



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 313 OF 2014

(Coram: Mwongo PJ, Korir, Ngugi, Odunga and Onguto jj)

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 27, 48, 50, 74, 129, 141, 148, 152, 166, 171, 172 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE RECOMMENDATION FOR THE APPOINTMENT OF JUDGES BY THE JUDICIAL SERVICE COMMISSION UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE POWERS AND ROLE OF H. E. THE PRESIDENT OF THE REPUBLIC OF KENYA IN THE APPOINTMENT OF JUDGES UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ILLEGAL, UNREASONABLE AND UNCONSTITUTIONAL REFUSAL/DELAY BY H. E. THE PRESIDENT OF THE REPUBLIC OF KENYA TO APPOINT JUDGES

AND

IN THE MATTER OF THE VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS

BETWEEN

THE LAW SOCIETY OF KENYA.....PETITIONER

-VERSUS-

1. THE HON. THE ATTORNEY GENERAL.....1ST RESPONDENT

2. THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

AND

KENYA MAGISTRATES AND JUDGES ASSOCIATION..... INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioner herein, the **Law Society of Kenya** is described as a professional body established under the **Law Society of Kenya Act** Chapter 18 of the Laws of Kenya, charged with the responsibility of overseeing the practice of law in Kenya and mandated to advise the public and the Government in respect of legal and constitutional matters.
2. The 1st Respondent, the Attorney General, is sued pursuant to Article 156 of the Constitution of Kenya on behalf of the Government of Kenya. He is the Chief Legal Adviser of the Government.
3. The 2nd Respondent, **the Judicial Service Commission**, (also hereinafter referred to as “**the Commission**”) is a Constitutional Commission established under Article 171 of the Constitution with oversight responsibility of the Judiciary.
4. The interested party, the **Kenya Magistrates and Judges Association** (hereinafter referred to as “the Association”), is an association of Judges and Magistrates which takes care of the welfare of the said judicial officers.

The Petitioner’s Case

5. By a petition dated 9th July, 2014, the Petitioner herein averred that pursuant to the provisions of Articles 166 and 172 of the Constitution, on 11th January, 2014, the Commission submitted to H. E. The President a list containing 25 names of persons to be appointed as Judges of the High Court of Kenya. The said names were listed in the petition.
6. It was contended that prior to the submission of the said names, the Commission interviewed the said persons and received reports on their competence and integrity from inter alia the petitioner and the interested party as well as favourable reports on their integrity from the Kenya Revenue Authority, Kenya Police-Criminal Investigation Department, the Ethics and Anti-Corruption Commission, the Credit Reference Bureau and the National Intelligence Service. In addition, the Commission invited members of the public with any relevant information on the said persons to present the same.
7. It was pleaded that upon completion of the incisive interview/vetting aforesaid, the Commission decided that out of the 76 persons who had been interviewed, the said 25 persons were fit and proper persons to be appointed as Judges of the High Court of Kenya and therefore forwarded their names to H. E. The President for formal appointment, swearing-in as judges and gazette.
8. According to the petitioner, under the Constitution, the President has no other role in the appointment of Judges other than the aforesaid. However, upon receipt of the said list, on 11th January, 2014, the President failed, refused and/or neglected to perform his constitutional duties as aforesaid for over 5 months until 27th June, 2014 when he only performed the said duties partly by appointing, swearing-in and gazetting only 11 of the persons submitted for appointment while leaving the remaining 14 persons.
9. It was disclosed that while appointing the said 11 persons as Judges, the President stated that the appointment of the remaining Judges (persons) was still being “processed” and was subject to “approval” and or “disapproval” in due course.
10. To the petitioner, under the Constitution the President has no role in “processing”, “approving” and/or “disapproving” the appointment of Judges as that role is exclusively for the Commission and once the Commission submits the names to the President his Constitutional duty is to appoint, swear-in and gazette those recommended to him for appointment by the Commission.

11. It was therefore contended by the petitioner that in unreasonably delaying the appointment of Judges and refusing, failing and/or neglecting to appoint the other Judges, the President violated Articles, 1, 2, 3, 27, 48, 50, 166, 171 and 172 of the Constitution. His actions and omissions, it was contended violated and negated the use of his executive authority under Article 129 and his oath of office in terms of Articles 74, 141(3), 148(5) and 154(4) of the Constitution.
12. It was further contended that under the Constitution the 1st Respondent not only has the Constitutional obligation to advise the President on his constitutional duties but also to publicly disclose that he has rendered such advice. The Commission was on the other hand accused of failing to take any action to enforce its action.
13. The Petitioner therefore sought the following orders:
 - a. **A declaration that upon the submission of names of persons to be appointed as Judges by the 2nd Respondent to the President of the Republic of Kenya the President is under a mandatory Constitutional duty to appoint, swear-in and gazette the said persons as Judges forthwith and that the refusal to do so in respect of the 14 mentioned persons is unconstitutional.**
 - b. **A declaration that upon the submission of names of persons to be appointed as Judges to the President of the Republic of Kenya by the 2nd Respondent the President is not mandated and/or required to conduct any process of approval or disapproval and any such purported process is unconstitutional and is therefore null and void *ab initio*.**
 - c. **A declaration that the delay by the President to appoint, swear-in and gazette as Judges the persons whose names were submitted to him by the 2nd Respondent on 11th January, 2014 is unreasonable and is therefore unconstitutional.**
 - d. **An order that H. E the President of the Republic of Kenya do forthwith appoint, swear-in and gazette the remaining persons as Judges of the High Court of Kenya.**
 - e. **Any other relief that this Honourable Court may deem fit and just to grant.**
 - f. **The Respondents be condemned to pay the costs of this petition.**
14. In its supporting affidavit, the Petitioner reiterated the facts pleaded in the plaint and added that in acting in the manner he did the President stated that under Article 10 of the Constitution national values needed to be upheld to ensure the persons appointed Judges are persons of integrity and that that is why he needed to vet each individual thoroughly. The President also spoke of getting it right at the first instance and of ongoing consultation between himself and the Chief Justice.
15. According to the Petitioner, it is clear from these statements that the President sincerely but mistakenly believed that his role under the Constitution in the appointment of Judges includes vetting, processing, approving and/or disapproving those recommended after some investigations, a role which he does not have under Article 166 of the Constitution. It was reiterated that upon receipt of the recommendations by the Commission the role of the President is to formally appoint, swear-in and gazette the recommendees. This was justified based on the thorough and incisive vetting process that takes place before the recommendation and made to the President.
16. It was further averred that the executive including the President is represented during the vetting process because the 1st Respondent is a member of the Commission.
17. To the Petitioner, these constitutional provisions were deliberately crafted to insulate the Presidency from accusations of partisanship, ethnicity, cronyism and patronage in the appointment of Judges. The same were aimed at protecting the system of the appointment of Judges against politics and tribalism. It was therefore averred that in purporting to exercise non-existent vetting powers the President was taking the country back to the dark past.
18. According to the Petitioner, the delay and the piecemeal appointments denied Kenyans their constitutional right of access to justice and a speedy and fair trial. Further the appointment of some of the recommended persons while leaving out the others was a grave act of discrimination and therefore unconstitutional. It was its case that the President is subordinate to the Constitution and in the exercise of his executive authority, bound to uphold the Constitution, for which he took and subscribed to a solemn oath to uphold, obey and enforce hence the failure to do so whether wittingly or not is against the letter, spirit, intent, and tenor of the Constitution.

1st Respondent's Case

19. According to the 1st Respondent, **the Attorney General** (hereinafter referred to as “the AG”), this petition was brought for a determination of the extent of the exercise of, function and role of the President in the appointment of judges of the High Court vis-à-vis recommendations of the Judicial Service Commission on the appointments in the exercise of its functions under Article 172 of the Constitution.
20. According to the AG, the appointing authority of judges in terms of Article 166 of the Constitution is the President while the role of the Commission is to recommend such names for the consideration of the President. In support of his submissions the AG relied on the decision of the Canadian Supreme Court in **Re Thomson, [1992] 2 SCR 385; 89 DLR (4th) 28; 3 Adm. LR (2d) 242 and 51 FTR 267** for the contention that the term “recommendation” should not be taken to mean a binding decision.
21. It was the AG’s view that if the drafters of the Constitution intended the President to be bound by the recommendations of the Commission, the Constitution would have expressed so in no uncertain terms. In support of this submission the AG juxtaposed the provisions of Article 166(b) on appointment of Judges with the provisions of Article 168 of the Constitution on the removal of judges.
22. To the AG, the Petitioner’s assertion and prayer that the President has a mandatory constitutional duty to appoint, swear-in and gazette per the names recommended for appointment even when there are other compelling reasons to reject or disregard the same is not well founded in the Constitution and in law.
23. It was the AG’s position that neither the Constitution nor the Judicial Service Act prescribe the time frame within which the President must act in the performance of his function under Article 166(b) and therefore what is reasonable is to be determined by the unique circumstances of each case and the prejudice caused by such delay. In support of this contention, the AG relied on section 7(3) of the **Fair Administrative Action Act, 2015** and submitted that the Petitioner had not justified and proved how the President acted unreasonably in appointing the judges recommended for appointment by the Commission. The AG also sought support for this position from the authority of **D C Circuit, in Telecommunications Research & Action Center vs. FCC (“TRAC”)** and **Blackletter Statement of Federal Administrative Law from the American Bar Association**.
24. In conclusion, the AG urged this Court to find this petition unmerited and to decline to issue the orders sought

2nd Respondent's Case

25. According to the the Commission, the current Constitution being a transformative charter adopted by the people of Kenya sought to depart from the old order where the President played the dominant role in the appointment of judges and members of the Judicial Service Commission to a new order. According to the Commission, under the new Constitution, the process of appointment of judges is intended to be undertaken by the Commission with the President playing a facilitative role of swearing the judges nominated as a means of entrenching the independence of the judiciary.
26. According to the Commission, on 8th January, 2013 it passed as resolution to appoint more judges to the High Court, pursuant to which it advertised for positions of Judges and received a total of 193 applicants out of which 76 persons were shortlisted and interviewed. After a rigorous vetting process which included a comprehensive consideration of the applicants’ integrity, character and professional qualifications, 25 applicants were nominated and recommended for appointment as Judges of the High Court by a letter of transmittal dated 11th January, 2014.
27. However, on 27th June, 2014, six months after the recommendations, the President only appointed, swore in and gazetted eleven persons who had been recommended by the Commission.
28. Based on Articles 132, 166(1) and 171, the Commission contended that the Constitution conforms that the appointment of judges is not one of the reserved functions of the President under the Constitution as opposed to the appointment, nomination and dismissal of cabinet secretaries and

other state and public officers. It was the Commission's position that section 30 of the Act and the First Schedule thereto which provides for the powers of the Commission regarding the appointment of judges have no provision for any role to be played by the President. This, according to it was deliberate and was intended to insulate the process of appointment of judges and undergird the independence of the judiciary. However, it was contended, the Constitution reserves for the President, as head of state the power to appoint in accordance with Article 172 of the Constitution once the Commission has interviewed and recommended persons fit to be appointed. Based on *Kenya Democracy and Political Participation: a Review by AfriMap, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS)*, it was contended that there is no provision either in the Constitution or the Act for the appointment process to be undertaken by the office of the President, as opposed to the process under the retired Constitution which provided in section 61(1) and (2) that the President would appoint the Chief Justice and other judges on the advice of the Judicial Service Commission.

29. The Commission relied on *Particularistic Exchanges and Pacts of Domination in Africa: Examining How Patronage Appointments may have Increased Resistance to Public Sector Reforms in Kenya*, by **Sylvester Odhiambo Abongo**, and urged this Court to interpret and give effect to the Constitution and define the limits of the role of the President in the appointment of judges in the new dispensation. While making comparison with the South African scenario where the Constitution of South Africa provides for the three or more names it was submitted that the Kenyan President does not have the element of discretion in the appointment of Judges and reliance was sought from *Justice Alliance of South Africa vs. President of Republic of South Africa and Others (as consolidated with) Freedom Under Law vs. President of Republic of South Africa and Others and Centre for Applied Legal Studies and Another vs. President of Republic of South Africa and Others* [CCT 53/11].
30. By deferring appointment of the 14 nominees thus delaying the formalization of the appointment, it was submitted that the President did not discharge his role as contemplated under Article 171 of the Constitution.
31. According to the Commission, the principle which informed the new constitutional order is similar to the position propounded by **Andrews Penelope E** in '*The South African Judicial Appointment Process*' Osgoode Hall Law Journal [2006] 565-572 that:

“The drafters of the first Constitution, in keeping with the newly adopted principles of transparency and accountability in South Africa’s political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges under the system had been at the discretion of the President on the recommendation the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely. The new system reflects a complete rejection of that which persisted under apartheid.”

32. The Commission also relied on the Uganda case of *Karahunga vs. Attorney General [2014] UGCC* where it was held that:

“The Constitution provides for a tripartite procedure in which the Judicial Service Commission is required to compose a list of nominees and submit the list to the President. The President then makes appointments from this list and sends the names to Parliament for approval. The President can only appoint a judicial officer from a list the Judicial Service Commission provides. It is therefore my considered opinion the President cannot initiate the process of appointing any particular individual to judicial office. To allow such a process would be to undermine the independence of the Commission and in a way subject it to the direction or control of the Executive Arm of the Government, contrary to Article 147(2) of the Constitution.”

33. According to the Commission the President's inordinate delay to formalise the appointment of Judges undermined the role of the Commission in safeguarding and promoting the independence of the judiciary and to buttress this point, the Commission relied on the *Karahunga Case* (supra)

where it was held that:

“The fact that the Judicial Service Commission is placed within Chapter 8 of the Constitution – a chapter which deals with the judiciary – is not a mere coincidence. As a body created for purposes of supporting the Judiciary, the Judicial Service Commission must, like it is with the Judiciary, be supported by all institutions/branches of the state, to independently carry out its mandate without interference. The duty/authority to initiate the appointment of a Judicial Officer lies exclusively with the Commission and should not be interfered with by either the Executive or the Legislature.”

34. It was submitted while appreciating the doctrine of separation of powers that this Court is entitled to intervene where there is imminent threat to the Constitution as held in by the Supreme Court in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR** in which the Court expressed itself at paras 57, 59 and 64 as hereunder:

“In the South African case, Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11, it was held [para 38]:

‘under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament “must act in accordance with, and within the limits of, the Constitution”, and the supremacy of the Constitution requires that “the obligations imposed by it must be fulfilled.” Courts are required by the Constitution “to ensure that all branches of government act within the law” and fulfil their constitutional obligations.

Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandate as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of ‘right’ and ‘wrong’ in such cases, short of a resolution in plebiscite, is only the Courts.”

35. The Commission relied on **Hugh Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)** and was of the view that the decision by the President not to appoint the persons nominated by the Commission if left unchecked would set a bad precedent that will erode and diminish the constitutional mandate of the Judicial Service Commission. In this respect the Commission relied on **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11** which according to it demonstrates the constitutional limitations placed on a President in making appointments.
36. It was submitted on behalf of the Commission that the determination of appropriate qualifications for appointment as Judges is on the Commission as the Act contemplates no role for the President in determining qualifications for appointment and that though the President remains the appointing authority, he does not have the discretion to reject the nominees unless there is a clear violation of the Constitution.
37. It was further submitted that the President is under a duty to appoint the nominated persons as Judges of Superior Courts within a reasonable time as required under Article 259(8) of the Constitution hence a delay of more than one year is not reasonable.
38. The Court was therefore urged to find merit in this petition and to make appropriate orders to give effect to the Constitution.

Interested Party’s Case

39. The interested party herein, the Kenya Magistrates and Judges Association, associated itself with the Petitioner’s position.
40. Its greatest grievance, however, was that out of the 25 nominees, all the 14 nominees whose

nomination and appointments were deferred indefinitely were and remained career judicial officers holding different posts in the judiciary, while all the 11 nominees who were appointed earlier on were non-judicial officers which in its view was discriminatory. In its view there was no compelling and/or acceptable justification for such clear discrimination.

41. It was the Association's case that section 30 of ***the Judicial Service Act*** (hereinafter referred to as "the Act") ought to be looked into so as to identify and give sufficient differential recognition between direct recruitment and promotion of serving members of the bench from the cadres of magistrates.

Determinations

42. We have considered the issues raised in this petition.
43. We wish to note that by the time this petition was being heard, all the persons who had been nominated by the Commission for appointment as Judges of the High Court had already been appointed, sworn in and gazetted by the President. It follows that the prayer seeking an order compelling their appointment is no longer tenable.
44. In this petition it is our view that the substance thereof revolves around the role of the President in the appointment of Judges of the High Court of Kenya.
45. As already submitted, the current process of appointment of the said Judges was crystallised in the Constitution.

Historical Background

46. In **Judges & Magistrates Vetting Board & 2 others vs. Centre for Human Rights & Democracy & 11 others [2014] eKLR**, the Supreme Court expressed itself *inter alia* as hereunder:

"The Judiciary, in the run-up to the promulgation of the current Constitution on 27th August, 2010 was an institution largely distrusted by members of the public. Thus an official document, 'The peoples choice: The Report of the Constitution of Kenya Review Commission' (September, 2002) thus records (at page 52):

"The judiciary rivals politicians and the police for the most criticised sector of the Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the

most worrying. For lawyers, there is concern about competence and lack of independence."

It is to be recognized that the Constitution of Kenya, 2010 was a radical departure from the earlier norms of governance. Article 1 provides that all sovereign power belongs to "the people". And

Chapter 10 contains elaborate provisions on judicial authority and the legal system, with Article 159 declaring that judicial authority is derived from the people and vested in Courts and tribunals established under the Constitution...the Judiciary was considered one of the most important institutions to ensure the Constitution is upheld; it was perceived as the main arbiter, in instances where interpretation or application of the Constitution was essential."

47. This was noted in ***The Final Report of the Constitution of Kenya Review Commission*** (CKRC) at page 311 in the following unflattering terms:

"the Judicial Service Commission is no longer regarded as truly independent, so the Judiciary is seen as vulnerable to government pressures"

42. The reason for this as stated in page 312 of the same Report was that under the 1969 Constitution,

“appointments were made by the president, dismissals were initiated by him/her and their (commissions) finances were controlled by government ministries. The **Constitution of Kenya Review Act**, Cap. 3A, provided in section 17(d)(iv) that under its mandate the CKRC was to among others, ensure the people of Kenya “*examine and recommend the composition and functions of the organs of state, including the Executive, the Legislature and the Judiciary and their operations, to maximise their mutual checks and balances and secure their independence*”. Therefore the establishment and improvement of the judiciary and constitutional commissions was seen as a way of promoting constitutionalism.

48. Our system then was not too dissimilar to the South African one during the apartheid regime as propounded by **Andrews Penelope E** in ‘**The South African Judicial Appointment Process**’ Osgoode Hall Law Journal [2006] 565-572 that:

“The drafters of the first Constitution, in keeping with the newly adopted principles of transparency and accountability in South Africa’s political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges under the system had been at the discretion of the President on the recommendation the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely. The new system reflects a complete rejection of that which persisted under apartheid.”

43. It is therefore clear that one of the thinking that informed the reforms in the judiciary was the need to have an independent judiciary. In 2007/2008 this Country went through one of, if not its worst episode(s) in its independent history. This was as a result of the disputed presidential election results of 2007 when a section of the politicians declined to take their grievances for determination by the Court on the basis that the Courts as composed was not amenable to dispensation of justice.

44. Before delving into the issues raised before us it is important in our view to set out some the basic ingredients of an independent judiciary relevant to the matter before us.

45. According to annexure to **Commonwealth (Latimer House) Principles on the Three Branches of Government**, November, 2003:

“Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.”

46. In the Constitution of Kenya, 2010, one must necessarily start from the presumption that the provisions dealing with the judiciary were meant *inter alia* to correct the historical deficiencies that rendered the judiciary as then constituted unable to meet the expectations that the people of the Republic of Kenya had in it. As was held in **Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67**, it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. Similarly, in **Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR**, a majority of the Court held that quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles.

47. In the case of **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**, the Court stated as follows at paragraphs 57 – 60:

[57] “[T]his Court is enjoined under Article 259 of the Constitution to interpret the

Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2) (e) of the Constitution to protect and promote the purpose and principles of the Constitution.

...

*[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011* [2011]eKLR, *Samuel G. Momanyi v Attorney General and Another (supra)*). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 enunciated this principle as follows;*

'Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.'

*[59.] Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997* (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution."*

48. That purposive approach as explained by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012**, ought to take into account the agonized history attending Kenya's constitutional reform. In **Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006** [2006] 2 KLR 733, it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed **In Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012**; [2014] eKLR, at paragraph 26 where the Supreme Court opined that:

"...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."

49. It is therefore our view that the constitutional provisions dealing with the judiciary are partly steeped in historical context. This view has in fact acquired jurisprudential recognition by the Supreme Court which **In the matter of the Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011** [2011] eKLR paragraph 86, stated:

“The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 20(4) and 259(1)). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10 in chapter 6 and in various provisions, reflect historical economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court”.

50. It is with that historical context in mind that we will endeavour to unravel the issues raised before us. This must necessarily be so due to the fact that under Article 259(a) and (c) of the Constitution this Court is expected to interpret the Constitution in a manner that promotes its values, purposes and principles and permits the development of the law. We therefore associate ourselves with the views expressed by **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) to the effect that:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

51. In our view, the current system of appointment of judges was informed by the need to infuse a sense of integrity in the said process that would ensure independence of the judiciary and judicial officers. The determination of the independence of the judiciary, it is our considered view, is not based on one event but the whole process starting from the manner in which the judicial officers are appointed, how they are to carry out their mandate and the manner of their removal from the office. All these must be cumulatively considered in order to determine whether the judiciary is independent and the extent of such independence. Independence is therefore a culmination of several factors. It presumes that there is an appropriate appointment process; subject to strict procedures for removal of judges, a fixed term in the position; and a guarantee against external pressures.

52. Where therefore any stage of the process of appointment is shrouded in mystery without a clear formula that is both transparent and accountable on how such appointment is to be made, doubts may be cast as to what factors dictated such appointments. In this respect we adopt the position in the ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** to the effect that:

“...the process of appointment must also be legitimate in the eyes of the public, if the courts are to build and retain trust and secure the voluntary co-operation of the public in sufficient numbers to ensure the orderly administration of justice...A legitimate process may be achieved in part through the demonstrable quality of those who are appointed, but it will also be influenced by other factors, including who decision-makers are, how transparent the selection process is, and what provision is made for scrutiny and review in individual cases.”

53. Accordingly, if due to the process adopted, the possibility of interference by third parties is real, the independence of the judicial officers and by extension the judiciary may be cast into serious doubt. The decision by a five judge bench of the Uganda Constitutional Court in **Karahunga vs. Attorney General [2014] UGCC** therefore immediately comes to mind. In that case it was held that:

“The fact that the Judicial Service Commission is placed within Chapter 8 of the Constitution – a chapter which deals with the judiciary – is not a mere coincidence. As a body created for purposes of supporting the Judiciary, the Judicial Service Commission must, like it is with the

Judiciary, be supported by all institutions/branches of the state, to independently carry out its mandate without interference. The duty/authority to initiate the appointment of a Judicial Officer lies exclusively with the Commission and should not be interfered with by either the Executive or the Legislature.”

Separation of Powers

54. Before dealing with the core issue in this petition it is important to mention something about the doctrine of separation of powers.

55. Article 2 of the Constitution which provides that:

(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorised under this Constitution.

56. In our view, when any of the state organs steps outside its mandate, this Court will not hesitate to intervene and this was appreciated by the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** in the following words:

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

57. Subsequently, the same Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated as that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. ”

58. The Court went on to state as follows;

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a solution in plebiscite, is only

the Courts.”

59. The doctrine of separation of powers was dealt with by Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (supra) the following manner:

“The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation.”

60. The learned Judge continued:

“It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.”

61. As was appreciated by Langa, CJ in Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19 at para 33:

“In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.”

62. It is therefore our view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this petition alleges a violation of the Constitution by the Respondents, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.

63. Our finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of separation of powers to escape judicial scrutiny.

64. In our view the doctrine of separation of powers must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution. This is our understanding of the work of **Professor Laurence Tribe** in ***American Constitutional Law*** Vol 1, 3 ed. (Foundation Press, New York 2000) at 127) where he opines that:

“What counts is not any abstract theory of separation of powers, but the actual separation of powers operationally defined by the Constitution. Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure.”

The Role of the President in Appointment of Judges of the High Court

65. Article 166(1)(b) of the Constitution provides that:

The President shall appoint—

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.

66. Article 172(1)(a) provides:

(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—

(a) recommend to the President persons for appointment as judges;

67. Paragraphs 6, 7, 8 and 9 of the First Schedule to the ***Judicial Service Act*** provides:

6. (1) Within fourteen days of the deadline for the receipt of applications, the Commission shall review the applications for completeness and conformity with the necessary requirements.

(2) In particular, the review referred to in subparagraph (1) shall relate to a determination of whether the applicant meets the minimum Constitutional and statutory requirements for the

position.

7. (1) The Commission shall, within twenty-one days of the initial review, verify and supplement information provided by the applicant by communicating to all of the applicant's references and former employers who shall be asked to comment on the applicant's qualifications under the criteria set out under this Schedule.

(2) For the avoidance of doubt, the Commission may not share with the applicants any materials it solicits or reveal the identity of the source of information unless the source waives anonymity.

8. (1) The Commission shall, within thirty days of the reference check, investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.

(2) The background investigation and verification referred to under subparagraph (1) may continue until the time the Commission votes on its nominations.

9.(1) Upon the expiry of the period set for applications, the Commission shall —

(a) issue a press release announcing the names of the applicants; publicize and post on its website the place and approximate date of the Commission meeting for interviews;

(b) cause the names of the applicants to be published in the Kenya Gazette;

(c) invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and

(d) interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.

68.Paragraph 15 of the First Schedule to the Act in addition provides as follows:

(1) The Secretary shall, within seven days of the Commission's vote, cause the applicants to be notified by telephone or electronic means, about the Commission's decision.

(2) Despite subparagraph (1), the Secretary shall cause to be transmitted to each applicant, a written notice of the Commission's decision.

(3) The names of the persons nominated for recommendation for judicial appointment may be posted on the Commission's website and placed in its press release.

69.It was contended that prior to the submission of the said names, the Commission interviewed the said persons and received reports on their competence and integrity from inter alia the Petitioner and the interested party as well as favourable reports on their integrity from the Kenya Revenue Authority, Kenya Police-Criminal Investigation Department, the Ethics and Anti-Corruption Commission, the Credit Reference Bureau and the National Intelligence Service. In addition the Commission invited members of the public with any relevant information on the said persons to present the same. It is therefore clear that sufficient background check was done for the applicants even before the interview was conducted.

70.It is also not disputed that the Commission is composed of *inter alia* the Attorney General and two members, a man and a woman representing the public. All the three are persons directly nominated by the President. Clearly, therefore the President's interests are taken care of in the nomination process by the Attorney General.

71.It is our view that the President having taken part in the nomination process through his said

appointees, once the Commission nominates the persons to be appointed as Judges, the President's role is then limited to appointment, swearing in and gazettelement of the said persons as Judges of the High Court. He cannot therefore purport to "process", "vet", "approve" or "disapprove" the said nominees. At that stage the issue of consultation with the Chief Justice, also a member of the Judicial Service Commission, does not arise.

72. In our view, once the nomination process is finalised, subject to paragraph 16 of the First Schedule to the Act, the Commission and the President have no other role to play in the matter apart from putting in place the formalities of appointing the nominees as Judges of the High Court. In our view, the only way in which the names presented to the President can be reconsidered, and if so by the Commission itself is pursuant to **paragraph 16 of the First Schedule** to the *Judicial Service Act, 2011* which provides that:

The Commission shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee.

73. In our view, this system is meant to avoid sliding back to the old system where the appointment of Judges could not be traced to any particular criteria. To accede to the position adopted by the 1st Respondent would amount to this Court giving a clean bill of health to the proposition to take the people of Kenya back to an era discarded by them when they enacted for themselves the current Constitution.

74. We therefore disabuse the Respondents of any notion that the President has extra judicial discretion to decide whether or not to appoint the persons nominated for appointment as Judges of the High Court of Kenya. Such a trajectory if, upheld would, in our view, negate the constitutional interpretation principles decreed in Article 259 which enjoins to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.

75. By therefore opening a window for the President, even in a small way, to decide which nominees to appoint and which ones to reject would be a relapse to old system which was overwhelmingly discarded by Kenyans in a plebiscite. It would open the window for the reintroduction of manipulation and horse-trading in the process of appointment of Judges. To do so would open the process to contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism with the current one that is meant to espouse the values and principles of governance set out in Article 10 of the Constitution which include non-discrimination, good governance, integrity, transparency and accountability. In other words, the people of the Republic of Kenya set out to eradicate all the negative tenets of appointment of Judges which in their view had hitherto impacted negatively on the integrity of the judicial system.

76. We agree with the Commission that save for the limited circumstances provided in **paragraph 16 of the First Schedule** to the Act, the role of the President in the process of appointment of the Judges of the High Court is purely facilitative as the Head of State and must be in accordance with the recommendation of the Judicial Service Commission.

77. We reiterate that by coming up with this system of the appointment Judges, the people of the Republic of Kenya wanted a clear break from the old system in which the appointment of the Judges of the Superior Courts was in substance a prerogative of the President with the Judicial Service Commission playing merely a formal role.

78. The independence of the judiciary, as it relates to the appointment of Judges is summarised in the ***International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners' Guide No.1*** at page 49 as follows:

Judges should be appointed on their professional qualifications and through a transparent procedure. Even though international standards do not forbid that appointments be carried out by the executive or the legislature, it is preferable that the selection be entrusted to an independent body so that political considerations do not play any role in the proceedings. Irrespective of the body in charge of appointing judges, the outcome of such selection must always guarantee that the candidates appointed to the judiciary possess the necessary skills and

independence.

79. On our part, we find the views expressed in ***“Judicial Independence: An overview of Judicial and Executive Relation in Africa”***, an article by **Muna Ndulo**, apt when he observes that:

“In order to guarantee the independence and impartiality of the Judiciary, best constitutional practices and International law require States to appoint Judges through strict selection criteria and in a transparent manner...Judicial Service Commissions remain responsible for overseeing judicial appointments in most African Countries...But where the Chief Justice is appointed by the President, the issue of possible excessive presidential influence in the appointment of Judges arises...Even with a suitably constituted JSC, there remains the question of its role in the appointment process itself. Many African Constitutions provide that the President must appoint “after consultation with the Judicial Service Commission”. This is the weakest formulation, for the President is not bound by the Commission’s views. A stronger approach is one that requires the President to act “on the advise of” or “on the recommendation of” the JSC. This is the approach in the new Kenya Constitution adopted in 2010. This approach implies that the appointment by the President is a purely formal function.”

80. The terms “processing”, “approving” and “disapproving” the nominees as applied by the President in our view are in any case too vague as they found no basis in any legislative instrument in order for this Court to make a determination of what in these circumstances they actually entail. However the phrases applied such as the need to uphold “national values”, the need to “vet each individual thoroughly” and the necessity of “getting it right at the first instance”, gave away what the President set out to do. It would seem that the intention was to further determine the suitability of the persons whose names had been submitted by the Commission for appointment. By so doing the President was not only conferring upon himself the power to nominate the Judges but also the power to appoint them. In our view this was clearly against the letter, spirit and tenure of the Constitution.

81. Apart from that to constitutionally undertake such voyage, assuming the same was lawful, the President would have been obliged to comply with the rules of natural justice which would have entailed conducting interviews and affording the nominees an opportunity of being heard before any adverse decision was made. Accordingly, by purporting to determine the suitability of the nominees in absentia, the President was not only acting without jurisdiction but also contrary to the rules of natural justice in clear violation of Article 47 of the Constitution.

Whether by selectively appointing some of the nominees the President’s action was discriminatory

82. The next question is whether the President in making appointment of the Judges at different times acted in a discriminatory manner and contrary to the Constitution.

83. Article 27(4) and (5) of the Constitution provides as follows:

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

84. In his decision in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688**, Nyamu, J (as he then was) held:

“The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared

with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”

85. The learned Judge further expressed himself as follows:

“Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification...”

86. Therefore for discrimination to be justifiable there must be some intelligible differentia. In matters dealing with violation of rights and fundamental freedoms the law is that the burden is on the person alleging violation to prove that the State or somebody else has violated their rights and freedoms and once that has been established, the burden shifts to the State or that other person, whose acts are being complained of, to justify the restrictions being imposed or the continued existence of the impugned legislation. The criteria in such circumstances was set in Lyomoki and Others vs. Attorney General [2005] 2 EA 127 where the Constitutional Court of Uganda set out the following principles:

- i. **The onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights.**
- ii. **Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.**
- iii. **The constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.**
- iv. **Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms.**

87. The same position was adopted in Institute of Social Accountability & Another vs. National

Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR and Obbo and Another vs. Attorney General [2004] 1 EA 265.

88. It is therefore clear that discrimination which is disallowed under the Constitution cannot be justified where there is no rational basis for the same. In other words such discrimination cannot be arbitrarily imposed. It is trite that where no reasons are given for the exercise of discretion in a particular manner, assuming such discretion existed, or the reasons given are irrational or irrelevant, the Court is entitled to infer that there were no reasons for the exercise of the discretion in the matter it was exercised. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**
89. However, as held in **Nyarangi & 3 Others vs. Attorney General** (supra), since discrimination which is forbidden by the Constitution involves an element of unfavourable bias, it must be shown by a complainant that there was in fact an unfavourable bias before the burden shifts to the respondent to justify that the limitations to the rights complained of are justified.
90. In this case, it is our view that the Petitioners have not established that there was discrimination on any of the constitutionally protected grounds. In other words the Petitioner has not proved the existence of unfavourable bias in the President's decision to justify the inference of discrimination.

Whether there was delay in appointing, swearing-in and gazetting the nominees as Judges of the High Court of Kenya

91. It is clear that neither the Constitution nor the ***Judicial Service Act*** or even the Regulations made thereunder provide for the timelines within which the President is to appoint, swear-in or gazette the names of the nominees. However, the Constitution provides for guidance in Article 259(8) of the Constitution where it is provided that:

If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.

92. Therefore what is reasonable depends on the facts of a particular case. Where there is a further action to be undertaken by the President, the President may require more time to undertake the particular action. However, where what is required is purely a formalisation of a completed action, it is our view that the action ought to be undertaken as soon as an opportunity to do so arises. This was the view adopted by the Court in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443,** where Nyamu, J (as he then was) expressed himself as follows:

“Turning to the Constitution except where the Constitution itself has set out the limits there are no general stipulated time limits. Under the fundamental rights and freedoms provisions provided a matter is brought within a reasonable time and there is a good reason for the delay s 70 does not impose for any time limits. A liberal interpretation must be given to any time limit under the Constitution especially where the delay could be reasonably explained. Looking at the circumstances and facts of the case, including that enquiries and representations were made for the return of the vehicle the Court was satisfied that good reasons existed for the delay.”

93. In that case, it is clear that the Court took into account the circumstances and facts of the case which include the enquiries and representations to be made before the decision is made. In this case, we have found that after the Commission nominates the persons to be appointed as Judges, the President's only role is to formalise such appointment. In other words there is no further enquiry expected to be undertaken by the President.
94. In determining what is reasonable time therefore, it is our view that the timelines stipulated in the Constitution ought to act as a guide. Under Article 263 of the Constitution, the Constitution was to be promulgated within fourteen days of its gazetting. Under Article 115(1) the President is required to assent to a Bill within fourteen days after receipt thereof. Under Article 114(1) the President is required, within fourteen days after a vacancy in the office of Deputy President arises,

- to nominate a person to fill the vacancy. Under Article 158(4) of the Constitution, on receipt and examination of the petition for removal of the Director of Public Prosecutions, the President is required to, within fourteen days, suspend the Director of Public Prosecutions from office and, acting in accordance with the advice of the Public Service Commission, appoint a tribunal. Similarly, under Article 168(5), the President is required, within fourteen days after receiving the petition for removal of a Judge, to suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission, appoint a Tribunal.
95. In our view the spirit of the Constitution is that when it comes to matters of national interest, the thread that runs across the constitutional timelines with respect to purely procedural matters where what is required is more or less a seal of approval or formalisation of a decision already substantially made, is that fourteen days period is generally reasonable.
96. Taking the cue from the said provisions it is our view that to subject persons who have been nominated for appointment as Judges for a waiting period of more than five months as was the case herein, is clearly unreasonable. It subjects the said nominees to unnecessary anxiety. In arriving at this decision, we take into account the strict timelines given to the Commission in undertaking the process of nomination of Judges. Such strict timelines show the seriousness with which the appointment of Judges ought to be treated. Accordingly, all the players in the chain of the appointment process ought to expedite the process of appointment of Judges taking into account the important role played by the Judiciary in the administration of justice in any democratic system of governance.
97. The spirit of the Constitution is that whatever is to be done under it affecting the fundamental rights and freedoms must be done without unreasonable delay. See **Kigula and Others vs. Attorney-General [2005] 1 EA 132.**

Whether the Court can grant the orders sought in this petition

98. The next question for determination is whether this Court can in light of the foregoing grant the orders sought herein. Every person, including the President, is under a constitutional obligation pursuant to Article 3(1) of the Constitution to respect, uphold and defend the Constitution. Apart from that Article 131(2)(a) of the Constitution specifically obliges the President to respect, uphold and safeguard the Constitution.
99. It must also be recognised that under Article 2(4) of the Constitution, any act or omission in contravention of the Constitution is invalid. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the executive authority at national level vests in the national executive, Article 129(1) provides that the executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution.
100. Where therefore a question arises as to whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution, it falls on the laps of this Court pursuant to Article 165(3)(d)(ii) to determine the issue. This is due to the fact that under the current constitutional dispensation, the Constitution is supreme and all arms of the Government must bow to the Constitution as decreed under Article 2(1) and (2) the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate any unconstitutional action is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to “... institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”
101. On this issue, we defer to the words of **Kasanga Mulwa J** in **R vs Kenya Roads Board ex parte**

John Harun Mwau HC Misc Civil Application No.1372 of 2000 where he stated that:

“Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution.”

102. That decision was handed down during the reign of the retired Constitution. However the same position has been affirmed in **Coalition for Reform and Democracy (CORD) & Another vs. the Republic of Kenya & Another** (supra) where the court stated *inter alia* at paragraph 125 that:

“Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people’s will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution...Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid...”

103. We would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission** (supra) where it expressed itself at paragraph 54 as follows

“The Effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation...It was submitted that these sentiments apply with equal force to the legislature and legislative processes for the Constitution has ushered in a new era, not of Parliamentary supremacy but one of supremacy of the Constitution. The superintendents of the Constitution are the courts of law which recognise that each organ in its own sphere working in accordance with law not only strengthens the Constitution but ensures that the aspirations of Kenyans are met.”

104. Subsequently, the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR** stated as follows;

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an

Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. ”

105. The Court went on to state as follows:

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.”

106. In other words, where something is alleged to have been undertaken under the Constitution, it is the Court to determine whether this is in actual fact so and where a person alleges that the action taken is not in accordance with the Constitution it falls upon this Court to investigate and determine that issue since to fail to do so would amounting to this Court shirking its Constitutional responsibility. In our view this position resonates with the opinion held by the South African Constitutional Court in Minister of Health and Others vs. Treatment Action Campaign and Others (supra) at paragraph 99 where the Court explained its understanding of the role to protect the integrity of the Constitution thus:

“The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.”

107. As this Court held in The Council of Governors and Others vs. The Senate Petition No. 314 of 2014:

“this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court”.

108. Similarly in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 it was held that

“The Judges are the mediators between the high generalities of the Constitutional text and the messy details of their application to concrete problems. And Judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary they are applying the language of these provisions of the Constitution according to their true meaning. The text is “living instrument” when the terms in which it is expressed, in their Constitutional context invite and require periodic re-examination of its

application to contemporary life.”

109. Mbogholi Msagha, J on his part in Macharia vs. Murathe & Another Nairobi HCEP No. 21 of 1998 [2008] 2 KLR (EP) 189 (HCK) expressed himself *inter alia* as follows:

“The learned counsel cited several authorities from the English jurisdiction to advance his submission that the Courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because...the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the...[Constitution]. That shows that even when Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take an oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense.”

110. As Ngcobo, J expressed himself in Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2), (supra) where:

“I have found that the NCOP failed to fulfil its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers. This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, ‘there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.’ But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government.”

111. The Judge added:

“When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O’Regan J explained in a recent minority judgment, ‘the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.’ In order for the founding values that lie at

the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid..."

112. The Kenya Magistrates and Judges Association invited us to make determinations with respect to proportionate distribution of judicial appointment of Judges between serving judicial officers (magistrates) and non-serving persons. We respectfully decline the invitation to do so as this that was not the subject of this petition and we were not sufficiently addressed on the issue to enable us make an informed decision on the matter

Summary of Findings

113. We have dealt in the preceding sections of this judgment with the issues which were raised before us in this petition. What remains is to summarise our findings in this judgment and our disposition of the petition. Consequently we find that:

1. **The President violated the Constitution by purporting to “process”, “approve” or “disapprove” the nominees for appointment as Judges of the High Court by the Judicial Service Commission.**
2. **The period taken by the President in appointing, swearing-in and gazetting the Judges nominated by the Judicial Service Commission on 11th January, 2014 was unreasonable.**

Disposition and Remedies

114. Based on our findings hereinabove, we make the following orders:

- a. **We declare that save for the circumstances contemplated in paragraph 16 of the First Schedule to Judicial Service Act, upon the submission of names of persons to be appointed as Judges by the Judicial Service Commission to the President, the President is under a mandatory Constitutional duty to appoint, swear-in and gazette the said persons as Judges without unreasonable delay and that a refusal to do so is unconstitutional.**
- b. **We declare that upon the submission of names of persons to be appointed as Judges to the President by the Judicial Service Commission, the President is not mandated and/or required to conduct any process of approval or disapproval and any such purported process is unconstitutional and is therefore null and void *ab initio*.**
- c. **We declare that the delay by the President in appointing, swearing-in and gazetting as Judges the persons whose names were submitted to him by the Judicial Service Commission on 11th January, 2014 was unreasonable and was therefore unconstitutional.**
- d. **We make no order as to costs this being public interest litigation.**

Dated and Signed at Nairobi this 26th Day of May 2016

R MWONGO

PRINCIPAL JUDGE

W. KORIR

JUDGE

MUMBI NGUGI

JUDGE

G V ODUNGA

JUDGE

J L ONGUTO

JUDGE

Delivered on 26th day of May, 2016

R MWONGO

PRINCIPAL JUDGE

J L ONGUTO

JUDGE