



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 442 OF 2015

IN THE MATTER OF: THE KENYA MAGISTRATES AND JUDGES ASSOCIATION

THE CONSTITUTION OF THE KENYA MAGISTRATES AND JUDGES ASSOCIATION

THE DRAFT ELECTION RULES OF THE KENYA MAGISTRATES AND JUDGES ASSOCIATION

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

SECTION 17, 20, 30, AND 45 OF THE SOCIETIES ACT AND RULES 11 AND 13 OF THE SOCIETIES RULES

AND

IN THE MATTER OF: THREATENED OR LIKELY CONTRAVENTION OF ARTICLES

10, 73 AND 75 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: INTERPRETATION OF ARTICLE 171 (2) (d) OF THE

CONSTITUTION OF KENYA

BETWEEN

KEVIN TURUNGA ITHAGI.....PETITIONER

-VERSUS-

1. HON. JUSTICE HEDWIG ONG'UNDI

2. BENSON IRERI

3. HON. BYRAN KHAEMBA

4. HON. ABDILATIF SILAU

5. HON. DERRICK KUTO

6. HON. SINKIYAN TOBIKO

(Being sued as the officials of the

KENYA MAGISTRATES AND

JUDGES ASSOCIATION).....1STRESPONDENT

REGISTRAR OF SOCIETIES.....2ND RESPONDENT

AND

1. HON. LADY JUSTICE HELLEN WASILWA

2. HON. JUSTICE ALFRED MABEYA

3. HON. JUSTICE PETER MUCHOKI NJORGE

4. HON. LADY JUSTICE JANET MULWA

5. HON. LADY JUSTICE RUTH SITATI

6. HON. JUSTICE LUKA KIMARU

7. HON. JUSTICE RICHARD MWONGO

(as officials of the KENYA JUDGES

WELFRARE ASSOCIATION).....INTERESTED PARTY

JUDGMENT

Introduction

1. Kevin TurungaIthagi (the Petitioner) who is an advocate of this court brought this Petition under Articles 165 (3) (d) (ii) and 258 of the Constitution of Kenya, and Rules 4, 10, 13 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 against Kenya Magistrates and Judges Association (KMJA) through its officials and Registrar of Societies as the 1st and 2nd Respondents respectively.

2. Kenya Judges Welfare Association, an association of judges of the High Court, courts with the status of the High Court, Chief Registrar of the Judiciary, Registrar of the High Court and Registrars of the courts with the status of the High Court and Deputy Registrars as may be admitted by the Executive Council, through its officials successfully applied on 29th November 2018 to be enjoined as an interested party to this Petition.

3. The Petition was filed on 19th October 2015simultaneously with a Notice of Motion dated 15th October 2015. The Petition was amended on 11th November 2015 and further amended on 2nd March 2016 pursuant to court orders granted on 10th November 2015 and 23rd February 2016.

4. We note that in the further amended Petitionreliefs No. (v) and (viii) were deleted affecting the renumbering of the reliefs. The following are the reliefs as renumbered:

i) A declaration that the amendment of the Registered Kenya Magistrates and Judges Association (KMJA) Constitution by the former officials of the KMJA was illegal and the draft KMJA Constitution in use is null and void as it affronts the basic strictures of Article 10 of the Constitution of Kenya.

ii) A declaration that all Regions and Regional Councils of the KMJA that are not established under Article 10 of the Registered KMJA Constitution and all decisions made thereunder are null and void.

iii) A declaration that the draft Election Rules made in reliance of the illegally passed draft KMJA Constitution are null and void and cannot be used for the elections of the KMJA National Officials and JSC representative scheduled for 31st October, 2015.

iv) A declaration that the KMJA cannot hold any elections whilst the illegalities persist.

v) A declaration that only the registered office bearers can call an election or convene any meetings of the KMJA.

vi) A declaration that all the actions of the KMJA conducted on the basis of the illegalities of the former officials are null and void.

vii) A declaration that the former officials of the KMJA have committed offences under Sections 17 (2), 20 (3), 30 (3) of the

Societies Act and Rule 17 of the Societies Rules.

viii) An order compelling the Registrar of Societies to suspend the KMJA under Section 12 (1) (d) and (g) of the Societies Act.

ix) A declaration that the constitutional design is that each court is entitled to have their respective representative(s) to the Judicial Service Commission (JSC).

x) A declaration that the KMJA is in breach of Article 36 (1) of the Constitution of Kenya.

xi) A declaration that the KMJA in allowing Supreme Court and Court of Appeal Judges to vote or be involved in the vote of a High Court Judge and Magistrate representative to the JSC is inconsistent with the purposes and objectives of Article 171 (2) (d) of the Constitution.

xii) A declaration that the Magistracy and the Judges are distinct cadres with distinct constituencies and therefore voting across both cadres is inconsistent with the purposes and objectives of Article 171 (2) (d) of the Constitution of Kenya.

xiii) A declaration that the High Court Judge or Magistrate representative to the JSC to be elected by the members of the KMJA under Article 171 (2) (d) is not a representative of the KMJA but a representative of Judges and Magistrates respectively.

xiv) A declaration that Article 171 (2) (d) of the Constitution of Kenya in so far as it limits representation of judges to the JSC to a "High Court Judge" is discriminatory as against judges of the Employment and Labour Relations Court (ELRC) and Environment and Land Court (ELC) with equal status of a High Court Judge.

xv) Any such orders, reliefs and/or directions that this Honourable Court may consider just and appropriate.

5. The Petitioner filed an affidavit in support of the Petition.

6. Upon being served the 1st Respondent filed a Notice of Preliminary Objection and a Replying Affidavit on 22nd October 2015. The 2nd Respondent filed Grounds of Opposition and a Replying Affidavit on 21st December 2018 and the Interested Party filed a Replying Affidavit on 18th February 2019.

7. When the Petition came up for hearing the parties recorded consent to dispose of it by way of written submissions. In the intervening period before the Petition was argued, the Notice of Motion dated 15th October 2015 was canvassed before the late Hon. Mr. Justice J. L. Onguto. The Notice of Motion sought various conservatory orders against the 1st Respondent. The decision on the aforesaid Notice of Motion has had great impact on some of the reliefs sought in this Petition as shall be demonstrated in our judgment.

Petitioner's Case

8. The Petitioner questions the management of the KMJA on two fronts: firstly, the management of its affairs, and secondly the management of the elections of a representative to the Judicial Service Commission (JSC). The Petitioner also urges this court to interpret Article 171 (2) (d) of the Constitution.

9. The Petitioner contends that the officials of the 1st Respondent as state officers within the meaning of Article 260 of the Constitution have contravened the provisions of Articles 10, 73 and 75 of the Constitution which enjoins them to embrace national values and principles of good governance, integrity, transparency and accountability in all their undertakings.

10. The Petitioner further contends that the 1st Respondent failed to comply with the provisions of Sections 17(2), 20(3) and 30(3) of the Societies Act and Rule 17 of the Societies Rules. It is alleged that the 1st Respondent failed to issue notices of change of office bearers and of titles of its office bearers in the prescribed form; issuing a notice of 16 days instead of the prescribed 60 days; creating three KMJA Regions namely Embu, Bungoma/Busia and Western Kakamega, against its Constitution and adopting a draft constitution without following the laid down procedure.

11. The Petitioner further alleges that the 1st Respondent reverted to using its registered constitution as opposed to the draft constitution indicative that the 1st Respondent was aware that its actions were in contravention of the Societies Act.

12. The Petitioner further questions the legality of the election rules developed by officials of the 1st Respondent to be used in the elections of a representative of the Magistrates to the JSC in the Annual General Meeting scheduled for 31st October 2015.

13. The 1st Respondent is accused of bestowing upon itself the constitutional mandate under Article 171(2) (d) of the Constitution to be the "**association of judges and magistrates**" referred to in the above Article for purposes of electing a High Court Judge and a Magistrate representatives to the JSC.

14. The 1st Respondent is accused of allowing all its members from different cadres of the Judiciary to take part in the voting of a High Court Judge and Magistrate representatives to the JSC in contravention of the purposes and objectives of Article 171(2) (d) of the Constitution. It is alleged that this confers an unfair advantage to the judges of the Supreme Court and Court of Appeal as well as magistrates yet each cadre has distinct constituencies with distinct needs.

15. The 1st Respondent has been accused of infringement of the rights of judges and magistrates who are not its members in contravention of Article 36(1) and (2) of the Constitution thus disenfranchising them.

16. The Petitioner has invited this court to interpret Article 171(2)(d) of the Constitution in line with Article 259(1) of the Constitution. The Petitioner specifically invites this court to interpret that the term “**High Court Judge**” does not refer to the judges of the courts with the status of the High Court and therefore Article 171(2)(d) of the Constitution, insofar as it limits representation of judges to JSC to a “**High Court Judge**”, is discriminatory as against the judges of the courts with the status of the High Court.

The 1st Respondent’s Case

17. In its response, the 1st Respondent contended that the Petitioner lacked standing to present this Petition in terms of Articles 22 and 258 of the Constitution and Rules 4(2) and 10(2)(d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Legal Notice 117 of 2012 (herein referred to as “The Rules”).

18. Further the 1st Respondent argues that it acted according to the law with regard to the draft constitution by involving all its members in adopting the same at a National Council meeting held on 12th April 2014 and formally inaugurated it at an Annual General Meeting held on 8th November 2014.

19. The 1st Respondent argues further that it was in the process of adopting the draft Election Rules of the Association during its Annual General Meeting which was scheduled on 31st October 2015.

20. The 1st Respondent acknowledged that there was delay in updating of its records with the 2nd Respondent but contended that there is in existence of inbuilt remedies under the Societies Act to cure the non-compliance which remedies do not include invalidation of the office holding and/or nullification of actions of office bearers of the association.

21. On the aspect of the interpretation of Article 171(2)(d) of the Constitution the 1st Respondent does not agree with the interpretation proposed by the Petitioner. Instead the 1st Respondent urges firstly that this court interprets this provision in such a way that the representative elected by the 1st Respondent represents judges of the High and judges of the courts with the status of the High Court and secondly that this court has no jurisdiction to declare Article 171(2)(d) of the Constitution as being inconsistent with Article 27 of the Constitution.

22. In response to the assertion by the Petitioner that the 1st Respondent is not the body solely mandated to elect a representative of the judges of the High Court to the JSC the 1st Respondent argues that it is the only body mandated to do so.

The 2nd Respondent’s Case

23. It is the case of the 2nd Respondent that the Petitioner has not disclosed any reasonable cause of action against it. The 2nd Respondent maintains that it acted within its mandate in accordance with the provisions of the Societies Act.

24. The 2nd Respondent states that the Petitioner is seeking orders that are not available to him because he has not demonstrated any legal right that has been infringed by the actions of the 2nd Respondent. Further, in response to the prayer by the Petitioner for an order to compel the 2nd Respondent to suspend the 1st Respondent, the 2nd Respondent contends that it cannot exercise the powers conferred to it by law arbitrarily without following the due process.

The Interested Party’s Case

25. In response to the Petition and the Response by the 1st Respondent the Interested Party is of the opinion that it is best suited to provide a representative of the judges of the High Court and judges of the courts with the status of the High Court to the JSC as opposed to the 1st Respondent and invites this court to so interpret Article 171(2)(d) of the Constitution.

26. The Interested Party invites this court to give Article 171(2)(d) of the Constitution a purposive interpretation of the use of the word “**and**” in clause (d) where it reads “**elected by the members of the association of judges and magistrates**” to mean an association of judges and an association of magistrates and not an association that includes both judges and magistrates.

Identification of Issues

27. All the parties to this Petition have agreed on the following eight issues:

(i) Whether voting across cadres of judicial officers for their representatives to the Judicial Service Commission contravenes Article 171(2)(d) of the Constitution.

(ii) What impact would a finding in (i) above have on the previous compositions of the Judicial Service Commission and the decisions taken by the Judicial Service Commission ever since it was reconstituted under the Constitution of Kenya 2010.

(iii) Whether Article 171(2)(d) of the Constitution is discriminatory as against the judges of the Employment and Labour

Relations Court and Environment and Land Court.

(iv) Whether the KMJA in allowing Supreme Court Judges and Court of Appeal Judges to vote or be involved in voting of the High Court and Magistrate representatives to the Judicial Service Commission is inconsistent with the purposes and objects of Article 171(2)(d) of the Constitution.

(v) Whether KMJA is the body solely mandated to elect a representative of the High Court to the Judicial Service Commission.

(vi) Whether prescriptive recommendations should issue to formulate express statutory or subsidiary legislation to effect a purposive interpretation of Article 171(2)(d) of the Constitution.

(vii) Whether there is a valid cause of action against the 2nd Respondent.

(viii) Whether orders sought against the 2nd Respondent are available to the Petitioner.

28. Upon critically considering the eight issues above, it is our view that the same can be reduced to six issues as follows:

(i) Whether voting across cadres of judicial officers for their representatives to the Judicial Service Commission is inconsistent with the purposes and objects of Article 171(2)(d) of the Constitution.

(ii) If the answer to issue No. (i) above is in the affirmative, what impact would it have on the previous compositions of the Judicial Service Commission and its decisions after its reconstitution under the Constitution of Kenya 2010.

(iii) Whether Article 171(2)(d) of the Constitution is discriminatory as against the judges of the Employment and Labour Relations Court and Environment and Land Court.

(iv) Whether KMJA is the body solely mandated to elect a representative of the High Court to the Judicial Service Commission.

(v) Whether prescriptive recommendations should issue to formulate express statutory or subsidiary legislation to effect a purposive interpretation of Article 171(2)(d) of the Constitution.

(vi) Whether there is a valid cause of action against the 2nd Respondent.

Analysis and Determination

29. This court has taken time to critically read and understand the case for the Petitioner and the responses by the Respondents and the Interested Party. Before we delve into the reframed issues we deem it necessary to revisit and touch on the Notice of Motion dated 15th October 2015 with regard to the reliefs sought by the Petitioner and the orders granted by the late Hon. Mr. Justice J. L. Onguto on 26th October 2015 and 2nd November 2015.

30. In that Notice of Motion the Petitioner sought, among others, conservatory orders restraining officials of the 1st Respondent from convening any meeting or calling elections of the 1st Respondent pending the hearing and determination of the application and the Petition and an order to stay the Annual General Meeting and Conference of the 1st Respondent scheduled to take place from 29th to 30th October 2015 pending the hearing of the application and the Petition.

31. Among the grounds in support of the application were that the 1st Respondent had breached the provisions of Sections 17, 20 and 30 of the Societies Act and Rule 11 of the Societies Rules. Secondly, the 1st Respondent had allegedly formulated draft election rules in reliance on purported powers granted by the provisions of Article 13 (2) and 24(1) of the illegally amended constitution which draft election rules would have been used for voting during the Annual General Meeting which had been scheduled for 31st October 2015. Thirdly, the 1st Respondent illegally created Regional Councils for the illegally created Regions of the 1st Respondent and permitting the illegally created Regional Councils to vote at the National Council.

32. The application was canvassed and a ruling delivered on 26th October 2015 granting the following orders:

(i) A conservatory order staying the Annual General Meeting and Annual General Conference of the Kenya Magistrates and Judges Association scheduled from 29th through to 31st October 2015 for a period of one hundred and twenty day(120) days to enable the Respondents comply and/or ensure compliance with the provisions of the Societies Act;

(ii) A conservatory order staying the elections by the Kenya Magistrates and Judges Association of a Commissioner to the Judicial Service Commission for a period of one hundred and twenty days to enable the Respondents comply with (i) above and involve all the relevant constitutional bodies in the elections.

(iii) Liberty to apply was granted to the parties.

33. The 1st Respondent filed an application dated 28th October 2015 seeking to review the ruling of the court delivered on 26th October 2015

to allow the Annual General Meeting and elections of the 1st Respondent to proceed as scheduled on 29th to 31st October 2015. This application was anchored on the grounds that the 1st Respondent had in the intervening period complied with the provisions of the Societies Act and that they had sought and obtained the commitment of the Independent Electoral and Boundaries Commission (IEBC) to conduct the elections during the AGM

34. The court considered the application and reviewed the orders issued on 26th October 2015 and directed that the AGM be held immediately or at such times as the Respondents may deem fit. These orders effectively settled the Petition to a large extent. Specifically, the effect of the orders granted by the late Hon. Mr. Justice J. L. Onguto settled the Petitioner's reliefs numbers (iv), (v), (vi) and (vii) listed herein above.

Principles of constitutional interpretation

35. In our understanding for this court to comprehensively address the issues reframed by this court, we must first address the principles of constitutional interpretation. Our attention is drawn to Article 259 (1) of the Constitution of Kenya which sets the principles that should guide this court when interpreting the constitution. This Article provides as follows:

259 (1) This Constitution shall be interpreted in a manner that:

(a) Promotes its purposes, values and principles;

(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits development of the law; and

(d) Contributes to good governance.

36. The principles in the above Article have been advanced in case law locally and even in other jurisdictions. In the case of **George Bala v. Attorney General (2017) eKLR** the court cited with approval the case of **Ndyanabo v. Attorney General [2001] 2 EA 485** in which the Tanzania Court of Appeal held:

that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation was constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.

37. The court further cited with approval the case of **Kigula and Others v. Attorney-General [2005] 1 EA 132** in which the Uganda Court of Appeal sitting as a Constitutional Court held that:

the principles of constitutional interpretation are as follows (i) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (ii) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (iii) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (iv) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed; (v) that in determining constitutionality both purpose and the effect are relevant; and (vi) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people.

38. These principles were restated by this court in the case of **Peter Solomon Gichira v. Independent Electoral and Boundaries Commission & Another [2017] eKLR** in part as follows:

“Our Constitution, it has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and inter alia Article 10 of the Constitution.”

39. Further, the Supreme Court in **In the Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR** had similar view as in the **Peter Solomon Gichira** case above and had this to say about the interpretation of the constitution:

“...But what is meant by a holistic interpretation of the Constitution” It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.”

40. We have noted that the Petitioner, the 1st Respondent and the Interested Party in their submissions have invited this court to apply the principles of interpreting the constitution as set out under Article 259(1) of the Constitution and the authorities cited above.

41. With these principles in mind, we now turn to the specific issues:

Whether voting across cadres of judicial officers for their representatives to the Judicial Service Commission is inconsistent with the purposes and objects of Article 171(2)(d) of the Constitution.

42. On this issue it is the submission of the Petitioner that the 1st Respondent's practice of allowing all its members from different cadres of the Judiciary to vote or be involved in the voting of a High Court Judge and a Magistrate representative to the JSC under Article 171(2)(d) of the Constitution is inconsistent with purposes and objects of that article. This is because in the Petitioner's view as we understood it, it is the constitutional design that each cadre should elect their respective representative to the JSC. Further, it is the submission of the Petitioner that the practice confers an unfair advantage to the judges of the Supreme Court, Court of Appeal, Magistrates and Kadhis as these cadres have distinct constituencies and needs.

43. As far as we can discern from the submissions of the 1st Respondent and the Interested Party, they did not specifically address us on this issue.

44. Article 171 (1) of the Constitution establishes Judicial Service Commission. The composition under Article 171 (2) includes:

a)

b) one Supreme Court judge elected by judges of the Supreme Court;

c) one Court of Appeal judge elected by judges of the Court of Appeal;

d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;

e)

45. This court having taken into account the principles of constitutional interpretation urged by the parties herein, and having considered the authorities cited adopts an interpretation that promotes the purposes and the objects of the Constitution. Our understanding is that Article 171(2)(b) (c) and (d), being provisions relating to the election of representatives to the JSC by Judges and Magistrates, should be considered and read together to give effect to the purposes and objects of the Constitution. Looking at Article 171 (2) (b), (c) and (d) of the Constitution it is our considered view that it was the intention of the framers of the Constitution that each cadre of the courts should elect their own representative to the JSC. It is our view that if this court were to adopt different interpretation of Articles 171 (2) (b), (c) and (d), this would create disharmony. Consequently we hold and find that the practice by the 1st Respondent of allowing different cadres of the Judiciary to vote for representatives of a High Court Judge and Magistrate to the JSC is inconsistent with the provisions of Article 171 (2) (d).

If the answer to issue No. (i) above is in the affirmative, what impact would it have on the previous compositions of the Judicial Service Commission and its decisions after its reconstitution under the Constitution of Kenya 2010.

46. We want to approach this issue by looking at it in two ways: firstly the composition of JSC and secondly its decisions since it's reconstitution under the Constitution of Kenya 2010. To our understanding the membership of JSC that is questioned in this Petition is the Judge of the High Court and a Magistrate. Given our finding above that the practice by the 1st Respondent of allowing different cadres of the Judiciary to vote for representatives of High Court Judges and Magistrates to the JSC is inconsistent with the provisions of Article 171 (2) (d) of the Constitution, we are called upon to pronounce ourselves on the impact of the decisions and actions of JSC as composed.

47. Under Article 172 (1) of the Constitution the functions of JSC are set out. These include promotion and facilitation of the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice; recommendation for appointment of judges of all cadres; recruitment of judicial officers and staff; review and recommendations on conditions and terms of service of judges, judicial officers and staff other than remuneration; training of judges, judicial officers and staff; disciplinary issues; development of policy guidelines and to advise the national government on the administration of justice.

48. We have no doubt in our minds that since its reconstitution in 2010, JSC as composed has carried out its functions as stated hereinabove. It has made recommendations for appointments of judges in all cadres who have subsequently been appointed and has appointed magistrates and judicial staff. It has made policy decisions including establishment of court stations in various parts of this country thus bringing justice closer to the people and promoting access to justice. It has established Judiciary Training Institute for the training of the judges, magistrates and staff to build their capacity for efficient and effective delivery of justice. It has established the National Council on the Administration of Justice which brings together all stakeholders in the administration of justice and it has advised the national government on improving the efficiency of the administration of justice.

49. JSC has also undertaken disciplinary action against judges, judicial officers and staff including recommendations on setting up of tribunals; suspension and dismissal of some judicial officers and staff.

50. We have considered this issue and we appreciate the magnitude of some of the decisions mentioned above. Some of these decisions for instance the recommendation for appointment of judges of all cadres, appointment of judicial officers and staff, policy decisions on the efficient and effective administration of justice, policy decisions on transparency and accountability of the judiciary, are central to the running of the affairs of the judiciary as an arm of the government.

51. We appreciate that most of these decisions touch on the public in many ways for instance the efficient and effective administration of justice and access to justice. Further, some of these decisions for instance the recommendation for appointment of judges, appointment of judicial officers and staff vest the rights on individuals and the promotion of transparency and accountability of the judiciary and the rule of law.

52. We have considered this issue at length and have agonized over it. We are of the opinion that if we make a decision that would lead to the nullification of the decisions and actions of the JSC as composed it would lead to far reaching consequences. It would shake the foundation of the Judiciary as an arm of government and it would weaken and destroy the Judiciary as an institution and undermine the rule of law.

53. Having answered issue No. (i) above in the affirmative it is expected that this court would issue orders declaring the past decisions and actions of the JSC invalid. However, in the unique circumstances of this case we are of the view that we should not issue such orders as to do so would have far reaching ramifications.

54. In arriving at the above decision, we are emboldened by reasoning of the Court of Appeal in the case of *East African Cables Limited v. Public Procurement Complaints, Review Appeals Board & another [2007] eKLR* that expressed itself in the following manner:

We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mills, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most good. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.

55. We wholly adopt the above reasoning of the Court of Appeal.

Whether Article 171(2)(d) of the Constitution is discriminatory as against the judges of the Employment and Labour Relations Court and Environment and Land Court.

56. It is the Petitioner's submission that Article 171 (2) (d) of the Constitution discriminates against the Judges from the Environment and Land Court (ELC) and Employment and Labour Relations Court (ELRC) in not allowing them to exercise the right to present themselves as candidates or to vote for their own representative to the JSC. The Petitioner submits that the term "**High Court Judge**" under Article 171 (2) (d) of the Constitution should not be construed and interpreted to mean or as making reference to judges of the Environment and Land Court and Employment and Labour Relations Court.

57. The Petitioner cited the case of *Karisa Chengo & 2 others v. Republic [2015] eKLR* where the Supreme Court pronounced itself thus:

"It is therefore our finding that the courts established under the Constitution and the judges appointed to sit in them are synonymous with the court they are appointed to. We reject the argument that a judge once appointed either as a High Court Judge, ELRC or ELC Judge can hear and determine matters reserved for any of those courts. We have already found that each judge appointed to a particular court possesses the requisite constitutional or statutory experience required of one to serve in that court."

58. The Petitioner further submitted that Article 171 (2)(d) of the Constitution only applies to judges of the High Court and not judges of the ELRC and ELC. The latter judges are barred by the Constitution from representing judges in the JSC and any such election of a judge from these courts to the JSC would be unconstitutional. The Petitioner's view therefore is that this article is discriminatory as far as it limits representation of judges to the JSC to a High Court judge.

59. On the same issue the 1st Respondent submitted that this court lacks jurisdiction to determine this issue as this would run counter to the provisions of Article 2 (3) of the Constitution which provides that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organs.

60. The 1st Respondent further submitted that if this court were to declare Article 171 (2) (d) of the Constitution as being discriminatory such declaration would run counter to the principle that the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other.

61. The 1st Respondent submitted that a reading of Article 171 (2) (d) of the Constitution as a whole would reveal that it was not the intention of the framers of the Constitution to have every person or institution represented in JSC.

62. On this issue, it is the view of the Interested Party that Article 171 (2) (d) of the Constitution is discriminatory against the judges of ELRC and ELC.

63. We have considered this issue. In our understanding this issue raises two main points: firstly the interpretation of "**High Court Judge**" under Article 171 (2) (d) of the Constitution and secondly whether Article 171 (2) (d) of the Constitution is discriminatory against the Judges of the ELC and ELRC.

64. Article 162 of the Constitution defines systems of superior courts to include Supreme Court, Court of Appeal, High Court and courts with the status of the High Court. Currently these courts with the status of the High Court are the ELRC as established under The Employment and Labour Relations Court Act, 2011 and the ELC established under the Environment and Land Court Act, 2011.

65. Our understanding is that the High Court referred to under Article 162 (1) of the Constitution is distinct from the courts with the status of the High Court. We take the view that the use of the words “**High Court Judge**” under Article 171 (2) (d) of Constitution should be interpreted to include judges of the courts with the status of the High Court and so we hold.

66. We wish to distinguish the interpretation of “**High Court Judge**” adopted by the Supreme Court in the case of ***KarisaChengo & 2 others v. Republic [2015] eKLR*** (*supra*) and relied on by the Petitioner in the dispute before us. In our view the Supreme Court in the case under reference interpreted the Constitution in the context of the jurisdiction of the High Court and courts with the status of the High Court. However, it is our understanding that in this matter we are dealing with the question touching on the election of the representative of the High Court and the courts with the status of the High Court in the JSC.

67. We now turn to the question as to whether Article 171 (2) (d) of the Constitution is discriminatory against the Judges of the ELC and ELRC. We have considered this issue at length. Having made a determination on the question preceding this issue we hold the view that Article 171 (2) (d) of the Constitution is not discriminatory against the Judges of the ELC and ELRC.

68. We have also considered the submissions of the parties on this issue. We are persuaded by the argument by the 1st Respondent that Article 171 (2) (d) of the Constitution, being a constitutional provision, cannot be declared unconstitutional. If this court were to do so, this would run counter to the principle that the entire Constitution be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. It would also run counter to Article 2(3) of the Constitution that provides as that:

“The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.”

Whether KMJA is the body solely mandated to elect a representative of the High Court to the Judicial Service Commission.

69. The Petitioner submitted that KMJA is not the association contemplated under Article 171 (2) (d) of the Constitution for election of a representative of the High Court and the Magistrates to the JSC. He submitted that KMJA bestowed upon itself this constitutional mandate. It was further submitted by the Petitioner that by purporting Article 171 (2) (d) of the Constitution exclusively refers to the KMJA, and purporting to execute the mandate therein, the KMJA curtailed the participation and the right to freedom of association guaranteed under Article 36 (1) of the Constitution of the Kenya to judges and magistrates who are not members of KMJA. This denies the non-members the right to participate in the election of the representative to the JSC or offer themselves as candidates.

70. The 1st Respondent’s argument is that the body envisaged under Article 171 (2) (d) of the Constitution is KMJA. It is the view of the 1st Respondent that the framers of our Constitution anticipated a definite association of judges and magistrates hence the use of the definite article “**the**”.

71. It was further submitted that whatever the name of that association it had to be an umbrella association of judges and magistrates hence the use of the conjunctive “**and**” and therefore whoever participates in the election of representatives to the JSC had to be a member of that association.

72. The 1st Respondent contends that the Interested Party is a welfare association of judges whose registration has not been disclosed to this court and therefore it is a body with a weak regulatory framework as compared to the 1st Respondent that is duly registered and regulated by the 2nd Respondent. It is also the submission of the 1st Respondent that the Interested Party is not an association of judges and magistrates envisaged under Article 171 (2) (d) of the Constitution which uses the phrase “**the association of judges and magistrates**”. It does not use the phrase “**the associations**” of judges and magistrates.

73. The 1st Respondent urged that this court makes a finding on this issue in the affirmative.

74. The 2nd Respondent did not make submissions on this issue.

75. The Interested Party did not file written submissions on this issue. In its oral submissions made in court it was submitted that the Interested Party is the association envisaged under Article 171 (2) (d) of the Constitution. It was submitted that the Interested Party came into being to address the issue of disenfranchising of the judges because of the big number of the constituency of magistrates and kadhis compared to that of the judges. It was submitted that the Interested Party is the only exclusive association that draws its membership from judges.

76. In its Replying Affidavit, the Interested Party states that it is the association best suited to represent judges of the High Court and courts with the status of the High Court. The Interested Party states that a “**judge**” is defined in its constitution and rules to mean “**a Judge who has assumed office in terms of the Constitution of Kenya 2010 and is serving either in the High Court or courts with the status of the High Court.**” The Interested Party further states that the use of the word “**and**” in Article 171 (2) (d) of the Constitution should be interpreted to mean “**an association of judges**” and “**an association of magistrates**” and not an association that includes both judges and magistrates.

77. Having considered rival submissions on this issue we think it is important to critically examine the meanings and applicability of the words “**the**” and “**and**”. According to the definition found on the Online English Dictionary the word “**the**” means a definite grammatical article that implies necessarily that an entity it articulates is presupposed, something already mentioned, or completely specified later in that same sentence or assumed already completely specified.

78. In the ordinary English Grammar usage nouns are preceded by the definite article when the speaker believes that the listener already knows what he is referring to (*see <http://www.ef.com>*)

79. Being guided by the definition of the word “**the**” and its usage as shown above it is our view that the textual use of the word “**the**” in Article 171 (2) (d) of the Constitution in the context of this matter refers to a definitive association. Put in other words it refers to an already existing association.

80. The word “**and**” in our understanding is a coordinating conjunction; expressing two elements to be taken together or in addition to each other.

81. We have considered the arguments of the parties with regard to the use of the word “**and**” in Article 171 (2) (d) of the Constitution and it is our view that the word as used in that article is conjunctive. In the context of the issue before us the usage of that word refers to an association of both judges and magistrates.

82. With regard to the submissions by the Interested Party that Article 171 (2) (d) of the Constitution refers to an association of judges and an association of magistrates because of the use of the conjunctive word “**and**”, it is our considered opinion that this argument cannot hold. This is because the word used in the article is “**and**” which is conjunctive and not “**or**” which is disjunctive. This distinction was clearly brought out in the case of *Raila Amolo Odinga & another v. IEBC & 2 others Presidential Petition No. 1 of 2017*. In this case, the Supreme Court was discussing the use of the word “**and**” in 2 English Statutes namely the English Ballot Act of 1872 and the Representation of People Act (1949). The latter Act was discussed in the case of *Morgan v. Simpson (1974) 3 ALLR 722*. The Supreme Court was comparing the use of the word “**and**” in the above statutes and the use of the word “**or**” in our repealed National Assembly and Presidential Elections Act (Section 28) and Section 83 of the current Elections Act. The Supreme Court’s view was that the use of the word “**and**” in the English cited statutes is conjunctive and the use of the word “**or**” in our repealed National Assembly and Presidential Elections Act (Section 28) and Section 83 of the Elections Act is disjunctive.

Whether prescriptive recommendations should issue to formulate express statutory or subsidiary legislation to effect a purposive interpretation of Article 171(2)(d) of the Constitution.

83. Having given the interpretation of Article 171 (2) (d) of the Constitution this court came to the conclusion that the 1st Respondent in allowing different cadres of the courts to vote for representatives of High Court Judges and Magistrates to the JSC is inconsistent with the provisions of Article 171 (2) (d) of the Constitution, the question that begs an answer is whether this court should recommend statutory or subsidiary legislation intervention. Our answer to this question is that we do not think it is appropriate to make that recommendation.

84. We note that what provoked the Petition before this court is the manner in which the 1st Respondent used its constitution to carry out the election of the representative of the High Court Judges and Magistrates to JSC. Therefore the only reasonable thing for this court to do under the circumstances is to recommend that the 1st Respondent amends its constitution to conform with the interpretation we have given to Article 171 (2) (d) of the Constitution, which we hereby do. Such amendment(s) should be done within eighteen (18) months from the date of this judgment. Failure to do so would render its future decisions and actions unconstitutional.

85. Following our interpretation that the intention of the framers of the Constitution was to have every cadre of the courts elect their own representative to the JSC, it is our view that the ideal situation would be to have the Judges of the High Court (which we have interpreted to include judges of the courts with status of the High Court) elect their own representative to the JSC and the Magistrates to elect their own representative to the JSC.

Whether there is a valid cause of action against the 2nd Respondent.

86. Our reading of the Further Amended Petition shows that the only prayer sought against the 2nd Respondent is an order compelling it to suspend the 1st Respondent under Section 12 (1) (d) and (g) of the Societies Act. This issue is spent following compliance by the 1st Respondent with this court’s order issued on 26th October 2015. Consequently there is no valid cause of action against the 2nd Respondent.

Reliefs

87. We have addressed our minds to the reliefs sought by the Petitioner and have noted that he seeks 15 reliefs. Out of these 15 reliefs, prayers (iv), (v), (vi) and (vii) have been adequately addressed by the late Mr. Justice J. L. Onguto in his ruling delivered on 2nd November 2015. In that ruling the learned judge noted that the 1st Respondent had satisfactorily addressed the irregularities that the Petitioner had complained of.

88. By the time of writing this judgment prayer (viii) had been spent.

89. In regard to prayer (i) the learned judge noted that although the 1st Respondent had submitted that its amended constitution was launched in 2014 the same had not been adopted but the same was scheduled to be adopted on 31st October 2015 during the 1st Respondent’s Annual General Meeting.

90. Though there was no evidence presented to this court during the hearing of the Petition as to the status of the amended 1st Respondent’s constitution, counsel for the 2nd Respondent in her submissions informed this court that the said amended constitution was registered on 8th January 2016. By virtue of that submission this court can conclusively make an inference that the amended constitution of the 1st Respondent was adopted during the AGM and Annual Conference held between 29th and 31st October 2015. For this reason we decline to grant prayer (i).

91. We have considered prayers (ii) and (iii) and going by our order in respect to prayer (i) we decline to grant these prayers.

92. We have considered prayers (ix), (xi), (xii) and (xiii) and note that they are in agreement with the interpretation we have given hereinabove. The same have been granted as prayed.

93. Having come to the conclusion that the 1st Respondent is the association envisaged under Article 171 (2) (d) of the Constitution, prayer (x) cannot issue. We decline to grant that prayer.

94. Having found that Article 171 (2) (d) of the Constitution is not discriminatory as against the judges of the courts with the status of the High Court we decline to grant prayer (xiv).

95. Before we conclude on the reliefs sought we have noted that the Interested Party had sought the following prayers in its Replying Affidavit sworn on 18th February 2019 and filed on even date. We have summarized these reliefs as follows: (i) A declaration that the Interested Party is best suited to select the JSC representative of the High Court and courts with the status of the High as opposed to the 1st Respondent; (ii) A declaration that the judges of the High Court and courts with the status of the High Court are constitutionally entitled to representation in the JSC by electing their own representative from within their constituency; and (iii) a recommendation on specific corrective prescription to either have specific substantive legislation or subsidiary/rules to operationalize the provisions of Article 171 (2) (d) of the Constitution.

96. We have taken time to consider the prayers sought by the Interested Party. We note the manner in which they have approached this court, which in our view is inappropriate. It trite that a party cannot seek substantive remedy by way of an affidavit. It can only be done by way of substantive pleading and in this case by way of a Cross Petition. Consequently we decline to make any findings on the reliefs sought save for prayer (iii) as explained below.

97. Following our decision declining to grant the prayers sought by the Interested Party, we note that its prayer No. (iii), that seeks a recommendation on specific corrective prescription to either have specific substantive legislation or subsidiary/rules to operationalize the provisions of Article 171 (2) (d) of the Constitution informed the agreed issue No. (v) in the re-framed issues. We have fully addressed that issue hereinabove as invited by all the parties to do so.

Conclusion

98. For the avoidance of doubt the following reliefs are granted:

(i) A declaration that the constitutional design is that each court is entitled to have their respective representative(s) to the Judicial Service Commission (JSC).

(ii) A declaration that the KMJA in allowing Supreme Court and Court of Appeal Judges to vote or be involved in the vote of a High Court Judge and Magistrate representative to the JSC is inconsistent with the purposes and objectives of Article 171 (2) (d) of the Constitution.

(iii) A declaration that the Magistracy and the Judges are distinct cadres with distinct constituencies and therefore voting across both cadres is inconsistent with the purposes and objectives of Article 171 (2) (d) of the Constitution of Kenya.

(iv) A declaration that the High Court Judge or Magistrate representative to the JSC to be elected by the members of the KMJA under Article 171 (2) (d) is not a representative of the KMJA but a representative of Judges and Magistrates respectively.

99. Due to the nature of this Petition we order that each party bears its own costs.

Dated, signed and delivered in Nairobi this 24th day of May 2019.

J. K. Sergon

S. N. Mutuku

L. M. Njuguna

Judge

Judge

Judge