petition, but rather mould reliefs that would ensure that the

Constitution is protected. The Nyarotho case and Sheela Barse vs. Union of India [1988] AIR 2011 are cited to support that contention.

13. On the second issue, whether the petition invites the High Court to supervise a court of equal status, the 2nd interested party submits that the court in the Adrian Kamotho case declined, at paragraph 65 of the ruling delivered on 30th July 2020, to allow enforcement of the orders, made in the judgment of the court in that cause, on grounds that the said orders were declaratory and that a prayer that the court finds that the 1st respondent had violated the Constitution and the law could not granted, since that prayer was for a substantive relief which could not be given in an interlocutory application. It cites decisions in Chief RA Okoya & ors vs. S. Santilli & ors (SC 200/1989) [1990] NGSC 43 (23rd March 1990), hereafter referred to as the Chief RA Okoya case, and the Okiya Omtata case. It was submitted that the declaratory orders in Adrian Kamotho case were orders of the High Court, and could be enforced by the High Court, however constituted, and that, therefore, the issue of this court supervising the court in Adrian Kamotho case did not arise.

14. On the matter being sub judice, in light of the notice of appeal filed by the 2nd respondent, it is submitted that there is no evidence that there was an appeal pending at the Court of Appeal, since the 2nd respondent had not filed a copy of the notice appeal nor the record of appeal filed at the Court of Appeal. It is further submitted that it had not been demonstrated that the parties in this cause were the same parties in the matter at the Court of Appeal, and the petitioner and the 1st respondent were not parties in the Adrian Kamotho case. The decision, in ASL Credit Limited vs. Abdi Basid Sheikh Ali & Another [2019] eKLR, is cited to support the contentions by the 2nd interested party on sub judice.

15. On res judicata, the 2nd interested party cites Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited [2017] eKLR, on the elements of res judicata, to argue that the instant cause is not res judicata the Adrian Kamotho case. It is submitted that this cause seeks to enforce the decision in the Adrian Kamotho case, and not the declarations sought in the Adrian Kamotho case. It is further submitted that the petitioners in the two matters were different persons or entities, while the respondents and interested parties were also different persons. It is further submitted that the issue of enforcement of the orders in the Adrian Kamotho case had not been finally determined. It is pointed out that an attempt was made in the Adrian Kamotho case, to enforce the orders made in the judgment in that matter, by way of an interlocutory application, but the same was dismissed on grounds that such enforcement could not be through interlocutory proceedings.

16. The petitioner submitted on three issues: the misjoinder of the 1st respondent on account of the constitutional immunity from litigation, the High Court exercising supervisory jurisdiction over decisions of courts of equal status and jurisdiction to grant orders that were not known in law, and whether the cause was res judicata or sub judice.

17. On the immunity of the 1st respondent from litigation, it is submitted that Article 143(2) of the Constitution ought to be interpreted holistically alongside non-legal phenomena such as Kenya's historical, economic, social and political context. As a background, the petitioner cited the final report of the Constitution of Kenya Review Commission, to argue that the provisions of the Constitution 2010 were designed to stop the dominance by the 1st respondent and impunity through that office. The petitioner identified the preamble to the Constitution, Articles 73(1) (2), 129, 131(2), 145(1) (a) and 165(3) (b) (d) as the provisions written into the Constitution to constrain the powers of the 1st respondent. It was submitted that Article 1(1) expressed the concept of the sovereignty of the Kenyan people, and the sovereign power of the people was to be exercised only under the Constitution, including directly by the people. Article 2 is cited to argue that the Constitution binds all persons and all state organs at all levels of government. Article 4 requires all Kenyans and state organs to respect, uphold and defend the Constitution; while Article 4 establishes the Republic as a sovereign multiparty

democratic state founded on the national values and principles of governance in Article 10. Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission Civil Application No. 11 of 2016 is cited to make the point that Article 10 binds the 1st respondent when he applies or interprets the Constitution or any other law. It is submitted that the values stated in Article 10 establishes a culture of justification, in which every exercise of power is expected to be justified. It is submitted that various state functionaries, such as parliamentarians, judges and prosecutors, enjoy a variety of immunities, intended to facilitate them by protecting them from the fear of personal liability for official actions and omissions, and the presidential immunity must be looked at in that context.

18. The petitioner asks whether the court lacked jurisdiction under Artless 159, 165 and 259 of the Constitution to countercheck the actions or inaction of the 1st respondent with respect to the issues in dispute was consistent with Articles 1, 10, 73, 129, 130 and 132. It is also posed whether the 1st respondent was immune to national values and principles of governance in Article 10, or excluded from the reach of the High Court under Article 165. It is submitted that Article 143 of the Constitution should not be read in isolation, but the Constitution must be read as an integrated whole, ensuring that none of the provisions destroyed the other or others, instead of sustaining them. Kanini Kega vs. Okoa Kenya Movement & 6 others [2014] eKLR and Cohens vs. Virginia 19 US 264 [1821] were cited to support the submission that Article 165(3) (d) of the Constitution should not be interpreted in a manner that divests the courts of jurisdiction.

19. It is submitted that there were no precedents that support the claim of absolute immunity from all proceedings. It is argued that the arguments made by the 1st respondent, that the 1st respondent enjoyed absolute immunity from litigation, would hoist the occupant of the office of the 1st respondent above the law and immunize his conduct from judicial scrutiny. It is argued, on the basis of Marbury vs. Madison 5 US (1 Cr.) 137 [1803], that it was within the province and duty of the court to say what the law is, and, therefore, the notion that immunity of the 1st respondent was absolute and unqualified immunity with respect to all proceedings cannot have any precedent. The petitioner argues that the decision relied on by the 1st respondent in Nixon vs. Fitzgerald (supra), in support of his argument, was distinguishable, as that suit turned on a claim for civil damages, and the pronouncement by the court was that the 1st respondent needed to be shielded from private lawsuits, which were likely to distract him from the discharge of his duties. It was submitted that Nixon vs. Fitzgerald (supra) was consistent with Article 143 of the Constitution. Nixon vs. Fitzgerald (supra), and had been followed in Kenya Human Rights Commission & another vs. Attorney General & 6 others [2019] eKLR. United States vs. Nixon 418 US 683, Clinton vs. Jones 520 US 681 [1997] and Republic vs. Chief Justice of Kenya & 6 others Ex parte Moijo Mataiya ole Keiwua [2010] eKLR and Republic vs. Minister for Tourism & another Ex parte Abdulrahman Rizik & 4 others [2014] eKLR, for the argument that the president is subject to the judicial process, the court has authority to determine whether the 1st respondent has acted within the law, and that presidential immunity cannot be used to defeat public interest or be applied contrary to public policy. In the end, the petitioner argues that the failure by the 1st respondent to appoint the persons nominated for judgeship harmed public interest and the rights of the individuals affected. It is further submitted that the decision in the Nyarotho case supported the petitioner's submission that the 1st respondent was amenable to judicial scrutiny by way of judicial review, and that it was never an issue that Article 143 of the Constitution shielded the 1st respondent from a constitutional petition raising questions about his exercise of constitutional power or function. It is also submitted that sitting Presidents have been sued routinely for public wrongs, and examples are given in Trump vs. Vance 591 US [2020, Trump vs. International Refugee Assistance Project 582 US [2017], Trump vs. Mazars USA LLP 591 US [2020] and President of the Republic of South Africa and others vs. South African Rugby Football Union and others [1999] ZACC 11. It is also submitted that the court had previously found the Adrian Kamotho case that the 1st respondent was a necessary party.

20. On res judicata and sub judice, the petitioner argues that the matter was neither. It is submitted that it was the High Court which decided the Adrian Kamotho case, and the same court, albeit differently constituted has the mechanisms for the enforcement of the orders made in the Adrian Kamotho case. It is argued that the authority cited by the 1st respondent, the Okiya Omtata case, supports that contention, to the extent that it stated that a declaratory order remained dormant until subsequent proceedings are undertaken to protect the threat to or violation of the rights declared in the judgment or order. The petitioner emphasises on the the Chief RA Okoya case, to assert a declaratory judgment may be a ground for subsequent proceedings in which the right having been violated receives enforcement. It is pointed out that the petitioner in the Adrian Kamotho case had moved the court that had pronounced the declaratory orders, but the Motion, seeking enforcement of the orders, by the Motion was dismissed for seeking substantive orders that could only be available through a petition, and for directing the application at the 2nd respondent herein instead of the appointing authority, the 1st respondent herein. The petitioner submitted at length on functus officio, however, that issue had not been raised in the preliminary objections.

21. On sub judice, the petitioner cites Rule 5(2) of the Court of Appeal Rules, for the objection is that there is a pending appeal at the Court of Appeal, to submit that the institution of an appeal does not operate to suspend or stay the order appealed against, and that there were no proceedings pending, either at the High Court or Court of Appeal, for stay of execution of the order in the Adrian Kamotho case. It is also submitted that the causes of action between the appeal and the instant matter are distinct, and so are the parties to the same.

22. With respect to res judicata, it is submitted that the parties to the instant matter are not the same as those in the Adrian Kamotho case, and similarly, the issues in contention are different. The decisions in John Florence Maritime Services Limited & another vs. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR and Law Society of Kenya vs. Attorney General & another (Interested Parties) [2019] eKLR are cited to support the contention.

23. The parties highlighted their respective written submissions before us on 18th November 2020. Mr. Wanga urged the case for the 1st respondent, while Mr. Bitta argued the case for the 2nd respondent. Mr. Ochiel replied for the petitioner, while Mr. Kiarie Mungai submitted for the 2nd interested party.

24. Mr. Wanga highlighted two issues, the misjoinder of the 1st respondent and the cause being an effort to have the High Court exercise supervisory jurisdiction over superior courts. On the immunity of the 1st respondent, it was submitted that there was absolute immunity from civil and criminal proceedings, and joinder of the 1st respondent made the petition incompetent. It was argued that the doctrine of necessity had no support in Article 143 of the Constitution, nor in any other provision of the law or statute, nor any decision of a court. Mr Wanga submitted that it was not that the 1st respondent cannot be held accountable, but rather that no case ought to be brought against him or his office. Any suit to call the 1st respondent to account, Mr. Wanga argued, should be brought in the name of the Attorney-General. It was submitted that it was not that parties aggrieved by the official decisions or misconduct or omission of the 1st respondent are without remedy, for he can still be held accountable through impeachment proceedings, by way of oversight through Parliament and scrutiny by the media. He cited the decisions in the Nyarotho case and Nixon vs. Fitzgerald (supra). On the second issue, Mr Wanga submitted that the petitioner was seeking to enforce a decision of another court in Adrian Kamotho case, for non-compliance with the judgement in that case. He asserted that that amounted to the court being invited to supervise other superior courts, contrary to section 165(9) of the Constitution.

25. Mr. Bitta highlighted that the instant matter was res judicata, in view of the decision in the Adrian Kamotho case, as the issues in this cause and in the former were the same and arose from the same

transaction. He submitted that both were presented in public interest, rather than in the private capacities of the petitioners. He relied on the decision in Benjamin Koech vs. Baringo County Government & 2 others; Joseph C. Koech (Interested Party) [2019] eKLR, for the proposition that constructive res judicata includes any issues that ought to have been raised in the preceding case. He submitted that the issues in the previous proceedings stemmed from the alleged failure by the 1st respondent to appoint the persons recommended for appointment as judges by the 1st interested party, and that all the issues that ought to have been raised about the matter should have been raised in the Adrian Kamotho case, including the remedies, since the court has discretion to give reliefs. He submitted that a party cannot come later to seek relief on the same facts, and claim that that relief was not available in the previous proceedings. He asserted that the addition of other parties or the seeking of other prayers cannot be a basis for departure from the principle of res judicata. He argued that it could not be said that there are new parties in the instant cause who were not in the previous cause, to exclude application of the res judicata principle. He further argued that the issue of jurisdiction of the court to make a finding to hear or determine that a state officer is unfit for office. He submitted that the High Court had no jurisdiction in the first instance over such a matter, since the same is first dealt with by political organs of the state.

26. Mr Ochiel, on the issue of the immunity of the 1st respondent, submitted that there was no absolute immunity under Article 143 of the Constitution. He argued that under Article 143(2)(3), the 1st respondent could be sued once he left office, since those provisions hold the limitation time from running. He submitted that those provisions only covered civil wrongs. He wondered why the 1st respondent should be sued for acts done officially once he leaves office. He argued that Article 143 ought to be interpreted holistically, and not narrowly, and the same should be informed by its constitutional context. He further submitted that the Constitution establishes a culture of justification, arguing that the court had a duty to promote and protect the purposes of the Constitution. He argued that Article 143 of the Constitution facilitated the exercise of presidential power, and the immunity was meant to protect the President from the fear of personal liability. He stated that the provision was not meant to be a tool for impunity. He submitted that there was no provision of the Constitution which supported the claim for absolute immunity, saying that the 1st respondent appeared to be claiming entitlement to absolute immunity from all proceedings, and not just civil or criminal proceedings.

27. He stated that he agreed with Nixon vs. Fitzgerald (supra), that the 1st respondent had absolute immunity from damages or liability in civil cases and private suits, he, however, did not have such immunity against a public law claim for mandamus to remedy his unconstitutional actions. He submitted that the instant cause is not a private suit, put public litigation, for it does not seek damages against the 1st respondent for private acts. He argued that Nixon vs. Fitzgerald (supra) recognised such suits are necessary where there was constitutional imperative. He argued that the petitioner was invoking the doctrine of necessity. He argued that the refusal to appoint Judges had created judicial problems, and, therefore, there was a constitutional imperative. He argued that under the doctrine of separation of powers, the need for confidentiality could not sustain unqualified presidential immunity under all circumstances for judicial proceedings. He said that such would amount to an impediment to the functioning of the judicial branch. He submitted that the 1st respondent was subject to judicial process in appropriate circumstances, and the court could determine if or whether the 1st respondent acted within the law.

28. He stated that in the Adrian Kamotho case, the court declined to grant relief as the petitioner in that cause had not sued the 1st respondent. He had sued the 2nd respondent instead of the 1st respondent who was the appointing authority. He stated that the court had pointed out that he should have sued the 1st respondent, and the petitioner in the instant cause has sued the 1st respondent, and, therefore,

there should be no basis for denial of relief. He reiterated that in the Adrian Kamotho case, the court had determined that the 1st respondent was a necessary party in such suits as the present one. He argued that the declaratory order made in the Adrian Kamotho case, could only be enforced through another suit. He cited the Omtata case to support that argument, where it had been concluded that declaratory suits have no coercive effective, and, therefore, the same could be the basis for subsequent proceedings. It had been held that a declaratory suit was a dormant right, until it was validated by a subsequent suit. He submitted that the Adrian Kamotho case founded a basis for subsequent proceedings, saying that the instant proceedings seeks to vindicate the public interest in the Adrian Kamotho case.

29. On res judicata and sub judice, he argued that the parties in this cause, and in the appeal arising from the Adrian Kamotho case, were different. Rule 5(2) of the Court of Appeal Rules was cited, for the submission that the filing of an appeal did not result in an automatic stay, and that there was no stay order to stop enforcement of the judgment in the Adrian Kamotho case. He further argued that the cause of action in the appeal was different from the instant matter, as the instant cause questions defiance of court orders and the fitness of the 2nd respondent to hold office, , which two issues are not the subject of the appeal. In any event, he argued, the court had not been furnished with the Court of Appeal pleadings to assess whether the issues in the two matters were the similar or not.

30. Mr. Kiarie Mungai, for the 2nd interested party, submitted that in the ruling of 30th July 2020, the court, in the Adrian Kamotho case, declined to allow enforcement of the judgment because the 1st respondent had not been joined to the petition, on grounds that orders had been sought and obtained against the 2nd respondent and not the 1st respondent, and, therefore, orders of enforcement could not be moved against the 1st respondent. He submitted that, if the court bought the argument on the absolute immunity of the 1st respondent, then that would present a problem that the petitioner faced in the Adrian Kamotho case. He argued that the decision in the Nyarotho case supported the petitioner's case, that the 1st respondent did not enjoy absolute immunity, urging that Article 143 of the Constitution be construed purposively. He stated that the orders sought by the petitioner were judicial review reliefs, which the court in the Nyarotho case had said were available against contraventions of the Constitution by the 1st respondent. He asserted that the court in the Adrian Kamotho case had held that the court had been contravened, and this court ought to not just say that it has no jurisdiction. He cited the decision of the Supreme Court of India in Sheela Barse vs. Union of India (supra), where it was said that the court should not be a disinterested umpire or onlooker; it has a responsibility for organisation of the proceedings, moulding of the reliefs and interpretation of the reliefs into remedies that will enforce the Constitution. He urged us, since the court in the Adrian Kamotho case had found the 1st respondent to have had violated the Constitution, to mould the reliefs, if we found them to be improper, into reliefs that would support the enforcement of the court's orders and judgments. He cited the Okiya Omtata case to argue that since the judgment in the Adrian Kamotho case was declaratory, the petitioner could file a fresh suit to ensure enforcement of the declaratory orders made. He urged that the instant suit was a suit for such enforcement. He argued that the declarations made in the Adrian Kamotho case were by the High Court, and that this is a panel of the High Court, and there are no two High Courts, and, therefore, this bench of three was not supervising the implementing of a decision of another court.

31. In rejoinder, Mr Bitta argued that he was arguing that the matter was res judicata since the Adrian Kamotho case had been instituted in public interest, and the decision in that cause was in rem. He submitted that the instant cause was also in public interest, as the two causes were instituted under the same title, and so they were res judicata. He submitted that the Adrian Kamotho case and the instant cause were founded on one cause of action, the failure by the 1st respondent to appoint the 41 individuals nominated by the 1st interested party. He argued that the petitioner in the instant cause was asserting an additional relief, yet it had not come up with a fresh cause of action, independent of that in

the Adrian Kamotho case. He submitted that an additional relief was not sufficient to exempt a party from res judicata. He stated that the cause in the Adrian Kamotho case did not just seek declaratory orders, there were other prayers that the court declined to grant, and the fact that those prayers were declined did not give a chance to another party to make an application for execution of the declarations. He argued that if we entertained the new reliefs we would be reviewing the decision in the Adrian Kamotho case.

32. On his part, Mr. Wanga argued, with respect to the presidential immunity being absolute, that the Constitution was not without a remedy. He submitted that the 1st respondent was accountable under the Constitution, saying that in the Nyarotho case the court had held that the 1st respondent's actions could be challenged through the 2nd respondent. He argued that the joinder of both the 1st respondent and the 2nd respondent was unnecessary, since the orders could still be entertained as the 2nd respondent was named as a party. With regard to the ruling of 30th July 2020, in the Adrian Kamotho case, he argued that the court had held the 1st respondent accountable, the orders sought in the application the subject of the ruling should have been sought in the petition, and that was why the court rejected the application. He argued that the court did not talk of the 1st respondent being made a party to the proceedings. He submitted that Nixon vs. Fitzgerald did not assist the petitioner, for it was a suit initiated after the President in that case had left office. On the doctrine of necessity, he conceded that the actions of the 1st respondent can be challenged but through the 2nd respondent.

33. At the end of the oral highlights of the written submissions, we identified three issues for consideration in determination of the two preliminary notices given by the 1st and 2nd respondents. The issues are the propriety of the joinder of the 1st respondent, the status of the instant cause in view of the Adrian Kamotho case and the appeal proffered from it, and enforceability of declarations made in constitutional causes.

34. Article 143(2) of the Constitution provides as follows:

> " Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution."

35. The provision talks about "civil proceedings," and the question that naturally arises is whether constitutional causes, such as the instant one, can be termed to be "civil" in nature. The Supreme Court of Kenya, in Deynes Muriithi & 4 others vs. Law Society of Kenya & another [2016] eKLR, appeared to hold that proceedings commenced by way of constitutional petitions are more than not in the nature of civil proceedings. The court said:

> " The High Court at Kisii, in Peter Ochara Anam & 3 Others vs. Constituencies Development Fund Board & 4 Others, Constitutional Petition No. 3 of 2010; [2011]eKLR, found that the particular issue, though occurring in a constitutional petition, was civil in nature. It thus held:
>
> "In as much as the Constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored nor witnesses should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agree or subscribe to the submissions of the petitioners that the petition

being neither a criminal nor civil proceedings, it must be conducted in vacuum" [emphasis supplied].

(37) It is evident to us that appeals dealing with constitutional issues, may in substance be civil in nature."

(See also the decision of the Court of Appeal in Ferdinand Ndung'u Waititu Babayao vs. Republic [2019] eKLR)

36. Article 143(2) grants the 1st respondent immunity from civil proceedings in any court during their tenure in office. Presidential immunity was elaborated in Abdul Karim Hassanaly & another vs. Westco Kenya Ltd & 3 others [2003] eKLR, a decision made under the retired Constitution, where the court struck out the name of the President from the proceedings before it. The court said the following, of the equivalent of Article 143 of the new Constitution:

> " Section 14(2) of the Constitution construed with the aid of the marginal notes, in my view, means what it says, that civil proceedings cannot be instituted against the President while he holds office or if instituted before he became the President such civil proceedings cannot continue against the President. But Section 14(2) does not absolve the President from civil liability in respect of claims arising either before or after he becomes the President. He can still be sued after he leaves office.
>
> That is to say that section 14(2) of the Constitution merely suspends the recovery of any claim of a civil nature through legal proceedings against a President and denies court jurisdiction against the President while he holds office but does not protect the President from any civil liability.
>
> Indeed, section 14(3) of the Constitution protects any such claims which cannot be brought or continued while the President holds office from being defeated by any law of limitation.
>
> The Constitution is the will of the people and I do not think that the constitutional provisions protecting the President from legal proceedings can be said to be against the public policy ... For the foregoing reasons I allow the oral application and strike out the name of the second defendant from the suit without prejudice to the right of the plaintiffs to reinstitute the suit after the second defendant ceases to be the President of the Republic of Kenya."

37. The court in the Nyarotho case discussed the doctrine of presidential immunity, and said as follows:

> " (13) The question to ask is: Whether, there is a legal way the people of Kenya can question any improper exercise of public power vested in the President, especially where the Constitution and Statute law have been violated. I will approach this issue by looking at three important constitutional matters. One, the constitutional duty of the President to adhere to, promote and protect the Constitution and all laws made under the Constitution. Two, judicial review as a public law remedy under the Constitution. Three, the role of public law of the state on these matters.
>
> (14) Needless to state that, the Presidency is a creature of the Constitution. According to Articles 1(3) (a), 129 and 130, the executive authority is derived from the people and is exercised in accordance with the Constitution. The presidency should adhere to, promote and protect the Constitution, to

mention a few say; observe national values and principles of governance (Article 10), observe principles of executive authority, maintain integrity for leadership (chapter six), observe legal requirements, and respect the authority of the judiciary. If the presidency violates the requirements of due process of the law as laid down in Constitution or any statute law, the Constitution is not helpless, as, it is self-referential and does not suffer a wrong without a remedy. Therefore, judicial review will lie against an order of appointment made by a sitting President in contravention of the law. This is a public law remedy which is directed to the state itself as the president exercised executive authority of state. It is a subject that is governed by the public law of the state. A narrow and strict interpretation of Article 143 of the Constitution would offend Article 259 of the Constitution which demands a purposive interpretation in order to give effect to the objects, purposes and values of the Constitution."

38. The court went on to say:

> "(15) According to Article 73 of the Constitution, authority assigned to a state officer is a public trust. On this basis, the Constitution installs a responsibility on the executive to serve the people rather than the power to rule the people; be accountable to the people, and respect the rule of law. See Article 129 also. Strict interpretation of Article 143 of the Constitution without regard to the objects, values, purposes and spirit of the Constitution, as suggested by the Respondents, particularly the Attorney General will; 1) deprive the public the right to demand for public answerability from the office of the president on the exercise of the sovereign authority they have delegated to the executive; 2) disparage the Constitution and promote impunity. These matters are placed in the public law of the state as a deliberate constitutional approach in order to enable the Constitution to avoid an absurd state of affairs that would otherwise be created by a narrow interpretation of Article 143. The courts reconcile the dichotomy of ensuring that there is no violation of the Constitution or the law that goes without a remedy whilst maintaining the integrity of the presidency which is a symbol of the Republic of Kenya by simply upholding and protecting the Constitution. In such suit as this, the Attorney General is the proper party. In countries with a robust Constitution, including Kenya, courts have questioned actions or inaction by the President in so far as the deed or omission thereof has violated the law. Although in the instances where courts have invoked judicial review to right the wrongs by the executive have been equated by some pundits to judicial activism, I am convinced, it is simply a judicial path that is permitted by the Constitution itself as a way of attaining checks and balances within the doctrine of separation of powers."

39. In Republic vs. Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua [2010] eKLR , it was said as follows:

> "There is an argument that the official and un-official acts of the President cannot be questioned by judicial or the legislative branch of Government because the President enjoys executive privilege with Presidential immunity. Presidential immunity is the power and authority that a President has to declare that his or her discussions, deliberations and communications are confidential and secret, therefore out of the reach of the jurisdiction

of the High Court ... It is clear in our minds that the President is always vested with certain important and unrestricted political powers. In exercise of such powers the president is to use his own discretion. However, the President always remains accountable to his country as a political agent

... In our view the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities hence the duty to act consistently with and according to the law. If public officers including the President fail to act, and their failure harms the interests of the public and rights of individual citizens, we think their action or omissions are subject to judicial review. ... We must restate that the constitutional provisions protecting the President from legal proceedings can be said to be against public policy when it is used in a manner likely to affect the interest of an individual or issues concerning human rights and environmental protection which is meant for the greater public good. It is therefore, the duty of the High Court in that regard to say what is the law and those who apply the rule of absolute immunity must of necessity expound and interpret the rule in a broad manner likely to benefit the interest of the wider public. And when two interest conflict with each other the court must decide on the operation of each. If the courts are to regard the Constitution for the benefit of the citizens, it cannot be said the President is superior to the Constitution and to any other legislation.

The rationale for official immunity applies where only personal and private conduct by a president is at issue. It means that there shall be no case in which any public official can be granted any immunity from suit from his unofficial acts. There has been argument that unless immunity is available, the threat of judicial interference with executive branch through judicial review orders, potential contempt citations and sanctions would violate separation of powers principle. It is also alleged that the fear of answering to court for his actions would impair or limit the president's discharge of his constitutional powers and duties. On our part we think the President being a public servant represents the interests of the society as a whole. The conduct of his official duties may adversely affect a wide variety of different individuals each of whom may be a potential source of current or future controversy. In some quarters the societal interest in providing the President with maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The immunity for the President in such circumstances is meant to forestall an atmosphere of intimidation that will conflict with his resolve to perform his designated functions in a principled fashion."

40. The court then said:

" The question therefore is whether there is a provision that gives the President an absolute immunity from any kind of civil and criminal prosecution ... In our mind the provisions of the Constitution cannot be read and interpreted in isolation. We are aware that an argument founded on the spirit of the Constitution, is always attractive for it has a powerful appeal to the sentiments and emotions. However, the court has to gather the spirit of Constitution from the language of the constitution and from the wholesome reading of all the provisions in order to understand whether there is a conflict or whether there is a complementary or supplemental intention in all the sections. But one cardinal and essential foundation of interpretation of the constitution is that a Constitution is to be construed in the same way as any other legislative enactment. And the words of the Constitution are to be used in their natural and ordinary sense ... The proceedings before us are in the nature of judicial review proceedings. In any case it is our finding that a party affected by the decision of a sitting

president can rightly and legitimately seek the intervention of the High Court for redress or remedy by way of judicial review or by way of constitutional declaration. For example, if the President purports to sack a constitutional office holder without going through the provisions of the Constitution, the affected officer can approach the High Court by way of judicial review so that the High Court can quash the illegality ... We therefore think a party or a constitutional office holder who is wrongly or illegally sacked by a sitting President can approach the High court by way of judicial review for redress ... As a matter of constitutional practice it is of course well known that the President is not above the reach of the courts and cannot be put in a situation where he is above the Constitution. We must add that the courts have no power to review the exercise of powers by the President provided that the President is acting within the scope of his powers and within the confines of the Constitution. And that he is within the legal nature of the exercise of his powers and responsibilities. No doubt the courts have powers to restrict and review decisions made by a sitting President which is in contravention of the Constitution and which is against public interest and policy."

41. From the above authorities, some of which date back to the days of the old Constitution, we hold and find that a purposive, progressive and holistic interpretation of the Constitution should be that the 1st respondent does not enjoy absolute immunity from the intervention of the court by way of judicial review or constitutional declarations for any actions or omissions by him in the exercise of his constitutional and statutory functions. If a party is aggrieved by anything done or not done by the 1st respondent, then the available remedy is either judicial review orders or constitutional declarations. That would mean that this court has jurisdiction to hear and determine judicial review proceedings and issue constitutional declarations such as those sought by the petitioner in the instant petition and application against the 1st respondent. It means that the 1st respondent does not enjoy absolute immunity from litigation. His actions or inactions can be questioned in court.

42. Closely related to that is the question as to whether the 1st respondent should be named as a party in proceedings of this nature, or whether he should be sued through the 2nd respondent, for it is one thing to have the decisions or actions or inactions of the 1st respondent challenged through judicial review or constitutional petitions, and it is another to have him named as a party in the proceedings.

43. The courts have had to grapple with that question in Kenya in a number of cases. In the Nyarotho case, the court had this to say on the subject:

> "(12) I take the view that Article 143 of the Constitution protects a sitting President from legal proceedings. The Constitution has, however, under Sub-Article (4) of Article 143, created an exception to the protection offered with regard to legal proceedings against the President for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity. In other words, except in those exceptions allowed under the law, a sitting President cannot ever be made a party to any legal proceedings in court. Any argument that would suggest a possibility of enjoining a sitting President as a party so that orders of judicial review can issue, to say the least, would be quite blind to the provisions of Article 143 of the Constitution. But it should be understood that the immunity in Article 143 of the Constitution only lasts for the time the President is in office."

44. The court in the Nyarotho case concluded as follows:

> "(21) ... I am not persuaded by the argument that because a sitting President enjoys immunity from legal proceedings under article 143 of the Constitution, no proceedings in the nature of public remedy should commence to put right a clear violation of the law in the exercise of a public power by the President. The public power herein is derived by the President from the Constitution and statute law as delegated by the people. Judicial review being a public law remedy is available in the Constitution to ensure due process has been followed, and it will not suffer ineffective because the impugned exercise of public power was committed by the President. Such proceedings, where it is claimed a state officer acted in contravention of the law are in the nature of constitutional remedy under article 22 and 23 of the Constitution, and are legally instituted and maintained against the Attorney General unless the Constitution or an Act of Parliament governing the particular state office provides otherwise, or where liability is of a criminal nature. These proceedings are not proceedings against the President but against the State itself and any ensuing liability would certainly be liability of the State within the public law of the State. The Attorney General is not sued on vicarious liability but under Article 156(6) as the defender of the rule of law and public interest."

45. The decision in the Nyarotho case was followed, with approval, in the Okiya Omtata case, where the court said:

> "41. As for the 1st respondent pursuant to Article 143(2) of the Constitution of Kenya 2010, proceedings shall not be instituted in any court against the President or the person performing the function of that office during their tenure of office in respect of anything done or not done in exercise of their powers under the Constitution.
>
> 42 ...
>
> 43. From the above, the President, Presidency and National Executive of the Republic means the same thing and thus no civil proceeding can be instituted against the President and Presidency during the terms of office."

46. We have not come across any other decision or decisions, of a Kenyan court on Article 143, where a contrary view is held or expressed, to effect that the 1st respondent should be made or named as a party in civil or constitutional proceedings, where his action or inaction is the subject-matter. It would follow from the above decisions, therefore, that although there is immunity for the 1st respondent from prosecution, the same does not bar prosecutions of a civil or constitutional nature being mounted, which challenge exercise of power by the 1st respondent, save that such proceedings ought not to be commenced against the 1st respondent, whether as the individual occupant of the office or in his official capacity, but rather the same ought to be against the 2nd respondent. That way there is compliance with Article 143 of the Constitution. To that extent, it can be said that there was a misjoinder of the 1st respondent, and the 1st respondent ought not to have been named as or made a party in these proceedings.

47. On whether the misjoinder is fatal to the petition, the court, in Speaker of the National Assembly vs. Centre for Rights Education & Awareness & 7 others [2019] eKLR, while citing the Constitution

of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, also known as the Mutunga Rules, said as follows on misjoinder, with respect to constitutional causes:

> " Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or non-joinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute."

48. In the foregoing, the misjoinder herein would not be fatal to the instant petition, and the same can still be disposed of the misjoinder notwithstanding.

49. We next consider whether the petition herein is res judicata. In answer to the petition, the 2nd respondent stated that the petition herein was res judicata having been the subject matter in the Adrian Kamotho case, which was also a public interest litigation on the same subject matter. The doctrine of res judicata in Kenya is established by statute, in section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows:

> " 7. Res judicata 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. Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it. Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation. (4)—Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

50. The elements of res judicata can be said to be the following:

a) the matter in issue is also directly and substantially in issue in the previously instituted suit or proceedings;

b) the previous suit is between the same parties or between parties under whom they or any of them claim, litigating under the same title;

c) such suit or proceeding or issues therein was heard and finally determined in the former suit; and

d) the court that formerly heard and determine the issues was competent to try the subsequent suit or the suit in which the issue is raised. (See The Independent Boundaries and Electoral Commission vs. Maina Kiai and 5 others [2017] eKLR)

51. In ET vs. Attorney General & Another [2017] eKLR, the court said the following on the issue:

> "52. The general principle of res-judicata is captured in section 7 of the Civil Procedure Act which provides that:
>
> 7. 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.
>
> 53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and Another vs. the Attorney General and Others [2005] 1 EA 83, 89) ...
>
> 57. The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs. National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu vs. Wambugu and Another Nairobi HCCC No. 2340 of 1991 ..."

52. The Court of Appeal, in Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd [2017] eKLR , said, on the principle of res judicata:

> "In its quest to escape liability or mitigate loss, Benjoh has pursued almost all possible legal avenues and has employed tremendous legal ingenuity and sophistry. Benjoh however seems to have ignored or failed to grasp the full tenor, extend and spirit of the doctrine of res judicata. The doctrine is grounded on public interest and thus transcends the parties' interests in a suit. Public interest requires or demands that litigation must at some point come to an end. In the Maina Kiai case (supra), the Court quoted with approval the Indian Supreme Court in the case of Lal Chand vs. Radha Kishan, AIR 1977 SC 789 where it was stated;
>
> "The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

Again, in Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] eKLR, this Court in determining yet another application by Benjoh stated thus,

"In Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Pte Ltd[2009] S GHC 234, the Court of Appeal (of Singapore) examined the doctrine of res judicata in relation to decided cases and observed that the policy reasons underlying the doctrine of res judicata as a substantive principle of law are first "the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" and second, "the rights of the individual to be protected from vexatious multiplication of suits and prosecutions."

53. The court further said:

" The Court went on to state that:

"The courts have never accepted res judicata as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the Court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the Court's erroneous decision were to form the basis of an estoppel against the aggrieved party.... In such a case, the tension between justice principle and the finality principle is resolved in favour of the former ... the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."

Therefore, there are instances where the public interest is given prominence over parties' interests in a suit. Such an instance, in our view, would be like in the instant suit where great burden of litigation has been placed upon a party necessitating such a party to seek protection from court. The Supreme Court of India in the case of State of UP vs. Nawab Hussain, AIR 1977 SC 1680, considered the doctrine of constructive res judicata and delivered itself thus,

"This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon.""

54. To enable us answer the question as to whether this petition is res judicata the Adrian Kamotho case, we need to set out the prayers which are sought herein. The petitioner contends that eleven (11) months since the determination in the Adrian Kamotho case, the 1st respondent has unlawfully and unconstitutionally refused to gazette the nominees and was intent of appointing only some of

them. This, therefore, raises the issue as to whether the 1st respondent can after, being presented with names by the 1st interested party, pick some from the list for appointment and whether that appointment, if made will be constitutional. The petitioner further seeks declaration on the suitable constitutional remedy against the 1st respondent's continued refusal to make the appointments of the nominees. These issues, to our mind, have not been determined and, therefore, the petition herein cannot be deemed res judicata. There is further the prayer against the 2nd respondent which was not for determination in the Adrian Kamotho case.

55. The issues raised in this petition, therefore, fall squarely within the doctrine of a fresh cause of action arising out of a declaration as was stated in the Chief RA Okoya case, quoted with approval in the Okiya Omtata case, where the court said:

> " First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, e.g. to pay damages or refrain from interfering with the plaintiffs' rights, such order being enforceable by execution if disobeyed.
>
> Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.
>
> Second: A declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it."

56. We have further noted that the court in the Adrian Kamotho case directed the parties to file a substantive petition in respect of the issue of enforcement of the declaration, and this being a constitutional petition, to lock out a party from the seat of justice on account of the doctrine of res judicata, without affording him opportunity of having his day in court, would not be the best option for the court.

57. We, therefore, find no merit on the preliminary objection herein, with respect to res judicata, and in this holding we find support in the decision in Samuel Okoth & 7 Others vs. Consolidated Bank of Kenya Ltd [2012] eKLR, where the court said, on the issue of enforcement of a declaratory judgment:

> " 14. The present suit merely seeks to enforce the declaratory judgment. ... There will be no fresh litigation regarding the plaintiff's entitlement to severance pay that was litigated upon and determined in the said appeal.
>
> 15. The suit is thus not res judicata. It is an action brought upon a judgment with the meaning of Section 4(4) of the Limitation of Actions Act.
>
> 16 ...
>
> 17. Does this court have jurisdiction to hear and determine the suit? As already noted, the issue of liability was canvassed before and determined by this court in Nairobi HC Civil Appeal No. 231 of 2005. I have also accepted the prosecution that this suit is an action to enforce the decretal judgment rendered in the appeal. This court certainly has jurisdiction to enforce its own judgment.
>
> 18. Regarding the issue of joinder, the plaintiffs are simply seeking to enforce a declaratory judgment they already have. They are not seeking the adjudication

of claim of any desperate claims. The adjudication of their claims has already been done, they have properly come to court in one common suit."

58. The the respondents also argued that the matter was sub-judice, in that there was a pending appeal from the decision in the Adrian Kamotho case. Sub judice is defined in Black's Law Dictionary, 10th Edition, as a matter pending before the court for determination. It is captured in section 6 of the Civil Procedure Act, as follows:

> " 6. Stay of suit No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation - the pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."

59. The object of the sub judice principle is avoidance of multiplicity of suits over the same issue or subject matter, as was stated, in William Odhiambo Ramogi & 8 vs. AG & Others [2019] eKLR:

> " 56. The purpose of this principle is to avoid instances where multiple suits are filed by the same parties on the same issues before Courts of competent jurisdiction. In Standard Chartered Bank Limited vs. Jenipher Atieno Odok, HCCC No. 120 of 2003, Warsame J. (as he then was), had the following to say about the doctrine of sub judice: It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.
>
> 57. The test to be utilized to determine if a matter is sub judice, therefore, is to ask whether the parties in the suits are the same; whether the issues raised or subject matters of the suits are the same; and whether the matters are pending before Courts clothed with appropriate jurisdiction."

60. Although it was argued before us, that there was an appeal pending at the Court of Appeal, from the judgment in the Adrian Kamotho case, no proof was provided of the existence of any such appeal, on the basis of which it could be argued that the instant matter was sub judice vis-à-vis that appeal. We are, therefore, unable, in the absence of such evidence, to pronounce whether or not the instant cause violates the sub judice rule.

61. We now turn to the matter of enforcement or execution of declaratory orders of the court. The objection by the 1st and 2nd respondents in this regard is that fresh proceedings cannot be taken to enforce court orders issued in another High Court case, as such would amount to exercising supervisory jurisdiction over a decision of superior court of concurrent jurisdiction. The argument, as we understood it, is that the instant cause seeks to enforce the decision in the Adrian Kamotho case, and that we should not venture to do that, as that would amount to this court purporting to supervise the court that decided that case, which, it was submitted, would be wrong.

62. We think that we have to start by determining whether the orders in the Adrian Kamotho case were declaratory orders. It is noteworthy that the parties in that case were Adrian Njenga – Petitioner, Attorney General – Respondent, Judicial Service Commission- 1st Interested Party, Hon. Chief Justice

President Supreme Court – 2nd Interested Party, and Law Society of Kenya – 3rd Interested Party. The court in the end made the following orders:

a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st interested party in accordance with Article 166(1) as read with Article 172(1)(9) of the Constitution on the persons to be appointed as Judges;

b) A declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act;

c) A declaration be and is hereby issued that the continued delay to appoint the persons recommended as Judges of the respective courts is a violation of Articles 2(1), 3(1), (10),73(1)(a) 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution; and

d) Costs to the Petitioner.

63. We have no doubt, except for order (d) above on costs, that all the other orders are declaratory. In this regard, we are relying on the definition of declaratory orders given by the Court of Appeal in Johana Nyokwoyo Buti vs. Walter Rasugu Omariba & 2 Others [2011] eKLR, as follows:

> " A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force - that is, it does not require anyone to do anything. It is available both in private and public law save in Judicial Review jurisdiction at the moment. The rule gives general power to the courts to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter."

64. We hold that the judgment in the Adrian Kamotho case is declaratory. With regard to enforcement, it is also not in dispute that subsequent to the issuance of the above declaratory orders, the petitioner, in that cause, filed a Motion, on 24th February 2020, seeking a number of orders as follows:

a) That a finding be made that by failing to appoint the persons recommended for appointment as judges of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively within 14 days the Respondent was in breach of the orders of this Honourable court issued on 6th February 2020;

b) That a finding be made that the appointment of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of Employment and Labour Relations Court on 13th August 2019 respectively, having fallen due upon lapse of the 14 days appointment window and the appointing authority having failed to act as per the Constitution, the appointments have legally ripened and constitutionally crystalized;

c) That the Respondent be directed within 3 days to publish for the general information of the public in the Kenya Gazette, the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019, judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively;

d) That in the event of failure by the Respondent within three (3) days to publish in the Kenya Gazettee the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019, judge of the Environment and Land Court and judge of the

Employment and Labour Relations Court on 13th August 2019 respectively, the names of the said persons be immediately published by the 1st Interested Party, within 3 days in any newspaper of nationwide circulation;

e) That upon publication of the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019, judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively the 2nd Respondent do within 3 days administer the Oath of Affirmation of office, in the manner and form prescribed by the Third Schedule to the Constitution to the said persons;

f) That the Controller of Budget be authorized to approve withdrawal of funds from the Consolidated Fund as per the prescribed legal terms, to facilitate the full and proper assumption of office by persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively; and

g) That the Inspector General of National Police Service be directed to provide the requisite security arrangements as per policy, for the full and proper assumption of office by persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019, judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

65. In a ruling, delivered on 30th July 2020, the court dismissed the application, principally on the grounds that the petitioner had sought, in the application, orders requiring the Attorney General to gazette the persons recommended for appointment as judges while the Attorney General did not possess such powers, that the prayer that the appointment of the judges would crystalize could not be sought by way of Motion, the same being a declaratory order, that since there was no party known as 2nd respondent, in the petition or application, in that cause, the court could not issue orders to a non-existent party to swear the persons recommended as Judges as requested, and that the applicant had sought, through a Motion, issuance of substantive orders against the Chief Registrar of the Judiciary, the Controller of Budget and Inspector General of Police, all of whom were not parties in the petition or the motion.

66. Before the above ruling was delivered, however, the instant cause, Petition No. 206 of 2020, was filed on 22nd June 2020, by the petitioner herein, citing the judgment in the Adrian Kamotho case. The parties this time are Katiba Institute as Petitioner, President of the Republic of Kenya 1st Respondent, The Attorney General 2nd Respondent, and, Chief Justice of the Republic of Kenya as 3rd Respondent. There are four (4) Interested Parties that is; Judicial Service Commission 1st Interested Party, Kenya Human Rights Commission 2nd Interested Party, Kenya Judges and Magistrates Association 3rd Interested Party and International Commission for Jurists (ICJ) Kenya 4th Interested Party. The petitioner, Katiba Institute, seeks several orders to enforce the orders made in the Adrian Kamotho case.

67. We have considered all the submissions of the advocates on record. We note that, in the ruling of 30th July 2020, the court did not make any specific finding on the issue of enforcement of declaratory judgment or order. We hold the view that a declaratory judgment is not a stale statement by the court, but one that can be enforced, but only through the filing of fresh proceedings. In this regard, we adopt the persuasive reasoning in the Chief RA Okoya case, in which the Nigerian Supreme Court stated:

> " It appears that the starting point is with regard to the consensus not only among academic centres but in judicial decisions that a declaratory judgment may be the ground of subsequent proceedings in which the right having been violated receives enforcement but in

the meantime, there is no enforcement nor any claim to it. So, until subsequent proceedings have been taken on a declaratory judgment following its violation or threatened violation and the right, declared in the judgment, receives enforcement or is given legal sanction for its violation, there cannot on the clear authorities I have referred to above, a stay of execution of the declaratory judgement, because prior to the subsequent proceedings it merely proclaims the existence of a legal relationship and it does not contain every order that may be enforced against the defenders."

68. We hold that a declaratory judgment or order cannot be enforced in the mother suit in the normal way, through a Notice of Motion, but may give rise to fresh proceedings for its enforcement or execution.

69. On the related issue as to whether entertaining fresh proceedings will amount to this court exercising supervisory jurisdiction over another superior court, we do not think that a separate enforcement suit will amount to this court exercising supervision of proceedings determined by another superior court, provided that the enforcement suit is filed in the same superior court, that would be the High Court

for the purpose of the instant proceedings. In our view, entertaining such fresh enforcement proceedings does not violate the provisions of Article 165(5) (6) of the Constitution, which states as follows:

"165

(5) The High Court shall not have jurisdiction in respect of matters –

(a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

70. In our view, therefore, enforcement proceedings arising from declaratory orders or judgments of the High Court, which are filed in the High Court, are competent proceedings, and can proceed, and be determined on merit, even if the Judge or bench of Judges, sitting in the fresh proceedings, are different persons from those who made the said declarations, provided they are Judges of the High Court.

71. We note also that the parties in cause herein are different from the parties in the Adrian Kamotho case. In our view, this being constitutional and public interest litigation, determination of sufficient interest of the parties in the enforcement proceedings has to be in line with the broad provisions of Article 22 of the Constitution, which provides as follows:

"22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threated.

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

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

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

(c) a person acting in the public interest.

(d) an association acting in the interest of one or more of its members."

72. In our view, therefore, the sufficiency of interest of a party, in such proceedings, will have to be determined on case to case basis, depending on the peculiar facts and circumstances of each case. Again, in our view, in such proceedings, additional prayers can be sought, but limited to enforcement of the declaratory orders.

73. In the end, it is our finding and holding that there is no merit in the preliminary points raised with respect to the instant matter being res judicata, sub judice and an invitation to this High Court bench to exercise supervisory power over a decision of a superior court, and we proceed to hereby overrule the said objections, and to dismiss them. On the other hand, we have found merit in the objection that the 1st respondent should not have been made a party to the instant cause, on account of Article 143(2) of the Constitution, however, the said misjoinder is not fatal to the matter for the reasons that have been given in the body of the ruling, and the petition ought to be heard on its merits, the misjoinder notwithstanding.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 17TH DAY OF DECEMBER, 2020

G DULU

JUDGE

J WAKIAGA

JUDGE

W MUSYOKA

JUDGE