



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**[CORAM: KIMONDO, MRIMA & ONGERI JJ]**  
**CONSOLIDATED PETITIONS NO. 210 & 214 OF 2019**

**BETWEEN**

SIMON MBUGUA.....1<sup>ST</sup> PETITIONER  
OKIYA OMTATAH OKOITI.....2<sup>ND</sup> PETITIONER

**VERSUS**

THE CENTRAL BANK OF KENYA.....1<sup>ST</sup> RESPONDENT  
DR. PATRICK NJOROGE.....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**JUDGMENT OF KIMONDO & ONGERI JJ**

***Introduction***

1. The petitioners challenge the *designs* and the *process* that introduced the new generation Kenyan notes and coins. They also take up cudgels on the decision by the Central Bank of Kenya (hereafter *the 1<sup>st</sup> respondent*) to withdraw the old Kshs 1,000 note as *legal tender* with effect from 1<sup>st</sup> October 2019.
2. The substratum of the consolidated petitions is that the design contains a *portrait* or a *sculpture-portrait* of the first President of Kenya, Mzee Jomo Kenyatta, contrary to **Article 231** of the **Constitution**. The actions of the 1<sup>st</sup> respondent are also impugned for breaching the **Central Bank of Kenya Act** (hereafter *the CBK Act*), the **Statutory Instruments Act** (hereafter *the SIA*) and other statutes.
3. The conduct of the 1<sup>st</sup> respondent is further assailed for among other reasons, being unreasonable; contravening the petitioners' rights to fair administrative action; and, for being implemented without public participation.
4. The Respondents oppose the consolidated petitions *in toto*. In a synopsis, they submitted that the new currency complies fully with the law; that the petitions are *res judicata*; that they are devoid of any merit; and, they should be dismissed with costs.

***The Parties***

5. The 1<sup>st</sup> Petitioner is a Kenyan citizen and a Member of Parliament of the East African Legislative Assembly.
6. The 2<sup>nd</sup> Petitioner is the Executive Director of *Kenyans for Justice and development (KEJUDE)* a legal trust incorporated in Kenya whose objects include the promotion of democratic governance, sustainable economic development and prosperity.
7. The 1<sup>st</sup> Respondent is established under **Article 231(1)** of the **Constitution** and is responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.
8. The 2<sup>nd</sup> Respondent is the Governor of the 1<sup>st</sup> Respondent appointed by the President under Section 13 (1) of the **CBK Act**.

9. The 3<sup>rd</sup> Respondent is the Attorney General of the Republic of Kenya who is sued in his capacity as the principal legal adviser to the Government and its representative in legal proceedings.

**Petition No. 210 of 2019**

10. The 1<sup>st</sup> Petitioner filed Petition 210 of 2019 on 3<sup>rd</sup> June 2019. It is supported by his affidavit sworn on even date. He prayed for the following reliefs:

**A declaration-**

**(i) THAT the issuance and unveiling of the new generational notes was in contravention of his right to fair administrative action and that of the Kenyan public at large.**

**(ii) THAT the process of developing, unveiling and issuance of the new generational notes by the Central Bank of Kenya was done in violation of the Petitioner's rights to public participation.**

**(iii) THAT the Kenya new generational notes unveiled by Central Bank are in violation of the provisions of Article 231 (4) of the Constitution to the extent that they bear the image of and portrait of Jomo Kenyatta.**

**(iv) THAT the issuance of the new generational notes has been tainted with unconstitutionality and illegality and hence is null and void.**

**(v) THAT by issuing Kenya new generation notes that are in contravention of Article 231 (4) of the Constitution, Patrick Njoroge, the Governor of the Central Bank of Kenya is guilty of abuse of office.**

**An order:**

**(i) Of Certiorari to move this Honourable Court and to quash the decision issued by the Respondent on 31<sup>st</sup> May 2019 and 1<sup>st</sup> June 2019.**

**(ii) Permanent injunction prohibiting the Respondent either by itself or its recognized agents or employees from issuing the Kenya new generation notes.**

**(iii) An order for the removal from office of Patrick Njoroge as Governor of the Central Bank of Kenya.**

**(iv) Costs, interest or any other appropriate relief the Court may deem fit and just to grant.**

**Petition No. 214 of 2019**

11. The 2<sup>nd</sup> Petitioner filed Petition Number 214 of 2019 which was amended with leave of the Court on 26th July 2019. He sought orders to quash the following documents in their entirety:

**(i) Legal Notice No. 72 of 31<sup>st</sup> May 2019, Legal Notice No. 235 of 10<sup>th</sup> December 2018 and the Kenya Gazette Notice No. 4849 of 31<sup>st</sup> May 2019.**

**(ii) The document titled, Launch of the New Generation Bank Notes, Remarks by Dr. Patrick Njoroge, Governor, Central Bank of Kenya, June 1<sup>st</sup> 2019, Narok Stadium Narok County.**

**(iii) The document titled, New Notes of (Noti Mpya Za Kenya.)**

**(iv) The Document titled, Press Release – Circulation of the New Generation Bank Notes and withdrawal of the older 1,000 shillings bank notes.**

**(v) The dummies for the proposed new generation Kenyan currency bank notes launched jointly by the President of Kenya and the Governor of the Central Bank on Saturday 1<sup>st</sup> June 2019 during the 56<sup>th</sup> Madaraka Day Celebrations held at Narok Stadium, Narok County.**

**(vi) To compel the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to surcharge the 2<sup>nd</sup> Respondent to recover the costs of producing and circulating the proposed new generation Kenyan currency coins and bank notes in contravention of the constitution.**

**(vii) To compel the respondents to bear the costs of this suit.**

**(viii) To suspend the declaration of the invalidity of the impugned new design currency coins and notes for a period not exceeding six months to give the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the time to recall the impugned/proposed new coins and notes from circulation and replace them with those issued in compliance with the constitution and statutory law.**

(ix) *Any other relief the Court may deem fit and just to grant.*

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed replying affidavits sworn by Kennedy Abuga on 3<sup>rd</sup> June 2019 and 7<sup>th</sup> August 2019 in answer to the interlocutory applications and to the two petitions. The 3<sup>rd</sup> Respondent filed a replying affidavit dated 9<sup>th</sup> August 2019.
13. The 2<sup>nd</sup> Petitioner filed a supplementary affidavit dated 13<sup>th</sup> August 2019 in response to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' replying affidavits dated 7<sup>th</sup> August 2019, and the 3<sup>rd</sup> Respondent's replying affidavit dated 9<sup>th</sup> August 2019.
14. On 4<sup>th</sup> June 2019, *Korir J* referred the matters to the Chief Justice who empanelled this three-judge bench to hear and determine the two petitions.
15. In the interest of saving judicial time the two petitions were consolidated on 29<sup>th</sup> July 2019. The Court directed that Petition 210 of 2019, which was filed earlier, be the lead file.

#### ***The 1<sup>st</sup> Petitioner's Submissions***

16. The 1<sup>st</sup> Petitioner contended that the design of the new currency notes contravenes **Article 231(4)** of the **Constitution** and further breached **Article 10(2)(a)** for want of public participation. He further posited that the withdrawal of the old Kshs 1,000 was unilateral and disruptive to the economy.
17. The 1<sup>st</sup> Petitioner relied on his written submissions dated 19<sup>th</sup> July 2019 and the annexed list of authorities. Learned counsel, *Mr. Osundwa*, submitted that **Article 231(4)** was couched in mandatory terms by decreeing that the currency *shall not* bear the portrait of any individual. He argued that the impugned statue and the Kenyatta International Convention Centre (hereafter *the KICC*) are not monuments. He referred the court to the **National Museum and Heritage Act No 6 of 2006 (Revised 2012)**. He also referred to various definitions of the words *portrait, statue* and *monument*.
18. He argued that the petition is not *res judicata* because the cause of action only arose on 1<sup>st</sup> June 2019 when the President and the 2<sup>nd</sup> Respondent unveiled the new notes.
19. As regards the 3<sup>rd</sup> Respondent's opinion of 30<sup>th</sup> October 2013, he submitted the 1<sup>st</sup> respondent was advised that if the statue was placed in isolation it would offend the **Constitution**. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have unlawfully merged the portrait or statue with KICC yet the two do not share a common foundation. He urged the court to visit the site. He buttressed his arguments by referring to various drafts of the constitution that led to the present **Constitution**.
20. Learned counsel argued that the actions of the respondents also violated on **Article 47** of the **Constitution**. He cited **Kenya Human Rights Commission & Another v Non-Governmental Organizations Co-ordination Board & another** High Court Petition No. 404 of 2017 [2018] eKLR.
21. Regarding legitimate expectation, counsel extensively relied on the Court of Appeal decision in **Kenya Revenue Authority v Darasa Investment Limited**, Civil Appeal No. 24 of 2018 [2018] eKLR.
22. The 1<sup>st</sup> Petitioner emphasized the importance of public participation in decision making by public bodies. He referred to **Republic v County Government of Kiambu ex-Parte Robert Gakuru & another** Judicial Review Case No. 434 of 2015 [2016] eKLR where *Odunga J* held that participation should not be a mere cosmetic venture or a public relations exercise.
23. Counsel implored us to adopt a holistic and purposive interpretation of **Article 231 (4)** the **Constitution**. He submitted that the intention of the people was to shun personal branding through the Kenyan currency. He relied on the Supreme Court decision in **In the Matter of Interim Independent Electoral Commission**, Constitutional Application No. 2 of 2011 [2011] eKLR, **Nderitu Gachagua v Thuo Mathenge & 2 others**, Court of Appeal, Civil Appeal No. 14 of 2013 [2013] eKLR and **Attorney General & Another v Andrew Kiplimo Sang & 2 Others**, Court of Appeal, Civil Appeal No. 147 of 2107 [2017] eKLR.
24. The 1<sup>st</sup> Petitioner also prayed for costs.

#### ***The 2<sup>nd</sup> Petitioner's Submissions***

25. The 2<sup>nd</sup> Petitioner relied on comprehensive written submissions dated 15<sup>th</sup> August 2019. Regarding the plea of *res-judicata* he submitted that the issues in the instant suit have never been litigated before any other court.
26. The 2<sup>nd</sup> Petitioner's case was that the new currency was not legal tender because of breaching **Articles 3(1), 10, 19(1), 20(1), 47(1)** and **231(4)** of the **Constitution**; Sections 2, 4A (1)(f), and 22(1) of the **CBK Act**; Sections 2, 3, 4, 5, 6, 7, 8 and 11 of the **SIA**; Section 5 of the **Access to Information Act 2016**; and, sections 5, 6, 8 and 12 of the **Public Service (Values and Principles) Act No. 1A of 2015**.
27. The 2<sup>nd</sup> Petitioner also censured the process for failure by the 1<sup>st</sup> Respondent to publish its decision by a *Notice* in the *Kenya Gazette* as mandated by sections 2, 4A (1)(f) and 22(1) of the **CBK Act**. He said that the 1<sup>st</sup> Respondent purported to use *Legal Notice No. 235* of 7<sup>th</sup> December 2018 (*Notice* in respect of coins) and *Legal Notice No. 72* of 31<sup>st</sup> May, 2019 (*Notice* in respect of notes) to issue the new

currency.

28. He argued that the impugned notices only described the technical features of the coins and notes to be issued at a later date. He further argued that *Gazette Notice No. 4849* issued by the 2<sup>nd</sup> Respondent on 31<sup>st</sup> May 2019 withdrawing the KShs 1,000 notes was the only *Gazette Notice* that was published.

29. It was the 2<sup>nd</sup> Petitioner's case that the requisite *Gazette Notice* to circulate the new notes has never been published by the 1<sup>st</sup> Respondent in breach of sections 2, 4A (1)(f) and 22(1) of the **CBK Act**. He further contended that while *Legal Notice No. 72* and the *Gazette Notice No. 4849* were circulated online and later published by the Government Printer, the one relating to coins, *Legal Notice No. 235* of 2018 was only circulated online but not published by the Government Printer.

30. He maintained that failure to publish the said notice in the Government Printer is a violation of **Article 35(3)** of the Constitution which places an obligation on the State to publish important information affecting the nation. He added that the failure was in breach **Article 47(1)** that requires administrative action to be fair expeditious, efficient, lawful, reasonable and procedurally fair.

31. The 2<sup>nd</sup> Petitioner also took issue with the failure by the 1<sup>st</sup> Respondent to table the instruments to Parliament as required by sections 11(1) (2) & (4) of **the SIA**.

32. The 2<sup>nd</sup> Petitioner further faulted the new currency for bearing a sculpture-portrait of President Mzee Jomo Kenyatta in contravention of **Article 231 (4)**. He equally questioned the names and signatures of individuals appearing on the face of the notes. He was also of the view that the pictures of unnamed individuals on the reverse of the new Kshs 200 note offended the law.

33. The 2<sup>nd</sup> Petitioner posited that the portrait reinforces "*the falsified and highly embellished association of the history of the Republic with the person and family*" of the founding father of the nation. He also said that the signatures and names on the currency portray individuals contrary to the law.

34. The 2<sup>nd</sup> Petitioner took issue with the prominence of the statue on the notes when viewed against the KICC tower. He said that the KICC has not been gazetted as a national monument.

35. The 2<sup>nd</sup> Petitioner also challenged the legal opinion provided to the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent dated 30<sup>th</sup> October 2013; or, the manner in which it was interpreted by the 1<sup>st</sup> Respondent. In his view the opinion ran counter to the spirit of **Article 156(4)(a)** and **Article 156 (6)**.

36. The Petitioner referred the court to **Merriam Webster Online Dictionary** which defines *portrait* as:

***A pictorial representation of a person usually showing the face 1: sculptured figure: BUST;***

***2: a graphic portrayal in words.***

37. It further defines *portraiture* as "*the making of portraits*". He also referred to *Berth Gersh-Nesic* who defined portraits as follows:

***Portraits are works of art that record the likenesses of humans or animals that are alive or have been alive. The word 'portraiture' is used to describe this category of art. The purpose of a portrait is to memorialize an image of someone for the future. It can be done with painting, photography, sculpture, or almost any other medium.***

38. The 2<sup>nd</sup> petitioner challenged the withdrawal of the old Kshs 1,000 for want of a Regulatory Impact Statement required under Part III of **the SIA**. He contended that the deadline was irrational and unreasonable. He said that the withdrawal has led to unnecessary costs and inconvenience to the public. He argued further that it contravened **Article 24** and **Article 40**. He also submitted that the petitioners' rights to legitimate expectation were violated.

39. The 2<sup>nd</sup> Petitioner argued that there was no public participation in the impugned decisions of the 1<sup>st</sup> Respondent in contravention of **Article 10** and **232(1)(d)** which require that the people be involved in the policy making process. He relied on **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission**, High Court Petition No. 294 of 2013 [2014] eKLR.

40. He also made reference to a document issued by the Public Service Commission giving guidelines on public participation in policy formulation.

41. The 2<sup>nd</sup> Petitioner submitted that the 2<sup>nd</sup> respondent should be held personally liable for the impugned decisions and actions and be surcharged for the losses occasioned to the taxpayer.

42. Reliance was further placed on **Republic v Ministry of Finance and Another Ex Parte Nyong'o** Nairobi High Court Misc. Civil Appl. No. 1078 of 2007 [2007] KLR 299; [2007] eKLR where the Court held:

***Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the***

*public interest. Good public administration requires a proper consideration of legitimate interests.....*

43. He also referred to **Republic v Independent Electoral and Boundaries Commission ex parte National Super Alliance (NASA) Kenya & 6 others**, Judicial Review Misc. Application No. 628 of 2017 [2017] eKLR, where it was held that public participation plays a crucial role in legislative, policy as well as executive functions of the government. He cited at length the decision in **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others**, Machakos High Court Constitutional Petition No.s 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR.

44. Finally the 2<sup>nd</sup> Petitioner prayed for costs and relied on **Erick Okeyo v County Government Of Kisumu & 2 others** High Court Petition No. 1 'A' of 2014 [2014] eKLR.

#### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

45. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied largely on the written submissions dated 9<sup>th</sup> August 2019; the annexed of bundles of authorities filed on 13<sup>th</sup> August 2019; and, a supplementary list dated 14<sup>th</sup> August 2019.

46. It was the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case that the notes and coins do not infringe **Article 231(4)**. They submitted that Section 34 of the **Sixth Schedule** to the **Constitution** preserved the validity of notes and coins issued before the effective date.

47. The Respondents then dealt with the history leading to the new currency. Following the promulgation of the **Constitution** the 1<sup>st</sup> Respondent published notices in the daily newspapers of 7<sup>th</sup> and 12<sup>th</sup> March 2012 inviting individuals, institutions, organizations and professional bodies to present proposals on the design of the proposed currency.

48. In those notices, the 1<sup>st</sup> Respondent gave the following guiding themes: *Kenya reborn* (to reflect the spirit of the Constitution) and *Kenya prosperity* (to reflect Kenya development goals as outlined in Vision 2030) and further gave broad factors for consideration including:

- i. *Dominant physical features reflecting any aspect of Kenya;*
- ii. *Key aspects of Agriculture, Technology, Sports, Manufacturing, Infrastructure, Tourism and Environment;*
- iii. *Kenya's natural treasures, culture and heritage;*
- iv. *Common dominant features including wildlife, flora and fauna unique to Kenya;*
- v. *Preferred colour schemes for each banknote; and*
- vi. *Preferred sizes for both banknotes and coins.*

49. The Respondents said that the above exercise was to run for a period of 30 days. They contended that in consultation with the Cabinet Secretary, National Treasury on the proposals received, they settled on the current designs of both the banknotes and coins.

50. They submitted further that prior to adopting the impugned statue they had sought legal advice from the 3<sup>rd</sup> Respondent who gave the opinion dated 30<sup>th</sup> October 2013. Following the advice, they tendered for printing of the new design bank notes in 2014. There was a series litigation surrounding the matter which we shall highlight later in this judgment.

51. The Respondent stated that on 31<sup>st</sup> May 2019, they published *Legal Notice No. 72* which notified the members of the public of the new currency notes in denominations of Kshs 50, 100, 200, 500 and 1,000. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case that the currency became legal tender from 31<sup>st</sup> May 2019.

52. The 1<sup>st</sup> Respondent also issued *Gazette No. 4849* dated 31<sup>st</sup> May 2019, notifying the public of the withdrawal of the old Kshs 1,000 note from circulation effective 1<sup>st</sup> October 2019. The respondents aver that the 4 months' notice period was reasonable. They submitted that Section 22 (3) of the **CBK Act** empowers the 1<sup>st</sup> and 2<sup>nd</sup> respondents to withdraw currency. They said that in this case the decision was informed partly by the desire to curb corruption and flow of illicit money.

53. Learned Counsel for 1<sup>st</sup> and 2<sup>nd</sup> Respondents, *Mr. Ochieng Oduol*, said that on 23<sup>rd</sup> July 2019, the Supreme Court delivered a ruling in **Okiya Omtatah Okiiti v Central Bank & 7 Others**, Supreme Court Application Nos. 32 and 33 of 2018 [2019] eKLR declining to entertain any further litigation on the issues of procurement, public participation and issuance of the currency.

54. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on **Interpretation and General Provisions Act** and the **Evidence Act** for the proposition that the term *Gazette* includes an electronic publication.

55. They further submitted that the mandate to issue currency belongs exclusively to the 1<sup>st</sup> Respondent and that no personal liability could attach to the 2<sup>nd</sup> Respondent. Furthermore, Section 13 of the **CBK Act** shielded the latter from any personal liability. It was argued that in any case the design for the new currency was done in 2013 long before the 2<sup>nd</sup> Respondent assumed office.

56. The 1<sup>st</sup> and 2<sup>nd</sup> respondents implored us to consider that the impugned currency has already been printed and in circulation.

57. They also submitted that the petitions are *res judicata*. They relied on a number of cases including *Chris Munga N. Bichage v Richard Nyagaka Tong'i & 2 others* Supreme Court Pet. No. 17 of 2014 [2017] eKLR.

58. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied that there was a conspiracy or mischief regarding the images or designs on the new generation currency.

59. They prayed for costs in view of the multiplicity of suits brought by the 2<sup>nd</sup> Petitioner; and, for wrongly enjoining the 2<sup>nd</sup> Respondent into the petition. Lastly, they implored us to dismiss the consolidated petitions with costs.

### **3<sup>rd</sup> Respondent's Submissions**

60. The 3<sup>rd</sup> respondent relied on written submissions and a list of authorities dated 13<sup>th</sup> August 2019. The 3<sup>rd</sup> Respondent associated himself fully with the submissions made by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

61. Learned Counsel, *Mr Nyamodi*, submitted that the issuance of the new generation currency notes and the withdrawal of the old Kshs 1,000 were in full compliance with the law.

62. He submitted further that there was sufficient public participation. He cited *Kenya Human Rights Commission v Attorney General & another* High Court Petition 404 of 2017 [2018] eKLR.

63. The 3<sup>rd</sup> Respondent argued that the final designs of the currency incorporated security features and therefore, it was not feasible to subject those designs to public participation.

64. Regarding the impugned statue, counsel submitted that so long as the statue was not presented in isolation of the KICC, there was no breach of **Article 231(4)**.

65. The 3<sup>rd</sup> Respondent supported an order for costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

### **Issues for determination**

66. From the pleadings, submissions and the authorities we find that the following broad issues arise for determination:

- a) Whether the consolidated petitions are *res judicata*
- b) Whether the design of new Kenyan currency notes violate **Article 231** of the **Constitution**
- c) Whether the withdrawal of the old Kshs 1,000 currency notes is valid
- d) Whether the issuance of the new Kenyan currency notes and coins violates the **CBK Act**, the **SIA** or other laws
- e) Whether there was public participation in the issuance of the new currency or withdrawal of the old Kshs 1,000 currency notes
- f) Whether the right of legitimate expectations by the petitioners was violated
- g) Whether there has been misjoinder of the Governor of the Central Bank of Kenya
- h) Who should bear the costs?

### **Analysis and determination**

#### **Whether the consolidated petitions are *res judicata***

67. We shall commence with the issue of *res judicata*. **Black's Law Dictionary**, Thomson Reuters, 10<sup>th</sup> Edition defines *res judicata* as follows:

#### ***A thing adjudicated***

**1. An issue that has been definitively settled by judicial decision.**

**2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit.**

*The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, (3) the involvement of the same parties, or parties in privity with the original parties*

68. The principle is well anchored in Section 7 of the **Civil Procedure Act** which provides:

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

69. In *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited*, Nairobi, Court of Appeal, Civil Appeal 107 of 2010 [2017] eKLR, the court spelt out the applicable principles:

*The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;*

*(a) The suit or issue was directly and substantially in issue in the former suit.*

*(b) That former suit was between the same parties or parties under whom they or any of them claim.*

*(c) Those parties were litigating under the same title.*

*(d) The issue was heard and finally determined in the former suit.*

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

See *Mulla, Procedure Code Act of 1908 16<sup>th</sup> Edition.*

*Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR,*

*The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.*

See also *William Koros (Legal Personal Representative of Elijah, C.A. Koross v. Hezekiah Kiptoo Komen & 4 others* (2015) eKLR.

*Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval *Wilgram V.C. in Henderson v Henderson* (supra) stated:*

*Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time (emphasis added)*

70. The respondents' case is that the present proceedings are *res judicata* in view of earlier proceedings in High Court Petition No. 477 of 2017 *Okiya Omtatah Okoiti v Central Bank of Kenya & Another*; Nairobi High Court Petition No. 597 of 2017, *Okiya Omtatah v Central Bank & 7 Others* (and the subsequent appeal to the Court of Appeal in Civil Appeal No. 116 & 119 of 2018, *Central Bank of Kenya & another v Okiya Omtatah Okoiti & 6 others* [2018] eKLR; and the Supreme Court of Kenya Civil Applications Nos. 32 and 33 of 2018 *Okiya Omtatah Okoiti v Central Bank & 7 Others*.

71. In paragraph 5 of the supplementary affidavit of the 1<sup>st</sup> Petitioner sworn on 19<sup>th</sup> July 2019, he avers that the petition is not *res judicata* because the issues raised by the Respondents “relate to matters which precede 31<sup>st</sup> May 2019 when [his] cause of action arose”.

72. We find that in Nairobi High Court Petition No. 597 of 2017 [supra] the primary issue was the procurement process and award of the tender for printing of the new currency. The award was set aside by the High Court. On appeal, the Court of Appeal in **Central Bank of Kenya & another v Okiya Omtatah Okoiti & 6 others** [supra] allowed the appeal against the decree of the High Court.

73. The petitioner applied to the Supreme Court of Kenya in Civil Applications Nos. 32 and 33 of 2018 **Okiya Omtatah Okoiti v Central Bank & 7 Others** [supra] for leave to appeal out of time and for stay of the Court of Appeal judgment. As at the time of filing of the present consolidated petitions, the proceedings in the Supreme Court were still pending. Our view is that the issues raised in the present petitions are thus not *res judicata*.

74. Following the Court of Appeal decision above, Okiya Omtatah withdrew his Petition No. 477 of 2017 [supra]. In that petition he sought declarations that the Kenyan currency notes bearing the portrait of any individual are unconstitutional; and that the Governor of the Central Bank was unfit to hold public office. He sought the issuance of new notes within 180 days. In our view, the formal withdrawal of the petition did not conclusively settle the issue in dispute. It is accordingly not *res judicata*.

75. Lastly in **Consumer Federation of Kenya v Central Bank of Kenya & 2 Others**, [supra] the petitioner sought a prohibitory injunction against the printing of the new currency notes before subjecting the process to public participation; and, for breach of **Articles 10 and 231(4)** of the **Constitution**. That petition remains unheard and hence not *res judicata*.

76. In the end we hold that *res judicata* is inapplicable to the present consolidated petitions.

#### **Whether the design of new Kenyan currency notes violates Article 231 of the Constitution**

77. Both petitioners contend that the new currency notes do not meet the test in **Article 231(4)** of the **Constitution**. The Article provides:

**Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolise Kenya or an aspect of Kenya but shall not bear the portrait of any individual.**

78. The 1<sup>st</sup> petitioner contended that the new generation notes in glaring breach of the law bear the portrait of the founding father of the nation H. E. Mzee Jomo Kenyatta. He said that the currency depicts a painting, picture, sketch, likeness, image, photograph, drawing of the first President.

79. He urged us to take a purposive approach in interpreting **Article 231(4)** of the **Constitution** and in light of the provisions of **Article 259**. He argued further that the intention of the new constitutional order was to usher in Kenya's rebirth; and, to shun personal branding through the Kenyan currency. He beseeched us to uphold the principles of good governance as enshrined in **Article 232** without destroying the provisions of **Article 10** or infringing upon the sovereignty of the people.

80. The 1<sup>st</sup> Petitioner relied on the Court of Appeal decisions in **Nderitu Gachagua v Thuo Mathenge & 2 others (2013) eKLR**, **Attorney General & Another v Andrew Kiplimo Sang & 2 others** [2017] eKLR and the Supreme Court of Kenya decision in **In the Matter of Interim Independent Electoral Commission (2011) eKLR**.

81. The 1<sup>st</sup> Petitioner attacked the use of the image for failure to conform to the parameters set by the 1<sup>st</sup> respondent as they do not symbolize *prosperity of Kenya* or the *rebirth of Kenya*. He also argued that the images do not even represent any national heritage, are not symbols of national unity and do not fall under the definition of flag, emblem or name as defined by the **Constitution** and the **National Flag, Emblems and Names Act**.

82. The 1<sup>st</sup> Petitioner contended that it was possible to have the image of the KICC without the impugned statue which is not even part of the KICC and stands further away. He argued that the image of the statue is disproportional to the depicted features of the KICC. The effect is to deliberately give undue prominence to the statue. He also lamented that the KICC is not even a gazetted monument.

83. The 1<sup>st</sup> Petitioner urged the Court to remain alive to the history of **Article 231(4)** of the **Constitution**. He referred at length to the *Draft Constitution of Kenya, 2004* and other drafts of the constitution.

84. The 2<sup>nd</sup> Petitioner referred to the words on the plaque placed on the impugned statue which reads:

**This statue is dedicated to His Excellency Mzee Jomo Kenyatta CGH MP, Father of the Nation, First President and Commander of the Armed Forces of the Republic of Kenya.**

85. The 2<sup>nd</sup> Petitioner also argued that the statue is erected on the *COMESA Grounds* about 80 metres away from the KICC tower. He argued that **Article 231(4)** is couched in mandatory terms by the use of the word *shall*.

86. The 2<sup>nd</sup> Petitioner also took issue with the 3<sup>rd</sup> Respondent's letter dated 30<sup>th</sup> October 2013 which to him was dishonest and meant to defeat **Article 231(4)** of the **Constitution**. Lastly, the 2<sup>nd</sup> Petitioner challenged the use of the images of some individual on the Kshs 200 Notes as well and the use of persons' names and signatures on the notes.

87. In reply, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the images on the new currency do not offend the **Constitution**. They cited the letter by the 3<sup>rd</sup> Respondent dated 30<sup>th</sup> October 2013. They argued that the image of the first President is a *statue* and not a *portrait* and that it comprises part of the KICC. They emphasized that the **Constitution** only bars the use of a *portrait*. They also denied manipulating the

image of the statue as it appears on the notes.

88. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the KICC is a gazetted monument vide *Gazette Notice No. 10686* dated 26<sup>th</sup> July 2013 which comprises of the KICC building and the impugned statue. Regarding the other images on the new Kshs 200 notes, they argued that the images represent the *social services theme* and do not contain portraits of any known individuals.

89. The 3<sup>rd</sup> Respondent associated itself fully with the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 3<sup>rd</sup> Respondent also vouched for a holistic interpretation of **Article 231(4)** of the **Constitution** in sync with **Article 259**. It relied on ***Council of County Governors v Attorney General & Another***, High Court, Nairobi, Pet. 56 of 2017 [2017] eKLR and ***In the Matter of the Kenya National Commission on Human Rights***, Supreme Court, Ref. No.1 of 2012 [2014] eKLR.

90. The Court is invited to interpret **Article 231(4)** of the **Constitution**. The **Constitution** itself gives guidance in **Article 259**. For instance, Sub-Article 1 provides:

- (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 the development of the law; and***
  - (d) ***contributes to good governance.***

91. The Supreme Court of Kenya in ***Judges & Magistrate Vetting Board (JMVB) & 2 Others vs. The Centre for Human Rights & Democracy & 11 Others***, Supreme Court Petition No. 13a, 14 & 15 of 2013 (consolidated) [2014] eKLR was emphatic that “no constitutional provision is “unconstitutional” and that “the historical context is relevant to the accurate interpretation of the Constitution”.

92. The Supreme Court also held in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others***, Pet. No.14, 14A, 14B & 14C of 2014 (Consolidated) [2014] eKLR that “the Constitution should be interpreted in a holistic manner, within its context, and in its spirit”. The term *holistic approach* was defined in ***In the Matter of the Kenya National Human Rights Commission***, Supreme Court Advisory Opinion Reference No. 1 of 2012 [2014] eKLR as follows:

***[26]...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. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result...***

93. In ***In the Matter of Interim Independent Electoral Commission*** Supreme Court Application 2 of 2011 [2011] eKLR the Supreme Court issued the following caveat:

***[89] Interpreting the Constitution is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation....***

94. The Supreme Court in ***Speaker of the Senate & Another v. Attorney-General & 4 Others***, Supreme Court Advisory Opinion No. 2 of 2013 [2013] eKLR observed:

***Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents.....***

95. The rationale behind the interpretation of the **Constitution** in a distinct manner from ordinary legislation is that the former captures the direct will of the people through a national referendum whereas the latter is a product of delegated authority through the legislature.

96. Returning to the issues before us, it is important to trace the history of **Article 231(4)**. The 1969 Constitution did not have any provisions relating to the Central Bank of Kenya. The bank was then a creature of an ordinary statute. The **Constitution of Kenya 2010** elevated the bank into a constitutional organ with a clear mandate under **Article 231** which we spelt out earlier.

97. The people of Kenya made clear proposals on the look or design of new currency. In the ***Draft Constitution of Kenya, 2004*** presented at the ***National Constitutional Conference*** on 23<sup>rd</sup> March 2004 the proposed Article 261(3) stated:

***Notes and coins issued by the Central Bank of Kenya may bear only the portrait of the first President of Kenya or other images that depict or symbolize Kenya or an aspect of Kenya. (emphasis added).***

98. The subsequent ***Harmonised Draft*** published on 17<sup>th</sup> November 2009 by the ***Committee of Experts on Constitutional Review (CoE)*** in the proposed Article 270(3) amended the above provision to read:

***Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya but may not bear the portrait of any individual.*** (emphasis added)

99. After further review by the CoE a new draft was presented to the Parliamentary Select Committee on Constitutional Review on 8<sup>th</sup> January 2010. In Article 266(4) of the draft the provision evolved further as follows:

***Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya but may not bear the portrait of any individual.*** (emphasis added).

100. This second draft underwent further review leading to a proposed Article 219(4) which read:

***Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya.***

101. Further consultations and review of the draft led to *The Proposed Constitution of Kenya* published on 23<sup>rd</sup> February 2010 which provided in Article 231(4) as follows:

***Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya and may not bear the portrait of any individual.*** (emphasis added).

102. The *Proposed Constitution of Kenya* was subjected to a National Referendum which led to the promulgation our current **Constitution**, which now provides in **Article 231(4)**:

***Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya and shall not bear the portrait of any individual.*** (emphasis added).

103. It thus imperative to define the words *image*, *portrait*, *statue*, *sculpture* or what the 2<sup>nd</sup> petitioner refers to as *sculpture portrait* in the amended petition.

104. Traditionally a portrait is a two-dimensional image of an individual usually from the bust upwards. The distinguishing feature of a portrait is said to be the *pose*. For example Cynthia Freeland in ***Portraits and Persons***, Oxford University Press, Oxford, 2010, defines a *portrait* as:

***An image that presents a recognizably distinct individual who has emotional and conscious states, and who is able to participate in the creative process by posing.*** (emphasis added)

105. The ***Collins Concise Dictionary***, 4th Edition, Harper Collins, 1999 at page 1154 defines a *portrait* as “a painting or other likeness of an individual especially of the face” .

106. The ***Cambridge Advanced Learner’s Dictionary***, 3<sup>rd</sup> Edition, Cambridge University Press, cited by the 1<sup>st</sup> Petitioner, defines *portrait* as “a painting, photograph, drawing etc of a person....”

107. In Shearer West, ***Portraiture***, Oxford Publishing History of Art, *portrait* is defined as follows:

***Usually, a portrait is a work of art that represents a unique individual. It is a picture or representation of a person.***

108. ***The Concise Oxford English Dictionary***, Oxford Press, 12<sup>th</sup> Edition, 2011, page 1119 defines a *portrait* as:

***A painting, drawing, photograph, or engraving of a person, especially one depicting only the face or head and shoulders.***

109. From those definitions there is no doubt in our minds that the pictures or images of the former presidents on the old Kenyan currency notes were *portraits*.

110. According to Leonard R. Rogers in ***Sculpture: Appreciation of the Arts***, a *sculpture* is an artistic form in which hard or plastic materials are worked into three-dimensional art objects.

111. ***Portrait sculpture*** on the other hand is “a representation of a person from the chest up. The smallest forms are the head, showing just that, or the bust”.

112. The ***Merriam Webster Online Dictionary*** (<http://www.merriam-webster.com/dictionary/portrait>) referred to by the 2<sup>nd</sup> Petitioner defines *portrait* as:

1. ***Picture, especially a pictorial representation of a person usually showing the face;***

2. ***A sculptured figure: bust;***

3. ***A graphic portrayal in words.*** [underlining added]

113. From the above definitions a *portrait-sculpture* cannot be a *portrait* unless it is frontal and from the bust or head upwards.

114. A *statue* on the other hand is a free-standing sculpture made from durable materials. We had the benefit of visiting the location of the impugned statue at the KICC upon application by the 2<sup>nd</sup> Petitioner and for the reasons in our considered ruling of 15<sup>th</sup> August 2019. The commemorative plaque states that the “*statue is dedicated to His Excellency Mzee Jomo Kenyatta CGH MP, Father of the Nation, First President and Commander of the Armed Forces of the Republic of Kenya.*”

115. From the statement of agreed facts following the site visit, the statue was unveiled on 10<sup>th</sup> September 1973 to commemorate 10 years of Kenya’s independence by Hon. Toroitich Arap Moi, then the Vice President. The main KICC tower and complex was opened the following day by H. E. Mzee Jomo Kenyatta on 11<sup>th</sup> September 1973. The symbolism surrounding the place of the founding president is thus obvious.

116. However, the statue as represented on the new currency notes is *not* frontal but a *full length image* from the head of the first President to his feet. True, the image of the statue has been given great prominence on the notes than the KICC tower. But it does not appear in isolation or independent of the complex.

117. It is also not true as urged by the petitioners that the statue is not part of the KICC complex. While it stands about 80 metres away from the main tower, the entire complex and surrounding land has been gazetted as a *national monument* vide *Gazette Notice Number 10686* of 26<sup>th</sup> July 2013.

118. Returning now to the text of **Article 231 (4)** of the Constitution, we readily find that the language is plain and unambiguous. In the first and permissive limb of the Article, it provides that the new currency *may bear images that depict or symbolize Kenya or an aspect of Kenya*. It is instructive that up to that point, the word used is *image*. That word is wide enough to perhaps include the impugned statue.

119. However, in the second and prohibitive part of the Article, it is emphatic that the currency *shall not* bear the *portrait* of any individual. The word used in that part is *portrait* and it is important to keep in mind the definitions given earlier.

120. None of the petitioners was able to demonstrate that the impugned *statue* amounts to either a *portrait* or even a *sculpture-portrait*. As we demonstrated in the definitions above, the word *portrait* has a narrower meaning than the word *image*. The impugned picture of the statue as printed on the new currency is *not* frontal; it is a *sideway* shot. It is a *full-length* representation of the first President from the head to his feet.

121. As we have seen, a *sculpture-portrait* can only be considered a *portrait* when it is frontal and from the bust or head upwards. We thus find that it would be a *strained construction* of **Article 231 (4)** of the **Constitution** to say that the image is a *portrait*.

122. Regarding the images at the back of the new Kshs 200 note, we are satisfied that they portray some *unidentifiable* individuals. Applying our reasoning above, we find that they do not offend **Article 231 (4)**.

123. The 2<sup>nd</sup> petitioner also challenged the new currency on the ground that the notes bear “*a name and a signature of individuals on the front side*”

124. Section 13(4)(c) of the **CBK Act** provides in the relevant part as follows:

(4) *The Governor shall be the principal representative of the Bank and shall, in that capacity have the authority:*

(a) .....

(b) .....

(c) *to sign individually or jointly with other persons contracts concluded by the Bank, notes and securities issued by the Bank, reports, balance sheets, and other financial statements, correspondence and other documents of the Bank. (emphasis added).*

125. The currency notes were signed by the Governor and a member of the board of directors of the 1<sup>st</sup> respondent. The petitioners failed to lead evidence to show that the Governor ordinarily signed in a different style than that on the face of the notes; or, that he signed in the format of his *name* for ulterior motives.

**Whether there was adequate public participation towards the issuance of the new notes:**

126. The subject of *public participation* in our jurisdiction is now well settled. The foundation can be traced from **Article 10 (2) (a)** of the **Constitution** where it is described as *the participation of the people*. The theme runs across **Article 201(a)** (on the principles of public finance) and **Article 232(1) (d)** (on the Values and Principles of Public Service). It has also been enacted in various statutes including the **Fair Administrative Action Act 2015**.

127. Public participation therefore is one of the national values and principles of governance which bind every State organ, State official, public officer and all persons whenever any of them applies or interprets the **Constitution**, enacts, applies or interprets any law or makes or implements public policy decisions.

128. The **Black’s Law Dictionary** 10<sup>th</sup> Edition, Thomas Reuters, at page 1294 defines *participation* as “*the act of taking part in something,*

such as partnership....". The South African Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) defined public participation as follows:

*The active involvement of members of a community or organization in decisions which affect them.... According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something.....*

129. The centrality of public participation was underscored in *Matatiele Municipality v President of the Republic of South Africa (2)* (CCT73/05A) quoted with approval by the Court of Appeals of Quebec, Canada, in *Caron v R* 20 Q.A.C. 45 [1988] R.J.Q. 2333 thus:

*A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect....*

130. Locally, the High Court in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Machakos, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR developed the following six principles to be taken into account whenever the application of the doctrine of public participation comes into issue:

*First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

*Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

*Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

*Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them....*

*Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*

*Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

*Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

131. It is thus well settled that there are no hard and fast rules on how public participation is to be applied or implemented. The parameters depend on the unique circumstances of each case.

132. Returning to the matter at hand, the 1<sup>st</sup> Petitioner did not raise the issue of public participation in respect of the final designs of the new notes. It is the 2<sup>nd</sup> Petitioner who raised the issue. The 2<sup>nd</sup> Petitioner acknowledged the fact that the process which eventually yielded the disputed currency was initiated by the bank when it placed two local newspaper advertisements. He further acknowledged that a decision was later made by the Cabinet on the final designs. The decision gave the green light to the processes leading to the printing and circulation of the new currency.

133. The 2<sup>nd</sup> Petitioner's case, as we understood it, is that even after the Cabinet approval the bank was obligated by the **Constitution** to subject the final designs, without the security features, to further public participation before the final print. He claimed that by failing to do so, it denied the public an opportunity to interrogate the final designs. His position is that the currency should be withdrawn as it is not legal tender; and, that the entire process should start afresh.

134. In reply, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that there was wide stakeholder engagement and public participation in the entire process. They highlighted the steps taken to engage the public. They submitted that the final designs could not be subjected to further public

participation on *four grounds*: Firstly, adequate public participation and stakeholder engagement was undertaken prior to the new designs. Secondly, there was need to safeguard the integrity of new notes. Thirdly, to avert or mitigate against the parallel printing and circulation of fake currency; and, fourthly, in the interest of national security.

135. The 3<sup>rd</sup> Respondent adopted a similar position. He referred to *Legal Notice No. 235* of 10<sup>th</sup> December 2018 and *Legal Notice No. 72* of 31<sup>st</sup> May 2019. He submitted that the bank is a public body and enjoys a measure of discretion on carrying out public participation.

136. The starting point is the public invitation to the public by the 1<sup>st</sup> Respondent. On 7<sup>th</sup> and 13<sup>th</sup> March 2012 it published notices in the daily newspapers inviting members of public, institutions, organizations and professional bodies to present proposals on the features of the new generation notes and coins.

137. We observe that the 1<sup>st</sup> Respondent received responses from the public. It further held a meeting with representatives of the visually impaired who gave proposals on inclusion of suitable features for ease of identification of various notes and coins. We also note that the 1<sup>st</sup> Respondent sought legal opinion from the 3<sup>rd</sup> Respondent on the final designs of the New Notes after the Cabinet approval.

138. We are alive that the process leading to the final designs of the new notes and coins is very sensitive and technical. It also hinges on national security and the stability of the currencies. It is equally in the public interest that the final designs and security features are ring fenced.

139. In this case the general public was reasonably involved in the process of generating the new designs of notes and coins. After the new designs the 1<sup>st</sup> respondent issued *Legal Notice No. 235* of 10<sup>th</sup> December 2018 and *Legal Notice No. 72* of 31<sup>st</sup> May 2019 containing the details and descriptions of the new notes and coins.

140. We find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore took reasonable steps of engaging the public on the new designs. For the reasons above, we also find that it was not in the public interest to subject the approved final designs to a fresh round of public participation. In the unique circumstances of this case we find and hold that the 1<sup>st</sup> Respondent discharged its duty of public participation.

#### ***Whether the issuance of the new Kenyan currency notes and coins violates the CBK Act, the SIA Act 2013 or other laws***

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

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

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

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

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

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

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

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

149. The 2<sup>nd</sup> Petitioner further contended that even if the notices were not *statutory instruments* they still did not qualify as *notices* issued under Section 22(1) of the **CBK Act**. He posited that the 1<sup>st</sup> Respondent failed to issue *Legal Notices* under that section but instead issued

them under Section 22(2) of the Act. In his view that was an incurable defect and accordingly the new currencies now in circulation are dummies and not legal tender.

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

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

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

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

***Provided.....***

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

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

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

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

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

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

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

#### ***Whether the withdrawal of the old Ksh 1,000 currency notes was valid***

158. Withdrawal or demonetization of a currency is the process of stripping a unit of currency of its status as a *legal tender*. **Black’s law Dictionary**, Thomson Reuters, 10<sup>th</sup> Edition defines it as “*a disuse of a metal in coinage; a withdrawal of the value of a metal as money*”.

159. It has been employed in other parts of the world. For example, on 8<sup>th</sup> November 2016 India demonetized the currency notes of Rs. 500 and Rs. 1,000. It gave people a period of about *two months* to exchange the notes with smaller denominations at any [bank](#).

160. On 31<sup>st</sup> May 2019 the 1<sup>st</sup> Respondent through *Gazette Notice No. 4849* issued under Section 22(3) of the **CBK Act** and published in the *Special Issue of the Kenya Gazette Vol. CXX1-No. 69* of the same date announced that the Kshs 1,000 note would no longer be legal tender with effect from 1<sup>st</sup> October 2019.

161. The 2<sup>nd</sup> Petitioner submitted that the decision violated principles of public finance, fair administrative action and national values and principles of governance which all provide that public resources shall be used in a prudent and responsible manner.

162. He urged the court to protect Kenyans from the losses to be incurred by the taxpayer as a result of withdrawing serviceable Kshs 1,000 notes. He submitted further that the process was opaque and lacked accountability. For example, the 2<sup>nd</sup> petitioner posits that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not disclosed how much money will be lost as a result of demonetizing the notes contrary to **Article 201(a)** which requires “*openness and accountability, including public participation in financial matters*”.

163. In his view it was arbitrary for the 1<sup>st</sup> Respondent to only withdraw the Kshs 1,000 note while the other older notes remained in

circulation. Both petitioners also relied on **Article 201 (d)** of the **Constitution** which provides that “public money shall be used in a prudent and responsible way” and **Article 232 (1) (b)** which states that “The values and principles of public service include— efficient, effective and economic use of resources”.

164. The 1<sup>st</sup> Petitioner added that the deadline is irrational, unreasonable and violates the Petitioners’ right to legitimate expectation that the old currency notes would be in circulation alongside the new ones. He submitted further that there was no evidence that the old 1,000 note series were being used for illicit financial transactions in Kenya or other countries.

165. The Petitioners contended that the action also violated section 34 of the *Sixth Schedule* to the **Constitution** which provides as follows:

**“Nothing in Article 231 (4) affects the validity of coins and notes issued before the effective date”**

166. At paragraphs 47 and 48 of the supporting affidavit of the 1<sup>st</sup> Petitioner sworn on 3<sup>rd</sup> June 2019, he deposes that the withdrawal of the notes was done unilaterally by the 1<sup>st</sup> respondent. He disputes the statement by the 2<sup>nd</sup> respondent that the public was “consulted extensively”. The 1<sup>st</sup> Petitioner also avers that the demonetization will increase inflation and disrupt the economy.

167. The 1<sup>st</sup> petitioner argued that the more reasonable course would have been to allow the notes to wear out and gradually phase them out. At paragraphs 27 to 30 of the his replying affidavit sworn on 19<sup>th</sup> July 2019, he questions why the other notes will remain in circulation and “that the respondent ought to have engaged the public in arriving at a suitable mechanism or time-frame for the withdrawal.....instead of imposing an arbitrary deadline”.

168. Both petitioners argued that the conduct of the 1<sup>st</sup> respondent breaches **Article 47** of the **Constitution** and the **Fair Administration Action Act 2015**. They also indicted the process for breaching **Article 24** of the **Constitution** and their right to property under **Article 40**.

169. They contended that there is a dearth of evidence to back up the claims that demonetization will help to fight corruption, terrorism and so forth. To buttress the argument, the 2<sup>nd</sup> petitioner submitted that the new Kshs 1000 is capable of being used to perpetrate the same vices. In view of both petitioners, the launch of new currency and the demonetization was a cover up to reinforce the Kenyatta imagery to defeat the spirit of the new constitution.

170. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the notice of withdrawal of currency notes was issued pursuant to Section 22(3) of the **Central Bank of Kenya Act** and vide *Gazette Notice No. 4849* of 31<sup>st</sup> May, 2019. They argued further that the deadline was reasonable and gave sufficient time to the public to exchange the notes. They submitted further that there was no evidence demonstrating any challenges by the public in meeting the deadline. It was submitted that Section 34 of the *Sixth Schedule* to the **Constitution** was merely a bridge to cross from the old to the new constitution; and, that the provision never usurped the power of the bank to issue new currency under **Article 231 (2)** of the **Constitution**.

171. On its part, the 3<sup>rd</sup> respondent sought refuge under section 22 (3) (a) of the **CBK Act** which mandates the 1<sup>st</sup> Respondent to notify the public of the withdrawal of any coins or notes by way of a notice published in the *Gazette* or in any other manner that the 1<sup>st</sup> Respondent deems likely to bring the notice to the attention of the public. It was submitted that the provision grants the bank discretion to determine the procedure for demonetization.

172. We find that **Article 231** of the **Constitution** expressly grants the 1<sup>st</sup> Respondent the responsibility of “formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament”.

173. Section 22 of the **CBK Act** on the other hand provides that the bank “shall have power to withdraw any notes or coins issued by the Bank” provided that the procedures and conditions in sub-section 3 are followed. Sections 22 (3) provides as follows:

**(3) The Bank shall have power to withdraw any notes or coins issued by the Bank, and the procedure for and effect of any such withdrawal shall be as follows—**

**(a) a notice published in the Gazette, and in such other manner as the Bank considers likely to bring that notice to the attention of the public, shall specify the issues, and the denominations forming part of the issues, of notes or coins that are to be withdrawn, the places where those notes or coins may be taken for exchange, and the date on which those notes or coins shall cease to be legal tender;**

**(b) the notice given under the foregoing paragraph may provide that, after such period as may be specified in the notice, the notes or coins to which the notice applies shall only be exchanged at the head office of the Bank;**

**(c) the notes or coins specified in a notice given under paragraph (a) shall be exchanged at their face value for legal tender at the places and for the periods (which shall be of reasonable duration) specified in relation to those places in the notice, and shall cease to be legal tender on the date specified in the notice;**

**(d) the Bank may, by notice published in the same manner as notice given under paragraph (a), specify a period during which notes or coins which have ceased to be legal tender may nevertheless be exchanged at the head office of the bank, and after which those notes or coins shall no longer be exchanged.**

174. Granted the express legal provisions we find that the bank had power to withdraw the old Kshs 1,000 note. At paragraph 51 of the

replying affidavit by Kennedy Abuga, it is deposed that the bank notified the public of the withdrawal of the old Kshs 1,000 note. The rationale was explained as follows-

***The large bank notes especially the Kshs. 1,000 notes [were used] for illicit financial flows through money laundering, corruption and financing of terrorism and in order to address the situation of counterfeit notes likely to jeopardize commercial transactions, the CBK notified the public that the old Kshs. 1,000/= would be withdrawn from circulation effectively from 1<sup>st</sup> October 2019. The members of the public have been given at least four (4) months to exchange the old Kshs 1,000/= notes with the new notes ahead of the said date”.[underlining added]***

175. Clearly the withdrawal was not preceded by public consultations. As we observed earlier *public participation* is a means by which citizens take part in the conduct of public affairs, directly or through their chosen or elected representatives. It is one of the national values enunciated in **Article 10(2)** of the **Constitution**. *Public participation* can however take various forms informing the public of the steps being undertaken by an administrative body.

176. As we have stated, the bank was seized of the power; and, had discretion to withdraw the currency. We have no cause to doubt the bank that it aimed at stemming “*illicit financial flows through money laundering, corruption and financing of terrorism and in order to address the situation of counterfeit notes*”. The withdrawal may have required an element of surprise or a short turn around period.

177. We agree with the petitioners that there are unspecified costs and inconveniences. But we are not persuaded that given the time frames and nature of the policy that it was feasible to have public participation. Not every decision by a public entity must be preceded by elaborate public participation. See generally *Moses Munyendo & 908 others v Attorney General & another*, Nairobi High Court Pet. 16 of 2013 [2013] eKLR, *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd & Others*, 2006 (2) SA 311 (CC). In a large economy like India, the period to exchange the demonetized rupees was a mere 60 days. We thus find that the period of *four months* in Kenya was reasonable.

#### ***Whether the right of legitimate expectations by the petitioners was violated.***

178. Both petitioners argued that they had *legitimate expectations* that the respondents would comply fully with the law in issuing the new currency or withdrawing the Kshs 1,000 notes. For instance, the petitioners argued that the new generation notes contravened **Article 231 (4)** of the **Constitution** by bearing the image or portrait of the first President of Kenya.

179. The petitioners also contended that necessary legal instruments were not published in the *Kenya Gazette* or submitted to Parliament. The petitioners argued that the conduct violated **Article 35 (3)** of the **Constitution** on the right to information; **Article 10** regarding national values and principles of governance; and, **Article 47** on fair administrative action. They said that all those actions ran counter to their expectations.

180. The retort by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is that legitimate expectation follows the law. At paragraph 17 of the further affidavit of Kennedy Abuga sworn on 7<sup>th</sup> August 2019, he deposes that-

***Whatever legitimate expectation that the petitioners may have had must be tampered by the provisions of Article 231 (2) of the Constitution as read with section 22 (3) (a)-(d) of the CBK Act that provide the parameters and procedure for the withdrawal of currency in circulation***

181. We are well guided on this subject by the decision in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935, where Lord Diplock stated;

***Legitimate expectation may arise either from an express promise given on behalf of a public authority, or from the existence of a regular practice which the claimant can reasonably expect to continue.***

182. We are also guided by *J. P. Bansal v State of Rajasthan & another*, Supreme Court of India, Case Number Appeal (Civil) 5982 of 2001 cited with approval in *Abdul Waheed Sheikh & another v Commissioner of Lands & 3 others*, High Court Misc. Case No. 1531 of 2005 (O.S) [2012] eKLR. In the *J. P. Bansal Case* [Supra], the Supreme Court of India stated:

***The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and others v Minister for the Civil Service [1985] 1 AC 374 (408-409) (commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they had a legitimate expectation that they would continue to enjoy the benefits of trade union membership, the interest in regard to which was protectable. An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons.***

183. In *Communication Commission of Kenya v Royal Media Services & 5 others*, Supreme Court of Kenya, Pet. 14A, 14B & 14C of 2014 [2014 ] eKLR. The court set out the test for legitimate expectation as:

*[269] The emerging principles may be succinctly set out as follows:*

- (a) there must be an express, clear and unambiguous promise given by a public authority;*
- (b) the expectation itself must be reasonable;*
- (c) the representation must be one which it was competent and lawful for the decision-maker to make; and*
- (d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.*

184. See also *Henry Muthée Kathurima v Commissioner of Lands & another* Court of Appeal Civil appeal 8 of 2014 [2015] eKLR and *South African Veterinary Council v Szymanski* 2003 (4) S.A. 42 (SCA) for the proposition that “*the law does not protect every expectation but only those that are legitimate*”.

185. We find that in view of the express provisions of Article 231 (4) as read with section 22 (3), the Petitioners claim of legitimate expectation is unfounded.

#### ***Whether there has been misjoinder of the Governor of the Central Bank of Kenya***

186. The 1<sup>st</sup> Petitioner in Petition No. 210 of 2019 did not enjoin the 2<sup>nd</sup> Respondent as a party. He however sought for a declaration that the Governor had abused his office by issuing the new currency contrary to the Constitution. He also prayed for an order to remove him from office.

187. We find that having failed to sue the Governor, the declaration and orders sought by the 1<sup>st</sup> Petitioner are without foundation.

188. The 2<sup>nd</sup> Petitioner in Petition number 214 of 2019 sued Dr. Patrick Njoroge in his personal capacity as the 2<sup>nd</sup> respondent. He claims that the 2<sup>nd</sup> Respondent, being the Governor, bears personal and full responsibility for decisions he executes at the CBK. He says that the Governor is “*only protected where he acts in good faith, but not when, with impunity. ....he disregards the Constitution and other laws of Kenya and exposes the taxpayer to losses of huge sums of money used to print void currency notes and coins.*”

189. The 2<sup>nd</sup> petitioner craved an order for personal liability of the 2<sup>nd</sup> Respondent; and, that he makes good the losses by taxpayers incurred in the printing and circulation of the new currency.

190. The 1<sup>st</sup> and 2<sup>nd</sup> respondents vehemently opposed the joinder of the 2<sup>nd</sup> respondent. They contended that the duty to issue currency in Kenya is bestowed upon the 1<sup>st</sup> Respondent, which is a body corporate with perpetual succession. They argued that the 2<sup>nd</sup> Respondent is only the Chief Executive Officer of the 1<sup>st</sup> Respondent. To the respondents, the joinder was only meant to cause annoyance and to sensationalize the proceedings. They prayed that he be struck out from the proceedings.

191. We find that under **Article 231 (3)** the 1<sup>st</sup> Respondent is an independent body and is shielded from the control or direction by any person. Section 13 of the CBK Act provides:

- (1) There shall be a Governor who shall be appointed by the President through a transparent and competitive process and with the approval of Parliament.***
- (2) The Governor shall hold office for a term of four years, but shall be eligible for re-appointment for one further term of four years.***
- (3) The Governor shall be the chief executive officer of the Bank and, subject to the general policy decisions of the Board, shall be responsible for the management of the Bank, including the organization, appointment and dismissal of the staff in accordance with the general terms and conditions of service established by the Board, and the Governor shall have authority to incur expenditure for the Bank within the administrative budget approved by the Board.***
- (4) The Governor shall be the principal representative of the Bank and shall, in that capacity have authority—***
  - (a) to represent the Bank in its relations with other public entities, persons or bodies;***
  - (b) to represent the Bank, either personally or through counsel, in any legal proceedings to which the Bank is a party;***
  - (c) to sign individually or jointly with other persons contracts concluded by the Bank, notes and securities issued by the Bank reports, balance sheets, and other financial statements, correspondence and other documents of the Bank.***
- (5) The Governor may delegate any of his powers provided for in this section to other officers of the Bank.***

192. The Governor as Chief Executive Officer is subject to the Board of Directors. He is responsible for the management of the bank and may incur expenditure within the limits defined by the Board.

193. The process of issuance of the new currency commenced sometime in March 2012 when the 1<sup>st</sup> Respondent placed the advertisements for the designs. In fact the advertisements were placed by the Director of Currency Operations and Branch Administration Department of the 1<sup>st</sup> Respondent. By that time the 2<sup>nd</sup> Respondent had not assumed office. By the time he assumed office the final designs had been finalized and approved by the Cabinet.

194. We find that the 2<sup>nd</sup> petitioner failed to lead evidence to demonstrate the culpability of the 2<sup>nd</sup> respondent. We therefore find that personal liability cannot attach to the 2<sup>nd</sup> Respondent and that accordingly he was a not a necessary party.

195. The upshot is that the two consolidated petitions are devoid of any merit and are hereby *dismissed* in their entirety.

196. Costs ordinarily follow the event and are at the discretion of the court. The respondents urged us to condemn the petitioners to costs for filing multiplicity of suits over the same subject matter. We however find that the consolidated petitions raised constitutional issues in the public interest. The order that commends itself to us is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of September 2019.

KANYI KIMONDO

JUDGE

ASENATH ONGERI

JUDGE

**JUDGMENT OF MRIMA, J.**

1. I have read the majority judgment in full. I wholly agree with it except part of the interpretation of **Article 231(4)** of the **Constitution**. I therefore adopt the unrivaled parts of the majority decision unto this judgment.

2. **Article 231(4)** of the **Constitution** provides as follows: -

**Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya and shall not bear the portrait of any individual.**

3. The provision comprises of two parts which are **the permissive part** and **the prohibitive part**. The permissive part allows the use of images that depict or symbolize Kenya or an aspect of Kenya. The prohibitive part forbids the use of portraits of any individual. I associate myself with the interpretation of the prohibitive part in the majority decision. It is the interpretation of the permissive part which I respectfully dissent from.

4. Whereas there is no doubt that images which depict or symbolize Kenya or an aspect of Kenya may be used on the currencies, to me, such images should not be of recognizable or identifiable persons.

5. The reason is the historical perspective and the intended purpose of **Article 231(4)**. The promulgation of the **Constitution** on 27<sup>th</sup> August 2010 marked the rebirth of our nation. Kenyans desired a change from associating currencies with any person, persons, community, communities or even political leadership. The evolution of **Article 231(4)** during the constitution-making process attests to that. The rationale behind **Article 231(4)** was well captured by the 3<sup>rd</sup> Respondent, the Honourable Attorney General of Kenya, in its letter dated 30<sup>th</sup> October 2013 as follows: -

**5. Money is a strong instrument of authority and the idea behind de-personification of the currency is to debunk the notion that political leadership is associated with any one community.**

6. Pursuant to the above, the 1<sup>st</sup> Respondent, the Central Bank of Kenya, properly dealt with the use of images on the currencies during the tendering process of the new currency notes. For instance, Technical Specification 6.2.13 in **Restricted Tender No. CBK/64/2016–2017 for the Production, Supply and Delivery of Currency Origination Materials, Proofs and Dataset Files for New Design Kenya Currency Banknotes** provided thus: -

**Where images depicting people have been used, the final images shall have no semblance to their original or capable of being related to their originals/original person.**

7. This Bench visited the place the statue is erected. The plaque on the statue inscribes its purpose as follows: -

**This statue is dedicated to His Excellency Mzee Jomo Kenyatta CGH MP, Father of the Nation, First President and Commander of the Armed Forces of the Republic of Kenya.**

**The commemorative plaque was unveiled by the Vice-President of Kenya the Hon. DT arap Moi EGH EBS MP on behalf of the People of Kenya on Monday 10<sup>th</sup> December 1973 during the 10<sup>th</sup> Anniversary Celebrations of our National Independence.**

8. There is no doubt that the impugned statue is an image. I have looked at the new currency notes and seen some images thereon. One of the images which clearly stands out is the statue. The image is easily recognizable as that of the Founding Father of our nation. It is also enlarged and is not proportional to the tower. The statue commemorated ten years of political leadership.

9. That being the case, I find that the image of the impugned statue on the new currency notes infringes the permissive part and as such contravenes **Article 231(4)** of the **Constitution**.

10. I hence agree with my Learned Judges on the finding regarding the images at the back of the new Kshs. 200 notes that '*we are satisfied they portray some unidentifiable individuals*'.

11. On remedies, I would have partly allowed the consolidated petitions to the extent of finding that the impugned statue infringes **Article 231(4)** of the **Constitution**. Since the new currency notes are already in circulation I would have *inter alia* suspended the declaration of the invalidity of those notes for a period of **at most** one year as to accord the 1<sup>st</sup> Respondent time to issue legally-compliant currency notes.

12. However, in view of the majority judgment, the final orders shall be as proposed in that judgment.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this 27<sup>th</sup> day of September 2019.

**A. C. MRIMA**

**JUDGE**

**Judgment read in open court in the presence of-**

Mr. Osundwa for the 1<sup>st</sup> Petitioner instructed by Osundwa & Company Advocates.

Mr. Omtatah, 2<sup>nd</sup> Petitioner (in person).

Mr. Ochieng Oduol, Mr. J. Gachoka, Mr. Chege & Mr. Ouma for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents instructed by *TrippleOKLaw* Advocates LL.P.

Mr. Nyamodi for the 3<sup>rd</sup> Respondent instructed by the Hon. Attorney General.

Mr. Lakaram, Mr. Ibrahim & Mr. Kamotho, Court Assistants.