REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 890 of 2004
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTIONS 66, 82 AND 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE KADHIS' COURT, OTHER COURTS AND, THE JUDICATURE UNDER SECTIONS 60, 65 AND 66 OF THE CONSTITUTION

AND

IN THE MATTER OF THE KADHIS' COURTS ACT, CAP 11 LAWS OF KENYA

AND

IN THE MATTER OF CONSTITUTIONAL REVIEW UNDER SECTIONS 3 AND 123 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA REVIEW ACT CHAPTER 3A OF THE LAWS OFKENYA

BETWEEN
1. VERY RIGHT REV. DR. JESSE KAMAU

2. BISHOP SILAS YEGO
3. BISHOP BONIFES ADOYO
4. BISHOP MARK KARIUKI
5. BISHOP WILLIAM TUIMISING
6. BISHOP JUSTUS MUSYOKA
7. BISHOP ROBERT MAHIRI
8. BISHOP STEPHEN KIGURU
9. BISHOP GERRY KABARABARA
10. BISHOP PATRICK MUNGAI
11. BISHOP JUSTUS WANJALA
12. BISHOP MARGARET WANJIRU
13. BISHOP PETER NJIIRI
14. BISHOP ISAIAH KYALO
15. BISHOP STEPHEN KANYARU
16. BISHOP JEFFERSON NYATUKA
17. BISHOP ARTHUR KITONGA
18. BISHOP RICHARD KIMWELE
19. BISHOP JOSEPH OGUTU
20. RT. REV. DAVID GITHII
21. BISHOP PETER KARANJA
22. REV. KEPHA OMAE
23. BISHOP CHARLES MUGO
24. REV. PATRICK MURUNGA
25. REV. JAMES MAINA
26. REV. AMBROSE NYANG'AU.....APPLICANTS

VERSUS

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

THE CONSTITUTION OF KENYA REVIEW COMISSION.....2ND RESPONDENT

CONSTITUTIONAL LAW

- **Constitutional procedural law**
- **Constitutional Interpretation and construction – the historical context**
- **Constitutional judicial review**
- **Locus Standi**
- **Public interest litigation**

- **The doctrines of political question; mootness, ripeness,**
- **Kadhis' Courts and the Constitution**
- **Conflict of Constitutional provisions**
- **Meaning of secular state and consequences**

JUDGEMENT

INTRODUCTION –

(1) The Application and Parties

This Judgement relates to the Further Originating Summons, first dated 12th July, 2004, Amended on 30th November 2004, (pursuant to the Order of Court made on 16th November 2004), and Further Amended on 1st February 2005 (pursuant to leave of Court given on 31st January 2005). It is brought by the twenty-six Applicants led by the Very Right Rev. Dr. Jesse Kamau the Moderator of the Presbyterian Church of East Africa, Bishop Silas Yego of the Inland Church of Africa, Bishop Margaret Wanjiru of Jesus Christ AliveMinistries,the Rt. Rev. Dr. David Githii, Bishop Arthur Gitonga, Bishop Boniface Adoyo of Nairobi Pentecostal Church and the Reverends as enlisted above against the Attorney-General as 1st Respondent and the defunct Constitution of Kenya Review Commission as 2nd Respondent.

(2) The Applicants seek the following declarations:

(1) that Section 66 of the Constitution of Kenya which introduces and entrenches Kadhis' Courts in the said Constitution infringes on the Constitutional rights of the Applicants to equal protection of the law embodied in Sections, 70, 78, 79, 80 and 82 of the Constitution and to that extent is discriminatory, unconstitutional and should be expunged in its entirety from the said Constitution;
(2) that Section 66 of the Constitution of Kenya is inconsistent with Section 82 of the same Constitution and is therefore null and void;
(3) that any provision similar to section 66 of the Constitution of Kenya in word or effect as proposed in the draft otherwise known as the "Zero" or "Bomas Draft" or any other draft infringes the right of the Applicants and is discriminatory, is unconstitutional, null and void and of no effect;
(4) that the enactment of the Kadhis' Courts Act contravenes the Constitution and is to that extent null and void;
(5) that the financial maintenance and support of the Kadhis' Courts from public coffers amounts to segregation, is sectarian, discriminative, unjust as against the applicants and others and amounts to separate development of one religion and religious practice and therefore unconstitutional;
(6) that further and in the alternative and without prejudice to the foregoing, the purported extension of the jurisdiction of the Kadhis' Courts through the enactment of the Kadhis' Courts Act from the former Protectorate to areas falling outside the said Protectorate contravenes the Constitution and is null and void;
(7) that any or all provision(s) such as Section 66 of the Constitution and Section 197 (2) 198, 200 (1) (e) of the "Zero" draft that seeks(s) to introduce and/or entrench, promote, elevate, encourage, advance, give special preference to, support by public funds or otherwise any religion or sectarian religious interests or such interests of a religious nature or otherwise that draw their base from a given or known set of religious teachings/doctrines, practices and/or beliefs in the Constitution is and would be discriminatory, oppressive to the applicants and others, offensive to the doctrine of separation of state and religion retrogressive, unconstitutional null and void;
(8) that any form of religious courts should not form part of the Judiciary in the Constitution of Kenya as it offends the doctrine of separation of state and religion and also Chapter 2 S. 9 of the "Zero" or "Bomas Draft";
(9) that the entrenchment of the Kadhis' Courts under the aforesaid section 66 of the Constitution of Kenya and in the draft otherwise known as the "Zero" or "Bomas Draft" section 197 (2), 198, 199, 200(1) (e) has a clear and determined hidden agenda to or is intended to advance, promote, encourage, introduce, propagate an Islamic agenda or what is popularly or otherwise known as the Abuja Declaration for Africa and Kenya whose ultimate objective is to turn Africa in general into an Islamic continent and Kenya in particular into an Islamic nation and transgresses, dilutes, vitiates, infringes on the constitutional rights of the Applicants and discriminates against the Applicants and their right to equal protection of law as stated above;

(10) the Applicants pray that without prejudice to the foregoing and in the alternative a declaration be and is hereby issued that such entrenchment does reasonably evoke fears of schemes of subterfuge and constitutional sabotage in the Applicants the right to equal protection under the Constitution.
(11) that the entrenchment of the Kadhis' Courts in the Constitution was and is but the stepping stone and or vehicle to the attempt being made through the "Zero" and or "Bomas Draft's introducing of "Sharia Law" or form of justice in Kenya as has happened in other jurisdictions in Africa and which step is retrogressive, discriminatory, dangerous as far as the stability of the Nation is concerned, unjust, detrimental to the Applicants and all Kenyans and is unconstitutional;
(12) further and in the alternative it be and is hereby declared that the entrenchment of the Kadhis' Courts in the Constitution, the introduction of Sharia and or Islamic agenda for Kenya and Africa and the whole of the Islamic religious agenda is aimed ultimately at the sole goal of acquiring inter alia political power, supremacy and control over Africa and Kenya in particular by means which are unconstitutional, discriminative and oppressive to the Applicants and other Kenyans;
(13) that the entrenchment of the Kadhis' Court in the Constitution elevates and uplifts the Islamic religion over and above other religions in Kenya which is unconstitutional and discriminatory against the Applicants and Kenyans of other religions;
(14) that the process leading to the inclusion of the Kadhis' Courts in the so called "Zero" or "Bomas draft" a new Constitution under the Constitution Kenya Review Act Cap 3A was flawed, lopsided, fraught with partisan entrenched and sectarian interests biased, corrupt and manifestly inimical to constitutionalism and discriminated against the applicants, their religion and other religions in Kenya; and
(15) that an order be issued in the first instance to restrain the respondents jointly and severally or any one of them or any other person or group of persons claiming under them jointly and or severally from discussing, subjecting to debate in any form and in any manner whatsoever the draft Constitution prepared by the National Constitutional Conference otherwise known as the "Zero Draft" or "Bomas Draft" or by whatever name called pending the hearing and determination of this application;
(16) that the Respondents be and are hereby ordered to pay the Applicants' costs in any event.

(3) The Grounds of the Summons and Supporting Affidavits

The Summons was supported by the Affidavit of the Very Right Reverend Dr. Jesse Kamau annexed thereto, sworn and filed on 12th July 2004, and the following grounds:-

(a) That Section 66 of the Kenya Constitution contradicts and offends the provisions and spirit of Chapter 5 of the Constitution and discriminates against the Applicants;
(b) There is no valid basis whatsoever for the inclusion of the Kadhis' Courts in the Constitution;
(c) Section 66 of the Constitution as framed is discriminatory against the Applicants who do not benefit from its inclusion and who do not profess the Muslim faith;
(d) Kenya is a multi-religious and multi-cultural state and Section 66 of the Constitution offends this position;
(e) The separation of the state and religion must be respected and promoted but section 66 of the Constitution contradicts this cardinal principle;
(f) Personal laws envisaged in Section 66 of the Constitution must not qualify the Bill of Rights in the Constitution;
(g) The entire process of the Constitutional Review has been skewed, biased against the Applicants and other Kenyans and bereft of any iota of Constitutionalism;
(h) The Kadhis' Courts Act is ultra vires the Constitution and should be struck down;
(i) The section of the Kadhis' Courts Act that purported to extend the jurisdiction of the Kadhis to areas outside the former Protectorate are oppressive and discriminatory to the Applicants and is null and void.
(j) That Sections 197 to 200 of the "Zero Draft" are inconsistent with Chapter 2 Section 9 of the said draft and is or would be unconstitutional null and void;
(k) The fundamental rights of the applicants are being breached by the unconstitutional and discriminatory manner in which the respondents are propagating the Islamic agenda;

In addition to his initial supporting affidavit and in response to the Replying Affidavit of Abida-Ali-Aroni, the 1st Applicant, the Very Rt. Rev. Dr Jesse Kamau also filed a Supplementary Affidavit sworn on 4th February 2005. Also filed as an annexture thereto was the Affidavit of Reverend David Oginde sworn on the same day, 4th February 2005. So far as is relevant and material for the purposes of this judgment,, the said Affidavit sets out firstly the historical question of the Kadhis' Court (paragraphs 5, 6, 7, 8 &10) and the issue of comparative constitutions in States in which persons of the Muslim faith constitute the majority or a significant percentage of the population of such countries (Paragraphs 12) and secondly the political question, (paragraphs 47-48).
The Affidavit of Revered David Oginde raises both the historical and political question (paragraphs 5-10, 13-15), and the antecedents to the decisions of the Constitution of Kenya Review Conference culminating in the entrenchments of the Kadhis' Court in Articles 9 and 10 of the "Zero Bomas" Draft.
The Hindu Council of Kenya were served by counsel for the Applicants, and it in turn by an Affidavit sworn on 11th February 2005 by Mr. Rashmin P. Chitmis and Mrs. Usha S. Shah the Vice Chairman and Assistant Secretary General of the Hindu Council of Kenya (the Council) the Council expressed its views in a Paper marked annexture "A" and entitled KADHIS' COURTS, in which the Council expressed the following "concerns", and made the following recommendations and conclusions-

CONCERNS

(*1) The records show letters were exchanged between the Prime Minister of Kenya the late Jomo Kenyatta and Mr. M. Shamte the Prime Minister of Zanzibar. Was the treaty between the two Governments ratified by their respective Parliaments to finalize the issue of the Kadhis' Courts?*
(2) If Muslims alone get preferential treatment for setting religious Courts, then other communities and faiths would come forward to have separate courts,
(3) Provision such as Kadhis' Courts is normally covered under the general law. It should not be part of the main body of the Constitution,
(4) Due to different school of interpretation of the Holy Koran and Hadith which figh will the Kadhis' Courts follow? Will there be Kadhis' Court as per separate jurisdiction of Shias and Sunis? What would be the views of Ismaili or Bohra Communities on the issue?
(5) Even in Pakistan, no universal Islamic courts could be established due to confusion and conflicts between the figh Jaferria of Shias and the figh of Sunis,
(6) The Constitution should not create wrong precedents for other communities in Kenya,
(7) Several sects of Muslims community do not follow Kadhis' Courts but have their own jurisprudence.
(8) The awards of the Kadhis' Courts are based on the sole discretion of the Kadhi. What view do the Muslim Women have on this system? Do the majority of the Muslim Women concerned get a fair trial in Kadhis' Courts? Are they convinced that their welfare and fundamental rights are protected at the hearings

RECOMMENDATIONS

(1) All people should be given options to go to independent or higher courts. The High Court and Court of Appeal should be above religious courts, if such courts are part of the Constitutional provision either directly or indirectly;
(2) There should be an open door policy to change the laws which cannot be challenged,
(3) Courts should be authorized to employ scholars who would enlighten judges on the interpretation of religious doctrines;
(4) The draft recommends setting up Village Councils to deal with minor problems in rural areas, which can take care of local religious sentiments to protect national unity and religious harmony. Expand the role of Village Councils to deal with social disputes;

CONCLUSION

It is our opinion that no single religion should be mentioned in the Constitution in order to maintain its neutrality,

We recommend incorporation of religious Courts for all major religions to deal with personal law relating to marriage, divorce and inheritance. Whereas we are not opposed to confirmation of Kadhis' Courts, Kadhis' Courts with limited jurisdiction as stipulated in the 1963 Constitution should be accommodated outside the main body of the new Constitution. We, however, recommend that suitable amendments be made to the draft Constitution to reflect the philosophy of national unity."

Considering the importance of the matter before it the court also ordered service of the application on the Supreme Council of Kenya Muslims (SUPKEM) but it declined to participate or send a representative to court.

The Application herein was filed wayback in July 2004, and was amended several times before the hearing commenced on 5th December 2006. By that time, the Referendum on the various mutations of the "Bomas" or "Zero Draft" had been held and rejected. So any questions or remedies against the Commission had become moot, as the Commission had been wound-up except for finalizing its affairs. Mrs Madahana and Mr. Kitheka represented the Applicants when the hearing of this matter commenced before us on 5th December 2006. The 1st Respondent, that is, the Hon. the Attorney-General was represented by Anthony Ombwayo, Principal Litigation Counsel. The 2nd Respondent, the Constitution of Kenya Review Commission (CKRC) having been wound-up took no part at the hearing of the Application the subject of this Judgment. We have considered the submissions of the 2nd Respondent as we have done to the Replying Affidavit of the Hindu Council of Kenya Vice-Chairman and Assistant Secretary General who had submitted an Affidavit and annexture already referred to above, and had indicated through the Applicants' Counsel that they did not wish to add anything to their Affidavit.

The essence of the application is that Kenya being a multi-religious and multi-cultural State, Section 66 of the current Constitution of Kenya which established and entrenched the office of the Chief Kadhi, and the Kadhis' Court, and the retention of a similar Section in the draft Constitution referred to as the "Bomas" or "Zero Draft", and the support thereof from public coffers amounts to segregation, is sectarian, discriminatory as against the Applicants and others and amounts to separate development of one religion and religious practice and is therefore unconstitutional.

The Application was vigorously opposed by the Attorney General and the Commission through the firm of J. B. Orengo & Co. Advocates. The Attorney General argued that the court had no jurisdiction to declare section 66 or any other section of the Constitution unconstitutional. The Commission on its part argued that the Applicants had no locus standi (standing) to bring the application and if the court found that the Applicants had such standing the application itself could not stand and was not tenable on the basis of the principles of ripeness, mootness, the political question, and collusive suits.

These doctrines postulate that the courts should only adjudicate upon a law which has been enacted and not upon a proposed law, that the Bomas Draft or the Zero Draft, being merely a draft, and pending further action by the Commission, Parliament, the Referendum and the President could not be a matter of adjudication by the courts. It was not ripe for such adjudication. On the other hand if a matter of litigation ceases to exist the issue becomes moot, and finally that there are issues which are not justiciable by the courts and that these can only be determined by other arms or agencies of Government. Those questions or issues like the establishment or otherwise of the Kadhis' Court is a matter which is politically a question to be determined by Parliament, the President and the people. That is to say a Political Question.

These contentions were set out in the Replying Affidavit of Abida Ali Aroni then Chair of the Constitution of Kenya Review Commission (the Commission) and in the submissions on the Preliminary Objection by Hon. J. B. Orengo counsel then for the Commission.

We will on the outset answer the procedural questions raised by Hon. J. B. Orengo's Preliminary Objection as well as the jurisdictional questions raised by Attorney Obwayo on behalf of the Attorney General for the 1st Respondent.

4. Jurisdiction and Procedural Questions and Collusive Suits

It was the contention in the Preliminary Objection by Hon. J. B. Orengo, learned counsel for the 2nd Respondent, that the Court had no clear jurisdiction to determine the Application principally because the applicants had invoked provisions without clearly stating under which of the provisions invoked they were seeking the Court's intervention. Counsel submitted in his written submissions that on this ground alone the Applicants' application was incompetent and was doomed to failure.
In so far as the Application invokes a multiplicity of jurisdictions Counsel's submissions are correct, for even in the Further Amended Originating Summons the Applicants still maintain references to section 3A of the Civil Procedure Act, and to Sections 3, 1A, 47, 60, 65, 67, 82, 84, and 123 of the Constitution of Kenya.
The invocation of these multiplicity of jurisdictions is a result of failure by Counsel for the Applicants to comply with the Constitutional procedural rules. Failure to comply with these rules would have rendered the application technically incompetent and were it not for the fact that it is a public interest litigation, it was doomed to failure on that ground alone. This being a very important public interest matter we consider that the "mix" is not fatal to the application because Section 1A, 84 and 123 of the Constitution represent what we would call the three "arms" of the Constitution because they are at the heart of the Constitution. We have therefore chosen to walk in the foot prints of our predecessors in the following cases - (1) Githunguri (2) reported as GITHUNGURI vs REPUBLIC [1986] 1 KLR 1 referred to in the case of ROYAL MEDIA vs TELKOM [2001]I E.A 210 where Visram J. (as he then was), following NGANGA vs KENYATTA UNIVERSITY COUNCIL & OTHERS (NBI. HCR MISCELLANEOUS APPLICATION NO. 172 OF 1999), adopting the English case of SOCITE UNITED & OTHERS vs MAURITIUS [1985] 2WLR 114,held inter alia that – the provisions of the Constitution should be given generous and positive construction to give effect to the Constitutional rights and freedoms.
In the case of KENYA BANKERS ASSOCIATION vs MINISTER FOR FINANCE & ANOTHER [2002]1 KLR 45, also referred to is RUTURI & 2 OTHERS vs MINISTER OF FINANCE & ANOTHER (NO.2), [2002] 1KLR 54, KENYA BANKERS ASSOCIATION vs MINISTER FOR FINANCE & ANOTHER, (NO.3), [2002] 1KLR 61, (a case of direct similarity to this case on procedure), the applicants, the Chairman and Secretary of Kenya Bankers Association) initiated a constitutional application by way of Originating Motion said to have been backed, supported or fostered by Section 46 (6), 60 (1) 75 and 77 (4) of the Constitution of Kenya Section 3A of the Civil Procedure Act, (Cap 21, Laws of Kenya) and sought the several declarations therein set out. Objection was taken by the Attorney-General on behalf of the Minister for Finance, the Respondent on – (1) the jurisdiction of the Court in view of the multiplicity of the jurisdiction invoked; (2) locus standi of the Applicant, the Kenya Bankers Association and the representative nature of the action;

The Court held inter alia that-

(1) The general principle relating to public interest litigation is the minimal personal interest which gives locus standi; and such interest gives a person a standing even though it is quite clear that he would not be more affected than any other member of the population;
(2) it is convenient and prevents a multiplicity of suits;
(3) representative suits by organizations on behalf of its members are permissible provided that –
(a) the members have standing to sue in their own right; or that the organization may have an interest of is own on its own right;
(b) interests sought to be protected are germane to the organization's purpose;
(c) and that neither the claim nor the relief sought individual participation of its members;
(4) in cases dealing with human rights, public interest and those challenging the constitutionality of Acts of Parliament technical objections cannot bar the jurisdiction of the court at the expense of justice.

Inthe GUYANA caseof ATTORNEY-GENERAL vs ALI & OTHERS [1989] LRC (const.), the issue was

whether the failure to enact rules for instituting references to the Constitutional Court denied the Respondents, locus standi to bring action. The Constitutional Court referring to the earlier case of JUANDO vs AG. Of GUYANA (9171) 16 WIR 141 – held that in such an instance where provisions are not provided by Parliament or by the rule-making body of the Supreme Court, a person constitutionally aggrieved within the provisions of articles 138 to 151 (similar to our Ss.70 to 83) can approach the court in any form of procedure by which the High Court can exercise its powers. At p.146, the court said:-
"The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule making authority to make specific provision as to how access is to be ground."

"….a citizen whose constitutional rights are allegedly trampled upon must not be turned away from the court by procedural hiccups. Once his complaint is arguable a way must be found to accommodate him so that other citizens become knowledgeable of their rights. I hold the parties are properly before the court."

Whereas we agree with and endorse the above, we hasten to add that rules of procedure like any substantive law, are as valid and enforceable as substantive law. Rules of procedure, constitutional or other procedural law (like the Civil Procedure Act) are designed and enacted for the guidance of plaintiffs or claimants and the protection of defendants or respondents, and are a pillar in the dispensation of justice. In as much as no genuine litigant, or litigant with a justiciable claim should be turned away or locked out of the corridors or seat of justice, the courts, we nevertheless think that it is important for the integrity of the Constitution and the Constitutional process, that the procedure prescribed under Sections 67 (3) and 84 (3) (on interpretation of the Constitution), and 84 (6) of the Constitution (for approaching the Court on matters concerning or touching interpretation or enforcement of fundamental rights or freedoms of the individual) be complied with at all times.
It is therefore paramount for all would be litigants and Counsel seized of a variety of constitutional and other legal procedural issues to carry out proper research and study on the constitutional and other procedure and desist from making haphazard, jumbled, catch-all applications and petitions under the Constitution. Failure to do so leads to a waste of valuable judicial time in deciphering a public interest application and an otherwise incompetent application which should be struck out ex debito justitiae. Such for instance was the fate of a judicial review application in the case of WELLAMONDI vs THE CHAIRMAN ELECTORAL COMMISSION OF KENYA [2002] KLR 486. which was struck out for invoking a multiplicity of jurisdictions of the court where only one of three remedies was available under Sections 8 & 9 of Law Reform Act (Cap.26), Laws of Kenya) and Order LIII of the Civil Procedure Rules.
However, the application herein is a matter of great public interest. It raises fundamental questions of whether the entrenchment of the fundamental right of conscience, including the freedom of religion in one part – Section 78 (formerly Section 22) of the Constitution, while at the same time entrenching however limited, a court of one faith in the Constitution (Sections 65 & 66 (formerly Section 78 & 179) of the Constitution,) is inconsistent with, or is in breach of Section 82 of the Constitution (which provides protection against discrimination on the grounds of creed).
We therefore hold that the Applicants have locus standi to bring the Application herein. We also hold that this court has jurisdiction to determine this application under the several heads of its sextuple (six fold jurisdiction) namely-

(1) the Court's original and unlimited jurisdiction in civil and criminal matters under Section 60 of the Constitution;
(2) the Court's supervisory jurisdiction over subordinate courts under section 67 of the Constitution;
(3) the Court's special jurisdiction to determine allegations of contravention or breach of fundamental rights under section 84 of the Constitution;
(4) The Court's power of interpretation of the Constitution under Section 123 (8) thereof in relation to the powers of Parliament to amend the Constitution under Section 47 of the Constitution, and in relation to determining whether any constitutional office holder has performed his mandate in accordance with

the constitution (constitutional judicial review);
(5) The Court's declaratory power over the supremacy of the Constitution under Section 3 of the Constitution, in relation to Section 65 of the Constitution;
(6) The Court's power of interpretation under Section 123 (8) of the Constitution in relation to Section 1A of the Constitution (as to the meaning of a democratic State, and democratic society (under Section 82 of the Constitution).

Having disposed of those jurisdictional and constitutional procedural issues we now turn our attention to the substantive arguments by counsel for the Applicants and the counter arguments on behalf of the Attorney General, 1st Respondent and Hon J. B. Orengo on behalf of the defunct Constitution of Kenya Review Commission.
5. Submissions by Counsel for the Attorney General 1st Respondent In view of the jurisdictional issues raised by both the Attorney General and Counsel for the defunct Constitution of Kenya Review Commission we will set out their arguments first.
On the question of jurisdiction Mr. Ombwayo learned Principal Litigation Counsel firstly argued that the court has no jurisdiction to strike out section 66 of the Constitution on the basis of Section 3 of the Constitution, that the court has only jurisdiction to strike out a law other than a provision of the Constitution.
Counsel urged that section 66 of the Constitution is an existing provision and cannot be struck out as being contrary to Section 3 of the Constitution as no provision of the Constitution is superior or inferior to any other provision of the Constitution and that an order of the court nullifying any provision of the Constitution would itself be unconstitutional.
Counsel's second argument was that the application itself was an infringement of the doctrine of the separation of powers as envisaged under section 23 and 24 of the Constitution that unlike this doctrine, the doctrine of a secular state is not clearly defined in the Constitution.
Counsel further argued that Sections 46 – 49 establish and empower the Legislature to make laws through Bills, passed by the National Assembly and assented to by the President. Section 47 of the Constitution provides for the manner of alteration of the Constitution, and that Section 66 thereof can only be altered in the manner so prescribed.
Said Counsel also argued that the Judicature is itself a creature of the Constitution and it has no power itself to alter any entrenched or other provision of the Constitution.
So far as the application is also brought under Section 84 of the Constitution, there is no power to declare the provision unconstitutional as section 66 does not affect the rights of the applicants. Section 5 of the Kadhis' Courts (Cap 11 Laws of Kenya) limits the jurisdiction of the Kadhis' courts, and the entrenchment of Section 66 does not infringe upon the applicants rights.
As to the cases cited by the Applicants' counsel, Mr. Ombwayo submitted that these cases were not relevant and in particular the case of BISHOP OF ROMAN CATHOLIC DIOCESE OF PORT LOUIS & OTHERS v. TENGUR & OTHERS (2004) 3 LRC 311 (2004) UKC 9 can be distinguished. The Catholic Colleges were established by the Catholic Church and were funded by the Government and could not therefore discriminate against non-Catholic children. In this application the Applicants seek to declare provisions for the Constitution as contrary to the doctrine of a secular state envisaged under section 1A of the Constitution.
Mr. Ombwayo also distinguished the case of BHEWA & ANOTHER vs GOVERNMENT OF MAURITIUS & ANOTHER (1991) LRC 298 and said it concerned a provision on a civil marriage based upon an Act of Parliament and not the Constitution and so the court could not interfere.
In conclusion Counsel submitted that the prayers sought should not be granted; that section 66 and 82 of the Constitution do not contradict each other, that there was no basis for other prayers sought and the whole application amounts to an investigation by the court of the legislative process.
Counsel therefore prayed that the entire application be dismissed.
6. The Preliminary Objection and Replying Affidavit by the 2nd Respondent
(a) The Preliminary Objection
Before the CKRC wound up, it filed a Preliminary Objection dated 1st November 2004 together also with a Replying Affidavit sworn by Mrs. Abida Ali-Aroni its Chairperson (and now Lady Justice Abida Ali Aroni). There were thirty grounds of objection, and it is necessary to set them all out for the purpose of easy reference to the ultimate issues to be determined in this matter. The objections are that –

(a) the application discloses no reasonable cause of action;
(b) the application is scandalous, frivolous, and vexatious;
(c) the application is an abuse of the process of Court;
(d) the Applicants have not demonstrated that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to each and all the Applicants;
(e) The Applicants have failed to produce or place before the Court any or any proper material by way of admissible evidence to justify the grant of any of the orders sought in the Application;
(f) There is no material before the court by way of relevant facts or documents presented to the court by affidavit upon which the court may exercise its discretion in favour of the Applicants;
(g) The applicants have not made any specific allegations of contravention of fundamental rights and freedoms in terms of Section 84 (1) of the Constitution and Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001;
(h) The mandatory requirements of Section 84 (1) of the Constitution of Kenya and Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001, have not been complied with;
(i) There must be separate and distinct applications by each Applicant alleging contravention of fundamental rights and freedom of the individual relating to each Applicant which must be pursued separately by each Applicant;
(j) The applicants have not specified which provisions of sections or sub-sections of Sections 47, 60, 65, 66, 67, 82, 84 and 123 of the Constitution of Kenya which are the subject matter of the Application or have been invoked or shown the contravention or mischief in respect of a specific section or sub-section of the said provisions complained of in the proceedings rendering the Application vexatious, oppressive and embarrassing;
(k) The court does not have jurisdiction under Section 67 of the Constitution as there is no question arising from a subordinate court involving the interpretation of the Constitution or a substantial question of law which has been referred to this court;
(l) The application has not specified which original jurisdiction of this court is being invoked in relation to the general human rights jurisdiction of the court and the enforcement of protective provisions as set out in section 84 (2) (g) and 84 (2) (b) of the Constitution of Kenya;
(m) The application is invoking several different special jurisdictions of the High Court simultaneously in the same application and is therefore incompetent, bad in law and cannot lie;
(n) The applicants cannot rely on the inherent and original jurisdiction of the court under section 60 of the Constitution and Section 3A of the Civil Procedure Act when they have relied on the specific and special jurisdictions of the High Court, which remain an unexhausted and provide and avail appropriate remedies. The court's inherent jurisdiction cannot be invoked where there is a specific statutory provision to meet the case;
(o) The application is inchoate and premature based on a document or instrument which is still subject to an incomplete process;
(p) Section 3A confirms and underpins the authority, supremacy and force of law of the Constitution of Kenya including Section 66 of the Constitution;
(q) Section 3A of the Constitution of Kenya is inter alia an aid to interpretation regarding statutes of law enacted by Parliament but does not affect the process of law-making of or pre-legislation dialogue, debate or settlements;
(r) The question or issues raised in the Application are not justiciable and are not matters which are appropriate for Court reviews or determination;
(s) There are comparative and persuasive political doctrines applicable in constitution-making where there are political settlements arising out of historical considerations and dynamics and indeed the same characterize as hallmarks of the Constitutional principles found in great written and unwritten Constitutions like those of India, United Kingdom, South Africa and the United States of America;
(t) The draft Constitution is a document pursued, created and on the basis of the statutory policy, object and purpose of Constitutional review and founded the guiding principles as provided in Sections 4 and 5 of the Constitution of Kenya Review Act;
(u) The review process and draft Constitution is required to secure provisions in the Constitution which inter alia respect ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and expression of their own identities;
(v) The guiding principles include the accommodation of the diversity of the Kenyan people including

socio-economic status, race, ethnicity, genders, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged and ensuring that the final out-come of the review process faithfully reflects the wishes of the people of Kenya;
(w) The issues raised in the application can be dealt with within the organs, structures and purview of the review process;
(x) The applicants or some of them are members of the National Constitutional Conference and are therefore not entitled and are estopped from reviving matters in a judicial forum or a court of law that have been settled in accordance with the Constitution of Kenya Review Act, the statutory guiding principles including the principles of a democratic and secure process for the review of the Constitution;
(y) The Application is misconceived in terms of the doctrine of the separation of Church and State and is based on the wrong conception and misunderstanding of the jurisprudence or potential theory regarding the separation of the Church and State;
(z) the Applicant's Affidavit sworn on 12th July 2004 by the Very Rev. Dr. Jesse Kamau is incompetent, bad in law as it offends the provisions of Order XVIII of the Civil Procedure Rules and be struck out;
(aa) Sections 67 and 84 of the Constitution of Kenya, Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules and Order XXXVI of the Civil Procedure Rules do not prescribe the filing of proceedings for a declaration or declarations by way of Originating Summons and hence the procedure followed in the application is wrong.
(bb) A declaration or order of the Court can be granted only where there are real and not theoretical questions in which the person raising it must have a real interest. The claimed or alleged Constitutional violations must be specific and real, not imaginary and speculative;
(cc) The orders prayed so long as they are in effect mandatory injunctions the same cannot hold against the Second Respondent;
(dd) No injunction or estoppel can operate against clear statutory provisions of an Act of Parliament or the Constitution;
(b) Replying Affidavit of Abida Ali Aroni
The Replying Affidavit of the Second Respondent was sworn on the 2nd day of November 2004 by Mrs. Abida Ali-Aroni its Chairperson, (now as already indicated above, Lady Justice Abida Ali-Aroni), and so far is relevant for the purposes of the opinions later expressed in this judgment, the following paragraphs are relevant 4, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 24, 26, 29, 31, 38, 41, and 41 (2) respectively and that –
1. I do not accept as true the allegations in the Supporting Affidavit nor do I agree with the opinions expressed by the first Applicant in the Supporting Affidavit (para 4);
2. that the Constitution of Kenya Review Act, Chapter 3A, (Laws of Kenya) was enacted to facilitate the comprehensive review of the Constitution of Kenya by the people of Kenya;
3. that the Constitution of Kenya Review Act, enshrines the guiding principles of the review process which inter alia enjoin the organs of the review to be accountable to the people of Kenya, ensure the review process accommodates the diversity of the Kenya people and provide the people with an opportunity to actively, freely and meaningfully participate in the Constitutional debate and ensure that the process is conducted in an open manner and that the final outcome of the review process faithfully reflects the wishes of the people of Kenya (para. 6);
4. in accordance with the views of the people of Kenya and its own recommendations the Second Respondent made provisions for the Kadhis' Courts in the draft Bill (para 11);
5. the Draft Bill was presented to the National Constitutional Conference for discussion, debate and adoption. The provisions relating to Kadhis' Courts were extensively debated at the Committee of the Judiciary and thereafter presented to the plenary of the Whole Conference. The plenary of the Conference adopted the provisions (para.12);
6. that it is significant that the convener of the Technical Working Committee on the Judiciary in the final and concluding sessions of the of the National Constitutional Conference was Rt. Rev. Bishop Philip Sulumeti of the Catholic Church in Kenya and the Committee was graced by the membership of the Honourable Very Rt Rev. Archbishop Zachaeus Okoth, Rev. Dr. Joachim Gitonga and Rev. Margaret Muchai and others of the Christian faith. The Appellants were indeed part of and were represented at the negotiations at Bomas that led to the agreement that the status quo on Kadhis' Courts should be maintained in the Constitution; (para 13);
7. that the issue of the Kadhis' Court was not characterized or designated as a contentious issue at the final phase of the Conference as the Steering Committee of the National Constitutional Conference set up the

Conference Consensus Building Group on 2nd February 2004 to build consensus on outstanding issues and report its decision to the Plenary of the National Constitutional Conference; (para. 14)
8. that the Conference Consensus Building Group consisted of representatives of all constituencies of the National Constitutional Conference including religious groups, (para 15),
9. that the substantive issues before the Consensus Building Group were –
· Dual citizenship,
· The Right to Life,
· Character of Marriage,
· Recall of members of Parliament and Councillors,
· Limits of Tenure of Members of Parliament and Councillors,
· The mixed Members Proportional Representation,
· The Authority to register and supervise political parties,
· Judicial Powers of the Electoral Commission,
· Devolution,
· Constitutional Commissions,
· Structure of the Executive,
· Transitional and Consequential Arrangements,
(Para 16);
10. that the provisions of articles 222 and 223 of the Revised Zero Draft of the Bill to alter the Constitution, establishing the Kadhis' Court were adopted without amendment by the National Constitutional Conference in the decisions made in the Plenary on 11th March 2004 which provisions now appear as Articles 198 and 199 of the Draft Constitution of Kenya as Adopted by the National Constitutional Conference on 15th March 2004, (para 17),
11. that it is significant that the statement of the Government declaring its position on contentious issues at the National Constitutional Conference said that “Kadhis' Courts should be entrenched in the Constitution in a manner generally consistent with the current Constitution” (para.18)
12. ..that letters to the editor and media statements authored by Rev. Fr. Gabriel Dolan of the Catholic Justice and Peace Commission demonstrate that the view of the Applicants on the question of the establishment of the Kadhis' Courts under the provisions of the current Constitution and Draft Constitution is not a universal opinion of all Christians nor is there unanimity in the debate among Christians, (para 20),
13. that the Draft Constitution makes provisions for other courts or the establishment by Act of Parliament of other Courts including the Magistrates Courts, (Court Martial), traditional and other courts and local tribunals, all subordinate to the High Court (Para 21);
14. that Kadhis' courts are not established as religious instruments or organs but are included as judicial institutions with a confined and limited jurisdiction (para 23);
15. that the provisions establishing the Kadhis' Courts do not therefore create a parallel judicial system and the Kadhis' Courts are Courts subordinate to the High Court (para24);
16. that the 2nd Respondent has been advised by its Advocate on record and verily believes the same to be true that all the provisions of the Constitution have equal and concurrent force of law and no one section or provision of the Constitution can be null and void on the basis of inconsistency, conflict or contradiction with another section of the Constitution on basis of section of Section 3 of the Constitution or otherwise; (para 26);
17. that Kenya is a secular state under the current Constitution and will be a secular state under the draft Constitution as evidenced by the provisions of sections 1 and 1A of the current Constitution and Article 9 of the Draft Constitution which state respectively as follows-
· Section 1 of the Current Constitution provides
:Kenya is a sovereign democratic Republic
And
:Section 1A Provides -
“the Republic of Kenya shall be a multiparty democratic state”
: Article 9 of the Draft Constitution provides –
(1) State and religion shall be separate
(2) There shall be no state religion,
(3) The state shall treat all religions equally.
18. that the doctrine of the separation of powers has therefore been jealously enshrined in the Draft

Constitution (para 38);
19. that the applicants have invoked a multiplicity of the special jurisdiction of the High Court, quite apart from its original and inherent jurisdiction thus making the application incompetent, bad in law and incurably defective (para 41);
20. that the Applicants have not placed before the court any facts or material that are sufficient for purposes of seeking the prayers, remedies or declarations set out in the Originating Summons. (para 42);
7. The Applicants' Counsel's Submissions
In view of the fact that the Constitution of Kenya Review Commission ceased to exist after the Referendum of 2005, except for purposes of winding-up its affairs, we do not propose to detail all the submissions of Mrs Madahana, the Applicants' Counsel in reply thereto except her submission that the Applicants were extremely concerned in the manner in which that Commission conducted the review of the Constitution in relation to the question of the Kadhis' Courts, and proposals to establish the Kadhis' Courts as a parallel judicial system to the secular courts. We also observe from the Replying Affidavit of the Chairperson of the CKRC that though the parallel judicial system was dropped in favour of the status quo, that is,the existing provisions of Section 66 of the current Constitution, the Applicants contention remains and it is not whether Kadhis' Courts should or should not exist, or whether they create a parallel Judicial system (which they in any event do albeit on a limited scale on matters of personal law), but rather, whether it should be entrenched in the Constitution. That is the issue which encompasses the entire basis of the Applicants' Originating Summons.
Mrs Madahana, Counsel for the Applicants divided her submissions into four broad categories-
(1) that there was no historical basis for the inclusion of the Kadhis' Courts in the Constitution;
(2) that the inclusion of the Kadhis' Courts in the Constitution violates the principle of equality of rights under the Bill of Rights;
(3) that the inclusion of the Kadhis' courts in the Constitution violates the doctrine of separation of Church and State, discriminates other religious faiths and is a threat to the secular nature of the State;
(4) that it enhances an Islamic Agenda.
To be able to answer the question, or issue, whether the Kadhis Courts should or should not be entrenched in the Constitution we will consider the question from nine perspectives –
(a) the historical question,
(b) the political question, justiciability, ripeness and mootness,
(c) whether the Kadhis' Courts violate principles of equality of rights under the Constitution,
(d) whether inclusion and funding of Kadhis' Courts in the Constitution violates the doctrine of separation of church and state,
(e) the comparative constitutional jurisdiction,
(f) An Islamic Agenda - Threat to a Secular State, 28
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(g) Analysis of the Kenya situation,
(h) Issues for Determination,
(i) Conclusions and Declarations.
A. HISTORICAL QUESTION
In support of their contention the Applicants argued that there were neither any historical, nor treaty basis, either in the Agreements between Great Britain and the Sultan of Zanzibar ceding the Kenya Coastal strip to Great Britain as a Protectorate, for entrenchment of the Kadhis' Courts, and the Office of the Chief Kadhi in the Constitution. The Applicants were as already noted, supported by the Hindu Council of Kenya who argued that no single religion should be mentioned in the Constitution in order to maintain its neutrality.
The Applicants' Counsel referred to the Exchange of Letters between the Prime Minister of Kenya (late Hon. Jomo Kenyatta) and the Prime Minister of Zanzibar (the late Hon. M. Shamte), dated 5th October 1963 paragraph 2 whereof said;
· "" The jurisdiction of the Chief Kadhi and of all the other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example marriage, divorce and inheritance) in proceedings in which all parties profess the muslim religion''.
The Applicants' counsel also referred to the Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar and the Government of Kenya done at Marborough House London on 8th October 1963 under which the Kenya Protectorate ceased to be part of His Highness's dominions

and thereafter formed part of Kenya and that the Agreement of 14th June 1890 so far as it applied to those territories and the Agreement of 14th December 1895 ceased to have effect.
Counsel submitted that no-where in either the Exchange of Letters, or the Agreements was it stated that the provisions relating to Islamic religion be entrenched in the Constitution.
Counsel further submitted that the Kenya African National Union (KANU), argued in its Memorandum at the Independence discussions among other matters that the people of the Coastal strip were not separate from other Kenyans, the African population at 260,000 were dominant, the Arab population was 35,000, there were 45,000 Asians of Indo-Pakistan origin and 5,000 Europeans. Counsel also referred to the vast amount of correspondence (over 80 pages) dating from, the Agreement of 14th December 1895 between Great Britain and the Sultan of Zanzibar under which the Coastal Strip was placed under the administration and protection of Great Britain, to 4th July 1960 relating to Kadhi's Court and again submitted that neither the Agreement nor correspondence nor any other historical evidence between 1960 - 1963 and 1963 - 1969 gave cause for entrenchment of the Kadhis' Courts in the Constitution.
Counsel further submitted that there was no justification for extending the Kadhis' Courts beyond the ten-mile coastal strip. The applicants therefore contended that the continued existence of Section 66 (in the Constitution) infringes upon the Applicants' rights.
B. THE POLITICAL QUESTION, JUSTICIABILITY, RIPENESS AND MOOTNESS
It was Hon. J. B. Orengo's argument, at the time these proceedings were filed, that the issue of the Kadhis' Courts as set out in the Zero Draft Article 222 (of Bomas Conference) was still being negotiated, and was a live issue before the Commission, Parliament, the Referendum and the President, and that these government organs are better suited, to resolve the issue of the Kadhis' Court. It is an issue beyond the courts or judicial determination. The courts will have no basis on which to answer the question whether or not it is right to entrench the Kadhis' Courts in the Constitution. Hon. Orengo referred us to the views by Prof. Tribe on the question of Ban on Advisory Opinions and the Problems of Declaratory and Partially Circumventable Judgments, Tribe says at pp.73-75-
"The federal courts created pursuant to Article III are barred by the case or controversy requirement from deciding "abstract hypothetical and contingent questions"
"Despite Justice Bankes dictum that granting or reviewing declaratory judgment is beyond the power conferred upon the federal judiciary, it is now settled that congressionally authorized declaratory judgments may be obtained in federal courts, and state judgments reviewed there; if the requirements of the justiciability doctrine are otherwise met where there is a concrete case admitting of one immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised".
Non Justiciable declaratory actions are usually characterized as hypothetical as presenting "abstract" questions because of suppositions contrary to fact or because of wholly speculative assumptions".
Similarly in United Public Workers of America vs Mitchell government employees sought declaratory relief from alleged unconstitutional restrictions imposed on political activities by the Hatch Act. The employees described in highly general terms the future conduct in which they planned to engage. The court's refusal to grant the relief sought turned in part upon the speculative nature of the claim. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication".
On Ripeness pp 80 -81 Tribe says:
"In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development or underlying facts. For example litigants alleging that a government action has effected an unconstitutional "taking" without just compensation" are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe"….Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available"
Essentially, the complaints and the allegations or questions raised by the Applicants in the Originating Summons are anchored in Section 66 of the Constitution. It is this section which is being challenged and impugned. It is the Section to be declared discriminatory, unconstitutional, inconsistent with the Constitution, null and void and of no effect. It is the Section sought to be expunged. It is found in paragraphs 1, 1a, 2, 3, 3a, 4, 4a, 5, 6, 7, 7a, 8, 9 & 10 of the Originating Summons.
It was argued for the Second Respondent that the Constitution – making legislation, the Constitution of

Kenya Review Act, was first promulgated in 1998. The Second Respondent is established under Section 6 of the Constitution of Kenya Review Act, (Chapter 3A of the Laws of Kenya), enacted by Act No.2 of 2001. It was also argued and we accept Mr. Orengo's argument, that Section 66 (of the Constitution) predated the Commission, the Second Respondent, and it cannot be held responsible for the enactment of Section 66 of the Constitution. It plays and played no legislative role. It was merely a creature of legislation by Parliament. It has no legislative authority; and plays no administrative role in the enforcement or operation of Section 66 of the Constitution. It is a stranger to the Kadhis' Courts.

It was further urged by Mr. Orengo, and again, with respect, we accept and agree with his submissions that Section 82 (1) of the Constitution prohibits any provision in any law which is discriminatory either of itself or in its effect. We accept that this provision does not include the Constitution; as any reference to the Constitution is covered consistently by use of the phrase, "subject to this constitution". This is evidenced by Sections 3, 47, 121 (1) 122 and 123 (1) of the Constitution. We accept the submission that the phrase "no law" in Section 82 (1) of the Constitution cannot therefore refer to the Constitution.

It was also Mr. Orengo's argument that religious discrimination cannot be brought within the ambit of Section 82 of the Constitution in the entirety of the section. He also submitted that section 78 contains derogations which allow the making of provisions in the law for the purpose of protecting the rights and freedoms of other persons including the right to observe and practice a religion without the unsolicited intervention of members of another religion.

This argument was shared by Attorney General as already observed above.

To illustrate his submission that courts should tread cautiously on political questions, Hon. J. B. Orengo referred us to several English and American Cases.

In the case of BLACKBURN vs ATTORNEY-GENERAL [1971]2 ALL ER138, Lord Denning said:

"We have been brought up to believe that in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality. Take the statute of Westmister 1931, which takes away the power of Parliament to legislate for Dominions. Can anyone imagine that Parliament would reverse the statute? Take the Acts which have granted independence to the Dominions and Territories Overseas. Can anyone imagine that Parliament could or would reverse those laws and take away their independence? Most clearly freedom once given cannot be taken away. Legal theory must give way to practical politics. It is as well to remember the remarks of Lord Sankey LC in BRITISH COLA CORP vs. REGEM [1935] AC 500 at 520 [1935] ALL ER Rep. 139 at 146:-

"The Imperial Parliament could as a matter of abstract law, repeal or disregard section 4 of the Statute (of Westminister). But theory has no relation to realities."

Lord Hailsham in his book on the Constitution says:

It is a solemn acknowledgment by the head of our otherwise secular state of the ultimate sovereignty of the spiritual and moral order in human affairs. I mention this because there is serious talk of disestablishing the Church of England so far as I know, there is no such talk of disestablishing the schism-ridden Presbyterian Church of Scotland. At this point I seem to sense the shade of the, in this life, not at all religious Melbourne, whispering in my ear, "why not let it alone"

It was also Mr. Orengo's submission that the courts or the judiciary cannot be turned or transformed into an ombudsman for general grievances of citizens. The politics of constitution - making is being exported to the courts and the contests of supremacy is turning the business of litigation into simply politics by other means. In the case of Blackburn vs Attorney General (supra) Salman LJ remarked:-

"I deprecate litigation the purposes of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions in and when they have been implemented by legislation. Nor have the courts to interfere with the treaty making power of the sovereign. As to Parliament, in the present state of the law, it can enact, amend, and repeal any legislation it pleases. The sole power of the courts is to decide and enforce what is the law and not what it should be now, or in the future".

Counsel for the second respondent also submitted that the Applicants' case is not amenable to judicial review or appropriate for judicial determination, that the case raises no judicially enforceable rights but raises issues which are of a peculiarly political nature, that it is not the courts that decided the nature, form or structure of our political system or the constitutional framework. That lies with the people and Parliament. Justice Frankfurter of the U.S. Supreme Court said "courts ought not enter this political thicket". (American Constitutional Law p. 100).

In the case of Anarita Karimi Njeru vs the Republic (No 1 [1979] KLR 154 the court's attention was drawn to a text and commentary on the Constitution of India where the author says:-

“In the United States, it has been established that constitutional questions must be raised “reasonably” that is at the earliest practicable moment. As a result of this rule, a constitutional right may be forfeited in a criminal as well as civil case by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”

Mr. Orengo also made the submission that the applicant’s case was not ripe for determination as there was still some way in terms of the dimension of space and time before (the constitution) in its new or reviewed form is enacted. Lord Denning in Blackburn vs Attorney General (supra) said:-

“Nevertheless, I do not think these courts can entertain these actions, negotiations are still in progress for us to join the Common Market. No agreement has been reached. No treaty has been signed. Even if a treaty is signed it is elementary that these courts take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tell us.”

If Her Majesty Ministers sign this Treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would otherwise go back on it and try to withdraw from it. But if Parliament should do so, then I will consider that event when it happens. We will then say whether Parliament can lawfully do it or not.”

So whilst in theory Mr. Blackburn is quite right in saying that no Parliament can bind another and that any Parliament can reverse what a previous Parliament had done, nevertheless so far as the court is concerned I think we will wait until that day comes. We must not pronounce on it today.”

Mr. Orengo also referred the court to the discussion of the doctrine of the political question and justiciability in American Constitutional Law by Laurence H. Tribe. The views expressed are both appropriate for consideration and are persuasive.

Professor Tyler summarizes the constitutional view of the doctrine of the political question as grounded in the assumption that there are constitutional questions which are inherently non-justiciable and that these practical questions, it is said concern matters as to which departments of government, other than the courts or perhaps, the electorate as a whole must have the final say, that with respect to these matters, the judiciary does not define constitutional limits.

And again on the political question Doctrine at p.96 Tribe says:-

“The need for an active judicial role in supervising the process of calling and conducting a new constitutional convention on the application of two thirds of States pursuant to Article V seems considerably clever. The Constitutional appropriateness of the substance of proposed amendments however, is undoubtedly a matter entirely committed to judicially unreviewable resolution by the political branches of government.”

In the US, Professor Henkin has disagreed with this view of the political doctrine. In his Article Is There A Political Question Doctrine published in 85, Yale Law Journal 597 (1976), Prof. Henkin has argued that the courts should not accept lightly the proposition that there are provisions of the Constitution which courts may not independently interpret because such a holding would be contrary to the principle established by the US Supreme Court in MARBURY vs MADISON (in 1903) (5 US 1 Cranch.) 137,180 3) that the constitution is a judicially declarable law;

“the Supreme Court does not surrender its power of judicial review by holding that while a particular provision may grant Congress or the Executive Authority to act, it is not susceptible of an interpretation which would yield judicially enforceable rights, rights whose enforcement would either constrain Congressional or Executive action or alternatively provide the basis for an exercise of judicial power parallel to the actions of the political branches. Such a holding does not deprive the court of all power to interpret a constitutional provision, the court retains the power to interpret a constitutional provision, the court retains the power to determine whether congressional or executive action comes within the terms of the constitutional grant of authority. It is an inquiry into whether particular constitutional provisions yield judicially enforceable rights and because this inquiry ultimately focuses on the limits of judicial competency, the political question doctrine is plainly a part of justiciability as a whole. It is not a question of the courts entering into a political thicket”

On the question of Ripeness (of issues for adjudication) and the courts' competence to issue declaratory orders, Hon. Orengo submitted that the issue at hand must not only be ripe for determination but must also not be either academic or hypothetical. He referred us to the excerpts from the case of Blackburn vs Attorney – General and Justice Ringera’s remarks in the Njoya case that one of "the most fundamental aspects of the court’s jurisdiction is that we are not an academic forum and we do not act in vain does indeed resonate in line with authorities and legal texts." The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical.

Stamp LJ in Blackburn vs Attorney General (supra) states at p.138 3 h J
"It is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical".
In Matalinga & Others vs Attorney – General [1972] E.A. 578 Simpson J held:-
"Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it."
In the Matalinga case, the Plaintiffs (representatives of an unincorporated association) had sued the Attorney General for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the Director of Personnel review and rectify salary structures.
The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was also
contended that the jurisdiction to give a declaratory judgment must be exercised "sparingly" with great care and jealously and "with extreme caution."
In GUARANTEE TRUST CO. OF NEW YORK vs. WAMAYU CO. Banks LJ said:-
"It is the person therefore who is seeking relief, or in which a right to relief is alleged to exist, whose application to the court is not to be defeated because he applied for a declaratory judgment or order and whose application for declaration of his rights is not to be refused merely because he cannot establish a legal cause of action.
It is essential however that a person who seeks to take advantage of the rules must be claiming relief. What is meant by this word relief? Where once its established as, I think it is established, that relief is not confined to relief in respect of a cause of action, it seems to follow that the word itself must be given its fullest meaning. There is however one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction"
That shows that the widest language of R.S.C.O 15 rule 7 is not free of all limitations. It is subject to this, that the declaration claimed must not be contrary to accepted principles on which the court exercises the jurisdiction, and one of those principles is that the court will not make declarations in a dispute which is not a justiciable dispute. For that reason I propose to order that the endorsement of the writ of summons and the statement of claim be struck out."
The discussion by Laurence H. Tribe in his book American Constitutional Law, second Edition, by Ralph S Tyler Jr Professor of Constitutional Law at Harvard University on the doctrine of justiciability is also both useful and instructive. The following passage is found at p.68-
"In order for a claim to be justiciable it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a real and substantial controversy is determined under the doctrine of "standing" by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy itself an aspect of the appropriateness of the issues for (judicial) decision… and actual hardship of denying the litigants the relief sought.
Examination of the contents of the controversy is regarded as necessary to ensure that the courts do not out-step the constitutional authority by issuing advisory opinions." The ban on advisory opinions is further articulated and reinforced by judicial consideration of two supplementary doctrines that of ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and that of mootness which reflects the complimentary concern of ensuring that the passage of time or succession of events had not destroyed the previously live nature of the controversy. Finally related to the nature of the controversy is the political question doctrine, barring decision of certain disputes best suited to resolution by other government actors".
Dealing with Non Constitutional Aspects of Justiciability Doctrine at pp.69-70, Tribe says:-
"the place to begin is where the Supreme Court's exercise of discretion is most obvious. The cases in which the court refuses to accept constitutionally and statutorily authorized jurisdiction. Early in the history of the Supreme Court, Chief Justice Marshall declared:-
"it is most true that this court will not take jurisdiction if it should not, but it is equally true that it must

take jurisdiction if it should"
In Rescue Aday vs Municipal Council of Los Angeles for example the US Supreme Court refused to review a California decision denying a claim under First Amendment establishment clause because the court was unable to determine with certainty how much of the questioned statute was implicated in the case.
"jurisdiction here should be exerted only when the jurisdictional question presented by the proceedings tenders the underlying constitutional issues in clear cut and concrete form unclouded by any serious problem of construction relating either to the terms of the questioned legislation or its interpretation by the state courts".
"And in SOCIALIST LABOUR PARTY vs GILLIGAN (1972) the Supreme Court refused after other issues in the case had become moot, to review a constitutional challenge to a state requirement that a political party must file a loyalty oath in order to obtain a position on the ballot. All issues litigated below have become moot except for one that received scant attention in the appellants complaints and was treated not at all in the affidavits filed in support of the cross motions for summary judgment. Nothing in the record shows that the appellants have suffered any injury thus far, and that the laws future effect remains wholly speculative."
On Collusive suits, Tribe at pg.93 says-
A suit is collusive and hence not justiciable in the absence of a genuine adversary issue between the parties without which a court may not safely proceed to judgment when it assumes the grave responsibility of passing on the validity of legislative action."
C. OF THE VIOLATION OF THE PRINCIPLES OF EQUALITY OF RIGHTS UNDER THE CONSTITUTION
Writings from the Age of Enlightenment posited that people enjoy certain rights which exist in a state of nature, unrestrained by governments or societies. These are known as natural rights. The theory of natural rights found its expression in law in the American Constitution - Bill of Rights.
The general and overarching principle of constitutional law as entrenched in Section 70 of our Bill of Rights (Fundamental Rights and Freedoms of the Individual) is that personal law of one community religious or otherwise cannot override or qualify the Bill of Rights - fundamental rights guaranteed under the Constitution.
Section 70 of the Constitution guarantees to every person equality before, and protection of the law. Mrs Madahana submitted that to the extent that Section 66 of the Constitution which introduces the Kadhis' Courts into the Constitution and establishes areas of jurisdiction on matters of personal status, marriage, divorce and inheritance where all parties profess the Muslim faith or religion, violates that principle. This is because Muslim law regards women as less than men in matters of both marriage and divorce, as well as devolution of property: Holy Quran Surah 2:228-232, and Surah 65:1-7 (only a man may divorce his wife even if he is required to provide for her); a man may beat his wife, even if lightly, the evidence of two women, is equal to evidence of one man (Surah 2:282). The application of such beliefs of faith are contrary to the Constitution.
D. OF WHETHER THE INCLUSION AND FUNDING OF KADHIS' COURTS IN THE CONSTITUTION - is a violation of the Doctrine of Separation of Church and State
The doctrine of separation of Church and State provides that as between the State and religion each had its own sphere, the former of law making for the public good, and the latter moral welfare of individuals and their God or creator. The contention by the Applicants is that the Muslim faith is, by the establishment and funding of Kadhis' courts through the public favoured by the state and this violates the principle of separation of state and religion and section 66 of the constitution should be struck out.
Mr. Ombwayo, learned Principal Litigation Counsel argued, and we agree with his argument, that the court does not have jurisdiction to strike out Section 66 of the Constitution even if (as he seemed to agree) it contradicts Section 82 of the Constitution. Counsel also argued that no provision of the Constitution is superior to the other. With respect we do not agree with that submission. For instance the Bill of Rights, which are also referred to as universal, inherent and natural rights, cannot be taken away by the State. In addition we also hold that the courts have the jurisdiction to declare conflict or inconsistency in the constitutional provisions, or to declare whether or not the provisions are in conflict with any values, principles or purposes of a democratic constitution such as ours.
Counsel further submitted that the Application (the Further Amended Originating Summons) is an infringement of the doctrine of separation of powers of state as envisaged under section 23 and 29 of the Constitution. Unlike the doctrine of separation of powers, the doctrine of a secular state is not clearly

defined in the Constitution.
Section 23 of the Constitution does indeed vest executive power in the President. It says the executive power of Kenya shall vest in the President and subject to the provisions of the Constitution shall be exercised by him either directly or through officers subordinate to him. Subsection 3 of Section 23 empowers Parliament to enact a law conferring by law functions on persons or authorities other than the President. Parliament enacts laws through Bills introduced to Parliament under the provisions of Section 30.
Indeed sections 46 – 49 of the Constitution provide for the legislative powers of the Parliament of Kenya (comprising the President and the National Assembly). The National Assembly enacts laws, and the President assents. Section 47 of the Constitution provides for the manner and procedure for alteration of the Constitution.
This court would not have a role or does not play any role in the alteration of Section 66 of the Constitution or any other section of the Constitution. The process of altering Section 66 of the Constitution or indeed any other provision of the Constitution lies in the National Assembly (Parliament which enacts the law and the President who assents to the law) before it becomes operational or comes into effect. Whereas an amendment may be challenged in court once enacted into law, only Parliament has the necessary legislative mandate to alter the provision by way of amendment provided the provisions of section 47 on amendments are satisfied. We have also held severally for instance in the case of NGOGE vs. SPEAKER OF THE NATIONAL ASSEMBLY (Nairobi H.C. Misc. Application No. 22 of 2004), that Parliament does not have the power to take away the basic structures of the constitutional "sanctum" - the Bill of Rights, the security of tenure of Judges, which is the cornerstone of the rule of law, and the democratic provisions of Section IA of the Constitution. The second exception is that it is only the people who have the power to enact a new constitution as we stated in the case of PATRICK OUMA ONYANGO & 12 OTHERS vs. HON. THE ATTORNEY GENERAL & 2 OTHERS (infra).
Indeed, it goes without saying, but it is necessary to remind ourselves, and the Applicants in particular, that the Judicature too is a creation or creature of the Constitution, and whereas it has power to interpret any provision of the Constitution (under sections 67, 84 and 123(8) of the Constitution, that power is limited to interpretation and constitutional judicial review but not alteration of the Constitution. Under its constitutional judicial review jurisdiction the court may grant a declaration in the event of conflict of provisions.
Whereas the Applicants are legitimately entitled to come to court, the supremacy of the Constitution as expressed in section 3 thereof is over any other law, and not any provision of the Constitution itself. Consequently the court’s power to declare void any other law inconsistent with the Constitution is limited by its express terms to such other law. The Applicants prayer to declare Section 66 of the Constitution void is therefore not tenable and is declined.
It is indeed correct as counsel for the Applicants submitted that Section 78 both grants and guarantees the freedom of conscience, including the freedom of thought and of religion, freedom to change one's religion or belief and freedom either alone or in community with others, and both in public and in private to manifest and propagate one's religion or belief in worship, teaching, practice and observance. It is also true that section 78(2) guarantees every religious community the right to establish and maintain places of education which it wholly maintains without any interference, to give religious instruction for persons of the community in the course of any education at any place of education which it wholly maintains or in the course of education which it otherwise provides.
It is further correct that Section 82 provides that no law shall make any provision, which is discriminatory in itself or in its effect.
The contention by the Applicants is that despite this specific provision (s.82) with regard to non-discrimination the same Constitution in Section 66 entrenches one religious community’s dogma by establishing in the Constitution, a court called the Kadhis' Court, adjudicate that community’s religious beliefs in matters of personal law – marriage, divorce inheritance (succession) or devolution of property. The Applicants contend that the exception provided by Section 82(4) that a law may be made which is discriminatory on such matters as adoption, marriage, divorce, burial and devolution of property 82(4)(d), or the application in the case of members of a particular race or tribe, customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons, is not sufficient justification for the entrenchment in the Constitution of one religious community’s courts and at the expense of the State where funds are obtained from a majority of the citizenry who are believers or adherents of other faiths including the applicants who are all adherents of

the Christian faith.
We agree with the above contention, and hold that where a universal right is granted it is discriminatory and an unnecessary burden for the State to fund one religion through the public service (like the Judiciary), or otherwise.
For these reasons the Applicants contend that the court should declare section 66 of the Constitution is inconsistent with section 82.
Sections 1 and 1 A of the constitution provides as follows: -
"1. Kenya is a sovereign Republic
1A. The Republic of Kenya shall be a multi-party democratic state."
Sovereignty encompasses the independence of the people of Kenya. A multiparty democratic state encompasses the admission of the diversity of social economic and political thought. It encompasses the way of life the people of Kenya have adopted. In fact in every civilization, that diversity of thought has been a mirror of the life as well as a reflection of the movement of the human spirit. These provisions signify that Kenya is secular state.
The Constitution of Kenya recognizes the freedom to profess, practice and propagate religion under Sections 78 (1) of the Constitution which secures freedom of conscience and the right to freedom of thought and religion, freedom to change religion or belief, freedom either alone or with others in public or private, to manifest and propagate that religion or belief in worship, teaching, practice or observance.
The Constitution declares that any person has a fundamental right not only to hold any religious beliefs that commend themselves to his judgment but also to express his belief in such other acts as prescribed by his religion and propagate its tenets amongst others. The exercise of these rights is however subject to certain limitations in the interest of defense, public order, morality or public health and the protection of the freedoms of others. The framers of our Constitution attempted to establish a delicate balance between essential and impartial interference on the part of the state. They kept in mind the possibilities arising out of circumstances in which Government may have to impose restraints on freedoms of individuals in the collective interest, but those limitations or restrictions cannot be done arbitrarily but must be done by law pursuant to a pressing national public interest specific in the constitution.
The term religion is not defined in the Constitution but the Supreme Court of India in Commissioner H.R.E. vs. L.T. SWAMMIAR held:-
“Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in a system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their spiritual well being. A religion may not only lay down a code of ethical rules of its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship, which are regarded as integral parts of religion and these forms and observance might extend even to matters of food and dress.”
Religion in each civilization has directed the faith of human beings in absolute values and way of life to realization. Ogburn a Sociologist defines religion as “. . . an attitude towards super human power. Religion explains the relation of men with God and also elaborates rules of conduct.” Muller another Sociologist defines religion as “a mental faculty or disposition which enables men to apprehend the infinite.” - A matter of belief in supernatural forces. Man believes that he is at the mercy of supernatural forces and shows his subordination to them by means of prayers, hymns and other acts, man believes that his disrespect and negligence towards religion would bring disaster so he engages in endless endeavors to adjust himself with the supernatural. He attempts to do only the acts, which are righteous and sacred to please the supernatural. Behaving in accordance with the norms laid down by religion is righteous but going against them is sinful.
"Religion is universal, permanent, pervasive and perennial institution and it has a vital function in maintaining the social system as a whole. There are many religions in the world and the questions that arise at this juncture are:-Which religion should be followed by a person – can a state force its citizens to follow a particular religion. Can a state have its own religion – can a Government of a State give preferential treatment to the followers of a particular religion?"
The answer to all these questions is negative if the state has adopted a theory of secularism. A secular state is neither supposed to compel its citizens to adopt a particular religion nor can it give preferential treatment to the followers of a particular religion.
Ms Abida Ali-Aroni states in paragraph 17 of her Replying Affidavit that Kenya is a secular state by virtue of Section 1 and IA of the current Constitution and Article 9 of the Zero (Bomas) Draft (which declared that Kenya is a sovereign democratic state, and the Republic of Kenya shall be a multi-party

democratic state) and state and religion shall be separate, that there shall be no state religion, and the state shall treat all religions equally). The term 'secular' denotes the three fold relationships among man, state and religion. The word secular is not defined either in the Independence Constitution or the current constitution and Hon. Abida's reference to the abortive Bomas Constitution on secularism is a moot point. A secular state means one that protects all religions equally and does not uphold any religion as a state religion. Unlike England where the Queen is Titular Head of the Church of England, in Kenya there is no provision to make any religion "the established church." The state is to observe an attitude of neutrality and impartiality towards all religions. In a secular state it is assumed that the state will minimally have to contend with and respond to each of the demands of equality, liberty and neutrality.

Random House Dictionary defines the term secularism as "a system of social political philosophy that rejects all forms of religious faiths." Secularism means liberation of politics from hegemony of religion. Oxford Learners Dictionary defines secularism, as "belief, morality and education etc should not be based on religion."

Professor Donald E. Smith Professor of Political Science in Pennsylvania USA in his Book – India as Secular State says: -

"The secular state is a state that guarantees individual and corporate freedom of religion, deals with individual as a citizen irrespective of religion, is not constitutionally bound to a particular religion nor does it seek to promote or interfere with religion."

The definition given by Smith reflects three aspects of secularism in the form of interrelated relatives as: - religion and individual, individual and state and state and religion.

Separation of state and religion is the third principle of a secular state that preserves integration, of the other two relationships, freedom of religion and citizenship.

It is ironical, but correct, that religion came before the state and assumed a pre-eminence superior to that of the state because it played an important role in regulating actions of human beings and it was the way for human beings towards God. In the present scenario, it must be kept in mind that the first role is being played by the state and as between the individual with God the domain of religion is totally reversed. On the other hand constitutions deal with allocation of power.

Writing on the application of the principle of separation of church and state one commentator on the American constitution says:

"As a principle, separation of church and state bans political interference in the church organization. It does not however appear to prohibit church organizations from influencing politics. It would also seem that interference by institutionalized government with institutionalized religion is legally prohibited but again, not vice versa. Although the framers of the American Constitution may have had it in mind to prohibit Government from religion as well as to protect religion from government, the First Amendment seems only to provide for the latter. Judging from the case reported here, however, the principle is properly interpreted that church and state are to be mutually separate."

By far the greatest proponent of this doctrine has, and is, still the United States of America as seen both from its Constitution and judicial pronouncements and to a lesser degree, India. The United States of America (United States) was founded in 1787 with the signing of the Constitution, a purely secular document. In relation to religion, Article 3(3) of the US Constitution provides that:

"Senators and representatives and the members of the several State legislatures and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution but no religious test shall ever be required as a qualification to any office of public trust under the United States."

Article II(1) which represented the form of oath a President was to take before assuming office simply provided-

"I …. do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect and defend the Constitution of the United States."

It is observed that under both Article 3(3) and Article II(1) there is no invocation of the help of God, "So help me God" as for instance is required of the President, Judicial Officers, the Vice-President or Minister, the Attorney-General, an Assistant Minister, and Secretary to the Cabinet under the Promissory Oaths Act, (Cap 100, Laws of Kenya).

As the original American Constitution primarily defined the powers of Government, it was quickly amended in order to protect the rights of the citizens. The third Article of the Bill of Rights (which became the First Amendment) forbids Congress from making law respecting an establishment of religion.

It states -
"Congress shall make no law respecting and establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people to peaceably to assemble, and to petition the government for redress of grievances."
In a speech to the Virginia Baptists (1808), President Thomas Jefferson said-
"Because religious belief, or non belief is such an important part of every person's life, freedom of religion affects every individual. State Churches use government power to support themselves and force their views on persons of other faiths and undermine all our civil rights. Moreover, State support of the Church tends to make the clergy unresponsive to the people and leads to corruption within religion. Erecting "the wall of separation between Church and State" therefore is absolutely essential in a free society."
We have solved … the great and interesting question whether freedom of religion is compatible with order in government and obedience to the laws. And we have experienced the quiet as well as the comfort which results from leaving every one to profess freely and openly those principles of religion which are the inductions of his own reason and the serious conviction of his own inquiries."
This statement was made at a time when there was much religious intolerance in Europe, and particularly England against Catholics. By his statement President Thomas Jefferson was extending the right of religious freedom to those who do not believe in God (atheists) and non-believers as well with equal respect.
In a letter dated March 8, 1823 to one Edward Everett, President James Madison said:-
"The settled opinion here is, that religion is essentially distinct from civil government, and exempt from its cognizance, that a connection between them is injurious to both."
That separation between religion and government is strongly guarded in the Constitution of the United States, is also illustrated and confirmed by recent decisions of the United States Supreme Court. Even an opening prayer by a school among willing pupils was declared unconstitutional. In ENGEL vs. VITALE 370 U.S 421 (NO. 468, Argued; April 3, 1962, Decided June 25, 1962), the Court of Appeals of New York quashed by order of certiorari the decision of New York's regulations requiring that public schools be opened each day with the following prayer:-
'Almighty God, we acknowledge our dependence upon thee, and we beg your blessings upon us, our parents, our teachers and our country.'
Although the prayer was entirely voluntary, and provision was made for excusing children, upon written request of a parent or guardian from saying of the prayer or from the room in which the prayer is said, the Supreme Court held that this practice offended the First Amendment to the American Constitution which guaranteed freedom of religion. The court at pp 444 said:-
"The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now, as when it was adopted, the price of religious freedom is double. It is that the church and religion shall live both and upon that freedom. There cannot be freedom of religion, safeguarded by the State, and intervention by the church or its agencies in the State's domain or dependency on its largesse: . . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation, it vanishes with the resting.
Public money devoted to payment of religious costs, educational or not, brings the quest for more. It brings too the struggle of sect against sect the larger share or for any. Here one by numbers alone will benefit most, there another . . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominant group will achieve the dominant benefit or all will embrace the state in their dissensions."
The court made an analogy of the established Anglican Church. All baptisms and marriages took place there. The Church was supported by taxation. In these and other ways the Anglican Church was favoured over others. The First Amendment put an end to placing any one church in a preferred position. It ended support of any church or all churches by taxation. It prohibited secular sanction to any religious ceremony, dogma or rite. Thus it prevented civil penalties from being applied against recalcitrant or nonconformists.
Similarly, in ELK GROVE UNITED SCHOOL DISTRICT and DAVIS W. GORDON SUPERINTENDENT (petitioners) vs. MICHAEL A. NENDON ET AL.: 542 U.S. – 2004 (NO. 02 – 1624), the Supreme Court RENHQUIST, C.J. concurring and joined with JUSTICE O'CONNOR AND JUSTICE THOMAS concurred in the judgement that the ELK GROVE UNITED SCHOOL DISTRICT

policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which included the words “under God”, violates the Establishment Clause of the First Amendment.
Similar conclusions were reached by the Privy Council in the Mauritius case of BISHOP OF ROMAN CATHOLIC DIOCESE OF PORT LOUIS & OTHERS vs TENGUR & OTHERS, [2004] 3 LRC 316, [2004] UKPC 9.
The appellants, that is to say, the Bishop of the Roman Catholic Diocese of Port Louis and others owned and administered a group of secondary schools called the Catholic Colleges, which received a regular grant in-aid from public funds. In consideration of the grant in-aid the appellants in agreement with the government reserved 50 places. The Government in turn allocated these 50 places to pupils according to merit assessed in an entrance examination, taking into consideration religious faith of a candidate. The remaining places were allocated by the Catholic Colleges so as to achieve a 50% first year in-take of Catholic pupils overall.
Section 35 of the Education Act 1957 provided that: -
“All Schools in receipt of a regular grant in-aid from public funds shall be open to pupils of any race or religion.”
Section 3 of the Constitution of Mauritius 1968 provided inter alia that -
“No religious denomination and no religious, social, ethnic or cultural association or group shall be prevented from establishing and maintaining schools at its own expense.”
However, Section 16 prohibited discriminatory treatment in the public domain. The first Respondent, Tengur, the father of an 11 year-old Hindu girl awaiting allocation to a secondary school feared that the allocation system might prejudice his daughter’s admission to one of the Catholic Colleges if she did not score highly enough in state examination to win a place within the Government’s 50% allocation. Should that happen, the first respondent feared that his daughter would lose a place in the Catholic Colleges because of the preference for Roman Catholic pupils shown by the colleges when allocating the 50% places reserved to them.
The first respondent commenced proceedings against the Ministry of Education and the State of Mauritius, challenging the constitutionality of those arrangements.
In the Supreme Court, the first Respondent contended that, pursuant to section 16 of the Constitution, which prohibited discriminatory treatment in the public domain, the allocation arrangements made and operated by the government with the appellant, were unconstitutional. Although the Government denied knowledge of the preference for Roman Catholic pupils shown by the appellants when allocation of the 50% places in the Catholic Colleges reserved to them, it accepted that the arrangements, if it knew of them, were unconstitutional. The Supreme Court ruled in favour of the Respondent. The Appellants, who had been made co-defendants in the Supreme Court, although no relief was sought against them, appealed to the Privy Council, before which the government supported the finding of unconstitutionality. The Privy Council dismissing the appeal held –
1. (i) Sections (b) and 14 (1) of the Constitution, read together, made it plain that denomination groups were entitled, without discrimination between one group and another to establish and maintain schools, but it was a limited right, protected only if the schools were established and maintained without expense to the state. The words “at its own expense” could not be discarded as surplusages. So interpreted, SS 3(b) and 14 (1) conformed with the prevailing rules of international law.
(ii) While Catholic Colleges had been established without expense to the State, when the instant proceedings commenced the Colleges were maintained very largely, if not wholly, at the expense of the State. Therefore the appellants were no longer exercising a right protected by SS. 3 and 14 and the Supreme Court was justified in regarding those Sections as essentially irrelevant. The giving of preference in the system of admission to the Catholic Colleges to one group necessarily worked to the disadvantage of any group to which preference was not given; the differentiation of which the Respondents complained appeared to be discriminatory and in breach of Section 16 of the Constitution, since it was based on creed;
(iii) Where apparently discriminatory treatment was shown it was for the alleged discriminator to justify it as having a legitimate aim and as having a reasonable relationship of proportionality.
(2) If the Catholic Colleges were still, entirely self financing, the appellants’ admission policy would not attract the operation of Section 16 (2), since although some potential pupils would be treated in a discriminatory manner – such treatment would not be “by any person acting in the performance of any public office or any public authority” the appellants would be exercising their right under Sections 3 (b) and 24 (1) to maintain denominational schools at their own expense and they would be free in running

private schools, independent of the state to give preference to Roman Catholic pupils. As Section 16 (2) makes it clear, it is discrimination of the state which brings, the prohibition on discriminatory treatment into play…….”

In BHEWA & ANOTHER vs GOVERNMENT OF MAURITIUS & ANOTHER [1991] 1 LRC 298, a decision of the Supreme Court of Mauritius, the plaintiffs were the followers of Islam who asked to be married solely in accordance with their religion. It was their case that the Quran is the Holy Book of Muslims and that, together with the practices and traditions (Hadiths) of the late Prophet Mohammed, it forms the body of commandments or rules (Sharia) which govern all aspects of the life of a Muslim, including marriage, divorce and devolution of property. As Muslims, they are required by their religion to abide by those commandments and since the legislative measures for the eventual introduction of Muslim personal law had been rejected by the Civil Status (Amendment) Act 1987, they no longer had the option to be governed by, and so to observe and practise, what their religion ordains. They therefore claimed that the said repealing Act should be declared unconstitutional.

In its defence, the State joined issue with the Plaintiffs on the constitutionality of the repealing Act and contended inter alia that there was nothing preventing the Plaintiffs from celebrating their marriage in accordance with their religious rites, that there would be grave risks of an unconstitutional and anarchical situation if every injunction of every religion were to be made law in order to guarantee the freedom of religion and the rules of the Sharia, in so far as they are understood to seal the position of women in society do not take away the competence of the state to legislate in that regard, and that the rules of religion do not override the lawful policies of the states as these evolve in the State’s intercourse with the community of nations.

The Supreme Court, discussing the Plaintiffs’ action held inter alia that -

2. “The provision of the Constitution excluding the fundamental right of protection against discrimination from application of personal laws was a standard provision in a number of Constitutions in the Commonwealth and was not peculiar to Mauritius. It was not therefore correct to think that the provision couched in general terms and not applicable only to Muslims, was especially designed for the introduction of Muslim personal law into Mauritius. What the provision meant was that the guarantee of protection against discrimination would not avail to non-Muslims if personal laws were to be enacted for Muslims and not for other ethnic, Religious or other groups, or if different personal laws were enacted for such groups……”

(2) per curiam –

(1) The enactment of personal laws was a matter for the state and if freedom of religion for Muslims, or for others could be fully enjoyed only on condition that all that was ordained in religion had to be given effect in the law, the question of the violation of a number of fundamental rights would undoubtedly arise. The reasoning of the Plaintiff was based upon insufficient understanding of the duality of religion and state in a secular state. The secular state was not anti-religious but recognized freedom of religion in the sphere that belonged to it. As between the state and religion each had its own sphere, the power of law-making for the public good and the latter of religious teaching observance and practice. To the extent that it was sought to give to religious principles and commandments the force and character of law, religion stepped out of its own sphere and encroached on that of law-making in the sense that it was made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion was the state religion but also the holy book of that religion was the supreme law.

E. COMPARATIVE CONSTITUTIONAL JURISDICTIONS

It was Counsel for the Applicants' submission that after entrenching a provision in the Constitution guaranteeing freedom of conscience and religion, there was no necessity for singling out one religion for preferential treatment and entrenching its practice however limited in a manner, in the Constitution. Counsel cited by way of example, countries with Muslim populations which are much larger than Kenya which have not established, and do not have Kadhis' Courts.

The United Republic of Tanzania with 40% Islamic population does not have Kadhis' Courts. The Constitution of the United Republic of Tanzania 1977, Chapter one, Part III, Basic Rights and Duties, Articles 12, and 13 (a), (2) 3 (3) provide –

12. (1) All human beings are born free, and are equal;

(2) Every person is entitled to recognition and respect and dignity;

13. (1) All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law;

(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in itself;
(3) The Civic rights obligations and interests of every person and of society shall be protected and determined by competent courts of law and other state agencies established in that behalf under the law;
(4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office;
(5) For the purpose of this Article the expression "discriminate" means satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and are subject to restrictions or conditions whereas persons of other categories are treated differently or accorded opportunities or advantage outside the specific conditions or the prescribed necessary qualifications;
Ghana
Article 21 (c) of the Constitution of Ghana 1992 provides –
21 (1) "All persons shall have the right to –
(a) - (b)
(c) freedom to practise any religion and to manifest such religion
26(1) Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of the Constitution;
(2) All customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited;
The Ghanian Courts recognize Muslim marriage, divorce and inheritance and issues are decided in accordance with Muslim personal law.
Indonesiaa country with the world's largest Islamic population does not provide for Kadhis' courts in its Constitution.
Chapter IX – Article 24 –
(1) A Supreme Court shall exercise the Judiciary power and law provides such other courts of law as.
(2) The composition and powers of these legal bodies shall be regulated by law.
The Republic of South Africa with arguably one of the most liberal and modern Constitutions does not provide for the Kadhis' Courts Article 9 (3) contained in Chapter 2, Bill of Rights provides –
9 (1)-(2)
(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual, orientation, age, disability, religion, conscience, belief, culture, language and birth.
It does not provide for Kadhis' Courts despite having a sizable population of Muslim faithful.
The United States where are to be found some of the largest and most modern mosques in the world today, provides in Article (1) of its Constitution –
Article one
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances;"
Drawing from that comparative analysis, Counsel submitted that the Kadhis' Courts do not have to be entrenched in the Constitution. Kadhis' Courts are purely religious courts, administer religious laws to persons who adhere to or profess the Islamic faith. By entrenching the Kadhis' Courts in the Constitution and using public funds to fund one religious group undermines the principles of separation of state and religion and this eventually undermines democracy.
Counsel submitted that section 179 (3) of the Independence Constitution provided for the establishment of the Kadhis' Courts within the former Protectorate, and by the proviso thereto, it emphasized that no area of the former Protectorate would be without the services of a Kadhi. Section 179 (3) and the proviso thereto is retained in exactly the same language in Section 66 (3) of the Current Constitution. Counsel submitted two- fold –
Firstly, that the inclusion of the Kadhis' Courts in the Constitution was itself unconstitutional.
Secondly that the inclusion of the Kadhis' Courts into the Constitution is detrimental to the Applicants because under Section 82 (formerly Section 26) of the Constitution, provides that no law shall make any provision that is discriminatory either of itself or in its effect;
Discriminatory treatment means affording different treatment to different persons attributable wholly or

mainly among other reasons, to one's creed whereby such persons are subjected to restrictions or disabilities which other persons are not subjected to or are accorded privileges or advantages which are not accorded to persons of another such description;"

Counsel submitted that the Muslim religion is accorded privileges and advantages by being entrenched in the Constitution together with the office of Chief Kadhi, and that no standards should be made on the basis of creed to appointment in the public service.

Counsel therefore submitted that Section 66 is inconsistent with Section 82 of the Constitution, as it provides, for appointment of officers on the basis of their creed and giving them judicial powers over a section of the Kenyan population purely on the basis of religion, and extending no similar privilege to any other religion. In other words, the state is advancing the cause of one religion over others and giving it constitutional sanctity. This, counsel submitted, offends the doctrine of separation of church and state, more so because Islamic religion is a way of or a code of life for its adherents.

Counsel submitted that by allowing the Kadhis' Courts in the Constitution, the state is providing a basis for undermining our secular state, and this is a serious threat to democracy and enjoyment of other fundamental rights and freedoms particularly freedom of conscience.

F. OF AN ISLAMIC AGENDA - THREAT TO SECULAR STATE.

Counsel also submitted that there had been much violence and aggravated intolerance manifested against opinions opposed to anything challenging or seeming to challenge or to question the entrenchment of Kadhis' Courts in the Kenya Constitution – shown by the burning of churches, clobbering of peaceful demonstrators against such wanton, violence and destruction. Counsel further submitted that government itself had given way and upheld, the position of the Muslims in the Constitution.

Finally, Counsel for the Applicants referred us to an array of literature presented at the Second Respondent's Bomas of Kenya Conference, ranging from such documents as KATIBA (Constitution) News on the proceedings at the Bomas Conference, to the Proceedings of the Conference – Islam in Africa at Abuja Nigeria from 24-28th November 1989.

In KATIBA Watch, Counsel drew our attention to a critique the KADHIS COURT where the author says –

"As captured in the December 2002 issue of KATIBA NEWS, The Church notes that they are not fighting Muslims. However the church believes that the historical reasons for which the Kadhis' Courts were set up have been overtaken by events, that the words Muslim, Islam and Kadhis' appear in the Draft Constitution more than 60 times, while the word Christian appear zero times." They reason that all tax-payers, including non Muslims will have to pay for the Kadhis' Courts. While the Christians agree that they do not want to be covered in the Constitution, they prefer life under the provisions of Article 10 (3) of the Draft Constitution, which provides that, all religions shall be treated equally and therefore no one religion should be entrenched in the Constitution even if that religion is Christianity……."

The same commentator continued -

"All these arguments should be weighed against the historical dispensation, provisions of the current Constitution and the wider cultural and religious diversity of all Kenyans. The debate of tax and fiscal dispensation will bring an interesting argument and will require careful scrutiny. The Government collects Kshs.210 billion annually worth of tax revenue. A large percentage of funds are used to meet recurrent expenditure including paying salaries, to all public servants and teachers. Kadhis are public servants. There are currently 16 Kadhis distributed throughout the country. There are Kadhis at Milimani (Nairobi), Mombasa, Garissa, Eldoret, Nakuru, Kisumu, Kwale, Nyeri, Isiolo, Hola, Bungoma, Lamu, Malindi, Mandera and Marsabit."

The Applicants are also concerned with the conclusion reached at the Conference - Islam in Africa and summarized at Appendix 6 "the Communique" issued at the end of "The Conference." Paragraph 9 of the Communique says–

"The Conference notes the yearning of Muslims everywhere on the continent who have been deprived of their rights to be governed by Sharia and urges them to intensify the efforts in the struggle to reinstate the application of the Sharia"

The applicants contend that by this Resolution, Islam had declared a jihad to spread the Muslim faith, and destabilize states which did not readily accommodate or support the Islam agenda.

Among the papers presented at the Conference-Islam in Africa, was - Islam in Africa – Conference which gave the population of Muslims in Kenya as 6% and 66% (Christians- Anglicans – 35%, and Roman Catholics 28%, indigenous beliefs 26%, and others 2%. (Hindus, Bohras, Ismail).

Counsel for the Applicants also drew to our attention another document which emanated from Conference, Islam in Africa. It carries the Presidential Seal of the Federal Republic of Nigeria besides which are three signatures in Arabic characters. The Document is headed – OFFICIAL DOCUMENT with sub-heading TOP SECRET – The disclosure of an ISLAMIC CONSPIRACY to TAKE OVER the Entire Continent of Africa. The anonymous author of the document says –
"The State Secret" Was sent to the United States from Nigeria, West Africa by an anonymous source. The intent and purpose behind this confidential expose is to WARN THE WORLD of the clandestine plans now in operation for Islamic world domination."
The contents of the Top Secret Memorandum are consistent with both the Communiqué issued at the end of the Conference – Islam in Africa, and the aims and objectives of Islam in Africa Organization (IAO) which was established at the end of Islam in Africa Conference on 28th November 1989. According to the Communiqué, the declared aims of IAO are –
(i) to support the establishment and application of the Sharia to all Muslims;
(ii) to encourage vigorous participation of all Muslim youth in all spheres of activities and to ensure that women are accorded their due rights and roles in society in accordance with the Sharia;
(iii) To ensure the appointment of only Muslims into strategic national and international posts of member nations;
(iv) to eradicate in all forms and ramification all non-Muslim religions (such religions shall include Christianity, Ahmadiyya and other tribal modes of worship unacceptable to Muslims);
(v) to ensure that Muslims only are elected to political posts of member states;
(vi) to ensure the decoration (the 24th African and 46th World member of 10) a Federal Islamic Sultanate at a convenient date and time from 28th March 1990, with the Sultanate of Sokoto enthroned as the Sultanate Supreme Sovereign of Nigeria;
(vii) to ensure that the ultimate replacement of all Western Forms of legal and judicial systems with Sharia in all member nations before the next Islam in Africa Conference.
To achieve the above and other objectives, Islam in Africa Organization, the Conference established a Steering Committee of nine countries comprising the host country, Nigeria and Mauritania, Tanzania, Niger, Senegal, Sudan, the Gambia, Libya and Tunisia, with a Headquarters in Abuja, Nigeria.
Counsel for the Applicants also referred the Court to literature and sayings by eminent Muslim scholars including, the late Ayatollah Ruhollah Khomeini (1902 – 1989) leader of the Islamic Revolution and founder of the Islamic Republic of Iran on "Differences Between Bismillah of each Surah" in Mutahhari Tabatabai & Khumayni Light Within Me pg 139 – 44:-
Stresses:-
"that man's worst enemy is the lower self within him, from developing in godliness. It is imperative to smash this idol and get rid of selfishness which is the root cause of human depravity. The major jihad is the fight against one's lower self – it is useless to engage in other jihads before succeeding in this one. Khomeini highlights the early Muslims who fought against their lower selves before going out in jihad against unbelievers and he calls contemporary believers to emulate them in fighting to the utmost against worldly desires within trusting Allah for success."
"The Koran commands Muslims to wage Jihad for the forcible conversion of the whole world."
"Islam makes it incumbent on all adult males, provided they are not disabled and incapacitated, to prepare themselves for the conquest of other [countries] so that the writ of Islam is obeyed in every country in the world"
And again –
"We shall export our revolution to the whole world until the cry "Allahu Akbar" resounds over the whole world."
The 14th Century Islam Scholar Ibn Qyyim al–Jawziyya explained the aims of Jihad –
"Jihad is obligatory until the word of Allah reigns supreme and until all are of the religion of Allah, until the religion of Allah triumphs over all religions and until they pay the poll tax while in the state of inferiority."
Archbishop Giuseppe Bernadin of the Vatican reported that during a Synod that the Vatican held in October 1999 to discuss rapport between Christians and Muslims, an eminent Islam Scholar addressed the stunned audience declaring with placid effrontery –
"By means of your democracy we shall invade you by means of our religion we shall dominate you."
And Khurram Murad of the Islamic Foundation, explains the nature of an Islamic Movement –
"An Islamic Movement is an organized struggle to change the existing society into an Islamic society

based on the Quran and the Sunna, and make Islam, which is a code for entire life supreme and dominant, especially in the socio-political spheres."

Professor Ali A Mazrui the renowned Kenya scholar sees the Islamic Agenda in terms of Islamic Revivalism and Expansion, and specific competitiveness between Judao-Christianity and Islam. In his paper Africa In Islam and Comprehensive Religion between Revivalism and Expansion presented at the Islam in Africa Conference at Abuja Nigeria, Prof. Ali A Mazrui, argues:-

"In Africa since independence two issues have been central to religious speculation. Islamic expansion and Islamic revivalism. Expansion is about the spread of religion and its scale of new conversions. Revivalism is about re-birth of faith among those who are already converted. Expansion is about a matter of geography and population in search of new worlds to conquer. Revivalism is a matter of history and nostalgia in search of ancient worlds to re-enact. The spread of Islam in post colonial Africa is basically a peaceful process of persuasion and consent. The revival of Islam is often an angry process of re-discovered fundamentalism".

In the same paper under the sub title Indigenous Ecumenism and Semitic competitiveness the same scholar says:

"Of the three principal religious legacies of Africa (indigenous, and Christian and Muslim) perhaps the most tolerant of them is indigenous tradition. It is even arguable that Africa did not have religious wars before Christianity and Islam arrived. Precisely because these two latter faiths were universalist in aspiration (seeking to convert the whole of humanity), they were inherently competitive. In Africa Christianity and Islam have often been in competition for the soul of the continent. Rivalry has sometimes resulted in conflict."

In Kenya we have witnessed that competitiveness and total intolerance to other faiths particularly Christianity resulting in the torching and burning to the ground here in Nairobi South "B" of Our Lady Queen of Peace Catholic Church and at the Coast of burning and razing down to the ground of five Pentecostal Churches in Tana River District. This is notwithstanding that the Quran, the Muslim Holy Book, and indeed Islam acknowledges the founder of Christianity Jesus (Issa), as a muslim figure in Islam. Muslims accept many of the miracles he performed on earth to the sick and disabled. Muslims accept the (Ascension), the bodily ascent of Jesus into heaven on the completion of his earthly career or mission.

Although theoretically at least, Islam encompasses a version of Christianity, in reality, no Muslim is likely to describe himself as a Christian and vice versa – No Christian will call himself a Muslim.

Prof Mazrui also postulates in his paper:-

"the greatest threat to Islam is not the passion on the cross but the ecstasy of Western materialism; it is not the message of Jesus but the gospels of modernity it is not the Church with a European face but capitalism in Western robes……."

If this be so, Prof. Mazrui himself seems to find a remedy in the force of indigenous African culture (which is itself, under attack from the same "dark" forces of ecstasy of Western materialism, the same gospel of modernity, the same capitalism). The indigenous culture however has resilience and strength of its own.

In the context of constitutional development or revival every aspect of the existing constitutional order must lend itself for review. That must of necessity include the judicature system, its current structure which would include the continued existence or otherwise of the Kadhis' courts (notwithstanding that they are entrenched in the current constitution). The argument that Islam is a way of life for its adherent may well be so. The Christians, Buddhists, Hindus, Bohras and Indigenous Traditionalists' adherents may claim the same. After all both Christianity and Islam are monotheistic faiths and so are indigenous traditional religions. There is therefore little logic in relegating the indigenous traditional religion to custom and not their way of life which should have been equally entrenched in the Constitution and special courts set up to adjudicate their claims on personal law. Instead what happened? The African courts were abolished by the Magistrates Courts Act 1967 and in came the Kadhis' Court Acts giving effect to Section 66 of the Constitution.

For the Natives, the indigenous traditionalists and spiritualists as they are disparagingly referred to, came tugged in section 3 of the Judicature Act (Cap 8 Laws of Kenya), a requirement that the High Court, Court of Appeal and Subordinate Courts would be guided by African Customary Law where all the parties were subject to such customary law. Matters of devolution or inheritance are tugged away in sections 32 & 33 of the Law of Succession Act (Cap. 160, Laws of Kenya), and customary law is restricted to apply only to distribution of agricultural land and livestock in cases of intestacy.

Now both Islam and African customary law rank women lower in matters of devolution. Widows and daughters receive much less than men. Widows receive a life interest, daughters are virtually hounded out of their homes and woe unto them if they are unmarried. Such treatment is inherently unconstitutional being contrary to Section 70 which guarantees life, liberty, security of the person protection of the law and freedom of conscience etc. without reference to sex (which should be "gender" as the two expressions have different meanings – gender relates to roles, responsibilities, values and attitudes ascribed to women, men, boys and girls by a given society at a given place and a given time – it is socially constructed by each society which defines the roles and responsibilities that women, men, girls and boys play whereas sex refers to the biological physical characteristics that differentiates and defines the females and males. Sex is natural, is not different from one community to another, is not learnt and does not change unlike gender.

Many of the Africans who follow their customary law are also Christians, and we dare say, adherents of Islam. Professor Ali Mazrui in his paper (supra) gives the anecdotes from Milton Obote, first President of Uganda, and his Military successor Idi Amin Dada. Obote a Protestant (Christian) is reported as having boasted that;

"As President of Uganda in his first administration, Milton Obote (a Protestant) used to boast that his extended family in Lango consisted of Muslims, Catholics and Protestants "at peace with each other." Obote's successor Idi Amin Dada (a Muslim) also had a similarly multi-religious extended family and even declared that he planned to have at least one of his sons trained for the Christian priesthood….."

Prof. Mazrui gives similar examples in respect of Tanzania where Roman Catholic Julius K. Nyerere who ruled between 1961 to 1985 without challenge to his religious credentials followed by Ali Hassan Mwinyi, a Muslim with similar results, Senegal's Abdou Diouf has a Roman Catholic wife. Similar examples abound in particular among the Yoruba of Nigeria.

If the argument for the adherents of Islam is that the articles of faith are also their way of life, why would that not be true to say that Christianity and indigenous traditional worship, the other arms of what the scholar calls the "African Triple Heritage" or "African Trinity Cultures" (Indigenous Africanity, Islam and Western) impact both secular and religious) is also a way of life. Is it one way of foistering the repugnancy clause upon non – Christians and non Muslims? Why would it be in order to revere the Judaic-Christian, and Islamic prophets and saints of yore and deny the same or similar reverence to our ancestors, women and men who led exceptional lives and bequeathed to us our respective common law? Unlawful killing, stealing, or child molestation is outlawed by the three cultures.

By these examples, and the initial proposals in the Draft of the Kenya Constitutional Review Commission to expand the jurisdiction of the Kadhis' Courts and establish a parallel Judicial system under the Chief Kadhi including an appellate and Supreme Court of the Kadhi, Counsel submitted, were nothing else but steps to propagate an Islamic agenda, win proselytes and eventually turn Kenya into an Islamic State under the Sharia and the Quran.

By these examples, we also understood Counsel for Applicants to be saying that Islam as a faith would not only be privileged over and above Christianity, the other dominant religion, and other indigenous faiths, all contrary to Section 82 of the Constitution (which prohibits any form of discrimination or granting of privileges on the grounds of creed), but would also constitute a launching pad for an Islamic agenda for Kenya in accordance with the objectives of the Communiqué of the Conference – Islam in Africa, and Islam in Africa Organization.

G. ANALYSIS OF KENYA SITUATION

We have described the situation in the United States and to a lesser extent, the United Kingdom on the question of justiciability or otherwise of current controversies which appear not to readily lend themselves to resolution by the courts. We have considered the doctrines of ripeness, mootness, collusive suits, and the doctrine of the political question.

We observe that the United States (which is a Federation) has State and Federal Courts and both exercise a definite jurisdiction. We also observe that the United Kingdom a monarchy without a written constitution, is the origin of the common law system, which to a certain extent is shared also by the United States and Kenya. Kenya unlike the United States, is unitary state with an hierarchical system of courts, subordinate or lower courts, the High Court and the Court of Appeal. An action or suit commenced in the subordinate or lower court may rise all the way to the High Court and the Court of Appeal whether through the process of an appeal as of right or leave of the High Court or review. To us therefore the doctrines of justiciability, ripeness, mootness, collusive suits and the political question cannot be determined on their own. They are aids to, or matters to be considered in the interpretation and

determination of a particular constitutional issue, if any, before the court. If any of the above grounds are present in an application, whether by way of reference from a subordinate or a lower court, or directly by Petition to the High Court, the court may uphold or strike out the application on those or other grounds.
Even without those doctrines, the constitutional position in Kenya is very clear. The High Court has a sextuple jurisdiction. Firstly it has original and unlimited jurisdiction in civil and criminal matters. Secondly it has supervisory jurisdiction over the subordinate courts under section 65(2) of the Constitution in all matters in which subordinate courts have jurisdiction. Thirdly it has jurisdiction to interpret any provision of the Constitution under section 67 (references, appeals and interpretation of the Constitution).
Fourthly section 84 (2) of the Constitution confers upon the High Court original jurisdiction to determine any question of alleged contravention of fundamental rights and freedoms of the individual and the discretion to grant relief to an aggrieved person by making such orders, issuing such writs and giving such directions as it may consider appropriate for the purpose of enforcement of any of the provisions of sections 70 to 83 (inclusive) that is, Chapter V (FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) of the Constitution.
Fifthly - The Constitution grants the court declaratory power on the supremacy of the Constitution in relation to Section 3 thereof and other law;
Sixth the Constitution grants to the High Court judicial review jurisdiction under Section 123(8) to review any action or decision of any other branch of Government or constitutional office holder granted and exercising any function under the Constitution. Section 123(8) says:-
1 – 7 –
(8) “No provision of the Constitution that a person or authority shall not be subject to the discretion or control of any other person or authority in the exercise of any function under this Constitution shall be construed as precluding a court from exercising jurisdiction whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”
So the High Court has thus a wide and unfettered discretion in the interpretation of the Constitution and review of the actions of any authority or person exercising any function under the Constitution or other law. For instance, it would be quite within the jurisdiction of the High Court to affirm and declare that in the process of calling and conducting a new constitutional convention or conference, the application of the two thirds majorities or other simple majorities would be, or would not be carried, in accordance with the applicable law.
Another example would be if Parliament which is required under section 47 of the Constitution to carry certain majorities (two thirds) of all members present and voting in order to effect constitutional amendments or simple majority to enact other laws were to fail to do so. Thus it would be within the jurisdiction of the court to declare any constitutional amendment or other law unconstitutional if it was not carried or passed in accordance with the requisite majorities. It would also be within the court’s power to declare ultra vires any terms of reference of a commission or tribunal if it or they were not within the terms of the commission or the rules establishing it.
The power of Judicial Review is however subject to the caveat that the Constitutional appropriateness of the substance or the merits of the proposed amendments is as Tribe says in American Constitutional Law (supra) at p. 102, “a matter undoubtedly and entirely committed judicially unreviewable and for resolution by the political branches of Government”.
H. ISSUE FOR DETERMINATION
Considering the sextuple jurisdiction, and therefore wide discretion of the court to hear and determine issues relating to interpretation of the Constitution and grant relief to persons who may be aggrieved by breaches or contraventions thereof, the ultimate issue is whether the applicants herein have established adequate grounds for the grant of any of the orders and declarations they have sought in the Further Amended Originating Summons. This essentially calls for what interpretation should be given to the relevant provisions of the constitution in this matter.
Before we determine this question, it is important to remind ourselves by way of a quick check list of where we have come from in our constitutional history or as we say in Africa, "when the raining started beating us". Thomas Jefferson one of the founding father’s of American Independence Constitution writing to Justice William John in 1823 said:
“On every question of the construction of the Constitution let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifest in the debates and instead of trying what meaning may be squeezed out of the text or intended argument, conform to the probable one in which it

was passed".
Kenya's own struggle for Independence from colonial bondage ended up with the Kenya Independence Order in Council 1963 (Statutory Instrument No. 1968 of 1963 laid before Parliament on 5th December 1963 and came into operation immediately before 12th December 1963 hereinafter called "the Independence Constitution". Among the provisions entrenched by the Independence Constitution were the whole of Chapter II - Protection of Fundamental Rights and Freedoms of the Individual which is now Chapter V of the current Constitution, Section 78 of which is in exact words as Section 22 of the Independence Constitution which provided, as does section 78 aforesaid, as follows:
22(1) "Except with his own consent no person shall be hindered in the enjoyment of his freedom of conscience and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom either, alone or in community with others, and both in public and in private to manifest and propagate his religion or belief, in worship, teaching, practice and observance."
(2) Every religious community shall be entitled at its own expense to establish and maintain places of education and to manage a place of education which it wholly maintains and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at a place of education which it wholly maintains or in the course of any education which it otherwise provides,
(3) Except with his own consent (or if he is a minor the consent of his guardian), no person attending any place of education shall be required to receive religious instruction or to take part in or at any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own;
(4) No person shall be compelled to take an oath contrary to his religion or belief or to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief,
(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required:-
(a) in the interest of defence, public safety, public order, public morality or public health; or
(b) for the purposes of protecting the rights and freedoms of other persons including the right to observe and practice any religion without the unsolicited intervention of members of another religion and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
(6) Reference in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly."
The other entrenched provision was section 26 of the Independence Constitution now section 82 of the Constitution. It provided-
26(1) Subject to the provisions of subsection (4) (5) and (8) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
(2) Subject to subsection (6), (8) and (9), of this section no person may be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of a public office or any public authority.
(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, or residence or other local connection, political opinion, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not subject or are accorded privileges or advantages which are not accorded to persons of another description;
(4) Subsection (1) of this Section shall not apply to any law so far as that law makes provision –
(a) with respect to persons who are not citizens of Kenya;
(b) with respect to adoption, marriage, divorce, burial devolution of property on death or other matters of personal law;
(c) – (d) not in issue.
(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question makes provision whereby persons of a description as is mentioned in subsection (3) of this section may be subjected to a restriction on the rights

guaranteed by sections 20, 23, 24 and 25 of the Constitution being such a restriction as is authorized by section 20(2), Section 22 (5) Section 23(2), Section 24(2) or paragraph (a) or paragraph (b) of Section 25(3) as the case may be."

Sections 20, 22, 23, 24 and 25 of the Independence Constitutionare similar to Sections 76 (protection against arbitrary search or entry), 78 (protection of freedom of conscience), 79 (protection of freedom of expression), S. 80 (protection of freedom of assembly and association) section 81 (protection of freedom of movement), and sections 76(2), (a) & (b), 78(5), 79(2), 80(2) the rights may be diminished in the interest of defence, public safety public order, public morality, public health, town and country planning and utilization of mineral resources, and the protection of the rights of others and section 81(3) (b), (c) the right of movement of any person or class of persons may be restricted on the same grounds.

Those were and are the generally entrenched provisions of the Bill of Rights referred to as Fundamental Rights and Freedoms of the Individual under Chapter V of the current Constitution. The other relevant and entrenched provisions in the Independence Constitution were Sections 178 and 179 which are now Sections 65 and 66 of the current Constitution relating to Kadhis' Courts.

Section 178 provided-

178 (1) Parliament may establish other courts subordinate to the Supreme Court and Courts-martial, and any such court shall, subject to the provision of this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

(2) …….

(3) …….

179 (1) There shall be a Chief Kadhi and such number not being less than three of other Kadhis as may be prescribed by Parliament;

(2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless:-

(a) he professes the Muslim religion; and

(b) he possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him in the opinion of the Judicial Service Commission to hold a court of a Kadhi;

(3) Without prejudice to the generality of Section 178(1) of this Constitution and subject to the provisions of subsection (4) of this section, there shall be such subordinate courts held by Kadhis in this Constitution referred as the “courts of the Kadhi” as Parliament may establish and each court of a Kadhi shall subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by any law;

(4) the Chief Kadhi and the other Kadhis or the Chief Kadhi and such of the other Kadhis not being less than three in number as may be prescribed by or under an Act of Parliament shall each be empowered to hold a court of a Kadhi having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed.

Provided that no part of the former Protectorate shall be outside the jurisdiction of some court of a Kadhis' Court.

(5) the jurisdiction of a court of a Kadhi shall extend to the determination of questions of muslim law relating to personal status, marriage divorce or inheritance in proceedings in which all the parties profess the Muslim religion.”

The above provisions are reproduced as sections 65 and 66 of the current Constitution.

Acting under the provisions of section 178 (1) (now section 66(1) of the Constitution), Parliament enacted the Kadhis' Courts Act (No. 14 of 1967) now Chapter 11 of the Laws of Kenya (Revised in 1998).

Section 3 of the said Act empowers the President not the Judicial Service Commission to prescribe the number of Kadhis by order in the Gazette.

Section 4(1) of the Kadhis' Courts Act provides:-

4(1) In pursuance of Section 66(3) of the Constitution there are established eight Kadhis' courts.

(2) the Kadhis' Courts shall have jurisdiction as follows:-

(a) three courts shall have jurisdiction within Kwale District, Mombasa District, Kilifi District and Lamu District;

(b) one court shall have jurisdiction within-

(i) Nyanza Province

(ii) Western Province and

(iii) the following Districts Rift Valley Province

· West Pokot District

· Tranzoia District

· Elgeyo – Marakwet District
· Baringo District
· Laikipia District
· Nandi District
· Uasin Gishu District
· Kericho District
· Nakuru District

(a) one court shall have jurisdiction in Marsabit District
(b) One court shall have jurisdiction within Wajir District and Mandera District
(c) One Court shall have jurisdiction within Nairobi Area and the Central and Eastern Provinces except Marsabit District and Isiolo District.
(3) each of the Kadhis' Courts shall be a court subordinate to the High Court and shall be duly constituted when held by the Chief Kadhi or a Kadhi."
(4) A Kadhis' Court may be held at any place within the area of jurisdiction of the court;

The other relevant provision of the Independence Constitution is section 71 (alteration of the Constitution). It is in exact words as section 47 of the current Constitution and it provided-

71. "Subject to the provisions of this section and of section 156 of this Constitution Parliament may alter any of the provisions of the Constitution or (in so far as it forms part of the law of Kenya) any of the provisions of the Kenya Independence Act 1963 (the Independence Constitution)
(2) – (5) not in issue.
(6) Notwithstanding anything contained in subsection (2) or subsection 3 of this section a Bill for an Act of Parliament under this section, so far as it makes an alteration to any specially entrenched provision of this Constitution or of the Kenya Independence Act 1963, shall not be passed by the House of Representatives unless it has been supported on the second and third readings by the votes of three quarters of all the members of that House and shall not be passed by the Senate unless it has been supported on the second and third reading by votes of nine-tenths of all the senators."

With the abolition of the Senate, a Bill for alteration of the Constitution under section 47 thereof now requires a vote of not less than sixty-five percent of all the members of the Assembly (excluding the ex-officio members) on its second and third reading.

Anybody who has been concerned in drafting (legislation or even large commercial contracts and treaties) knows that a whole history of discussion deliberation or policy may be behind a few words inserted or omitted in a formal instrument.

In the cascade of alterations made to the Constitution between 1964 to 1967 when the Kadhis' Act 1966 (No. 14 of 1967) was passed extending by section 4(2) of the Act, the jurisdiction of the Kadhis' Courts beyond the former Protectorate, the provisions of Section 179(4) of the Independence Constitution (now S. 66(4)) of the current Constitution) remained unaltered.

In their book Public Law and Administration in Kenya Professors Ghai and McAuslan both keen students and scholars of Kenya's Constitutional development at page 215 of their book say-

"Thus by the end of 1966 the Constitution had changed fundamentally. Apart from the removal of Majimbo several other amendments had been made, and the effect of these was to strengthen the Executive. The Constitution became more streamlined and compact, though perhaps not necessarily completely coherent in its basic assumption. All changes were carried out according to the letter of the law at no time was there a break in legal continuity".

And on Kadhis' Courts Act the said authors at p.368 say:-

"the bare outline of the Act conceals the controversy which it engendered, and some of the assumptions behind it. Despite strenuous efforts by the Speaker to prevent Members of Parliament from discussing the desirability or otherwise of Kadhis' courts, it was clear that there was some opposition to the whole principle of separate courts and laws for Muslims. There was objection to institutionalizing diversity instead of encouraging unity, and it was argued that it was illogical to establish special Muslim courts to deal with just those matters which were the subject of two Commissions expressly charged with drafting unified non denominational codes. Muslim MPs and sympathizers on the other hand defended the Bill on the ground that it would give the lie to Somali propaganda that Muslims were not properly treated in Kenya, and that Muslim law was a special religious law which could not be treated as an ordinary secular law.

"They took objection to the provision of appeal to the High Court since they considered that it was illogical to allow non-Muslims who might not apply Muslim law to give the final decision on Muslim

legal matters".
According to National Debates Vol. XII, Part I c/s 599 – 603 6th June 1967 (report and third reading) the Speaker objected to the debate on the principle of Kadhis' Courts on the grounds:-
"Members cannot discuss on this Bill whether or not it is desirable to have separate Kadhis' Courts because it is in the Constitution that we shall have them, and until someone moves a motion for an amendment to the Constitution it is not open to us to debate that provision of the Constitution….one of the oaths which is taken by the Hon. Members is to uphold the Constitution so you cannot speak freely contrary to oath".
As already observed despite this vigorous debate on the enactment of the Kadhis' Courts Act, (and despite the absence of any such provision requiring members not to discuss matters in the Constitution) the Hon. Members and the Speaker failed to have a look at the provision of Section 179(4) (now section 66(4) of the Constitution), which expressly specified the areas of the jurisdiction of the Kadhis' Courts, and the proviso to the said section which emphasized that no part of the former Protectorate was to be without the jurisdiction of the Kadhi. In the heat and pressure of fashioning the Independence Constitution and more so four years later when enacting the Kadhis' Courts Act, the framers of the Independence Constitution and the ten amendments culminating in the consolidating Constitution of Kenya Amendment Act 1969 (No. 5 of 1969) must have had within their radar the fact that the progenitors of the Arab citizens along the former Protectorate had, as traders mostly, penetrated the royal court, and made converts of the loyal subjects of Nabongo Mumia and had set up not only shop, but also a place of worship, the mosque, in far off places as Nyanza as the whole of Western Kenya was then called, the major trading towns of Rift Valley and certainly North - Eastern and Eastern Kenya where the majority population confess the Islamic faith. It begs and beats reason that the framers of the Independence Constitution and amendments thereto had their binoculars safely trained on the subjects of his Highness the Sultan of Zanzibar within the ten mile strip of the former Protectorate, and totally ignored and failed to shift their gaze to other areas.
Since it is to the former Protectorate where the sights of the drafters of both the Independence Constitution and the amendments thereto were trained, it cannot be said that it was a mere error of omission when they retained language in the Constitution that the Kadhi's courts were clearly restricted to operate within the former Protectorate which by definition extended to the ten miles beyond the Indian Ocean shoreline. For the Kadhis' Courts Act, though well intentioned, to purport to extend the jurisdiction of Kadhis' Courts beyond the former Protectorate is clearly in breach of Section 179 (4) of the Independence Constitution, that is, Section 66(4) of the current Constitution.
We also recall the words of Sri M. C. Chagla an eminent Indian lawyer, diplomat, and Judge, and above all a Muslim and contemporary of both Mahtama Gandhi, Pandit Nehru and Ali Jina the founders respectively of India and Pakistan writing his memoirs – ROSES IN DECEMBER says of "emotions"
"People refuse to think rationally or logically where deep seated sentiments are involved, and nothing is more deep seated than emotions relating to religion."
There is no doubt in our collective mind that entrenchment of Section 66 establishing the Kadhis' Courts in the Constitution is certainly inconsistent with section 65 which grants Parliament power to establish other courts subordinate to the High Court. Section 66 certainly favours one religion in preference to other faiths, Christianity, Hindu, Buddhist, Bohras, and Indigenous religions and culture.
With that historical background on the entrenchment in the Constitution of the Kadhis' Courts and the enactment of the Kadhis' Courts Act, we now revert to the primary issue for determination in this matter, what interpretation to give to the relevant provisions of the Constitution in this matter.
The first line of cases from Mauritius and the United States submitted to us by counsel for the Applicants posited that no religion should enjoy favour from the State.
The second line of cases submitted to us concerned the Court's approach to constitutional interpretation. As in the interpretation or adjudication of any dispute there are usually two or more opposing views and a court is called upon to determine which of the two or more opposing views is the correct one. We do not think that the interpretation of the constitution is really any different.
In the much criticized and misunderstood decision in REPUBLIC vs. ELMANN [1969] E.A. 357, 360d - the court said:
"We do not deny that in certain contexts a liberal interpretation may be called for but in one cardinal respect we are satisfied that a Constitution is to be construed in the same way as any other enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense."

The decision in Republic vs. Elmann (supra) has come to be known as the Elmann doctrine and has mistakenly been construed to say that the Constitution would be construed like any other ordinary statute. The decision in that case made no such claim. The said decision reiterated two cardinal principles of interpretation, the Constitution will be given a liberal interpretation in certain contexts where the words used are ambiguous and imprecise. Where the words used are precise and unambiguous they will be construed in their literal meaning.

An informed court will therefore take a pragmatic approach that is beneficial not merely to the aggrieved party, but to society as well. In JAMES vs. COMMONWEALTH OF AUSTRALIA [1936] A.C. 578, Lord Wright said -

"A Constitution must not be considered in a narrow and pedantic manner and that construction most beneficial to the widest amplitude of its power must be adopted."

The holding in Republic vs. Elmann is consequently a sound and valid approach to constitutional interpretation. It was not extinguished or expunged by either the Ringera J (as he then was) or Kasango's decision in Rev. Timothy Njoya & Others vs. The Constitution of Kenya Review Commission and Other [2004]1 K.L.R.232

The Court adopted the Elmann doctrine in the case of DR. MURUNGARU vs. KENYA ANTI-CORRUPTION COMMISSION (Nairobi H.C. Misc. Application No. 54 of 2006 (O.S.).

The Elmann doctrine has its pedigree in the older and more established jurisdictions such as India- that where words or language of a Constitution admit of no ambiguity, the Chief Justice of India, Kania in the case of A. K. Gopal vs State [1950] S.C.R. 88 AT 120 (50) in an often cited passage said -

“A court of law must gather the spirit of the Constitution from the language used and what one may believe to be the spirit of the constitution cannot prevail if not supported by the language which therefore must be construed according to well established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has not limited either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot limit them upon any notion of the spirit of the constitution.”

Another great Indian Chief Justice Gwyer in a subsequent case of CENTRAL PROVINCE [1959] FCR 18 (39) AFC said –

“A broad and liberal spirit should inspire those whose duty is to interpret the Constitution but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or Constitutional theory or even for the purpose of supplying omissions or correcting supposed errors. A Federal Court will not strengthen but only derogate further its position if it seeks to do anything but declare the law, but it may rightly reflect that a Constitution of a government is a living and organic thing which of all instruments has the greatest claim to be construed “ut res magis valeat quam pereat”

These principles were reiterated by this court in CRISPUS KARANJA NJOGU vs ATTORNEY GENERAL (H.C. CR. Application No. 39 of 2000) where the Court at p.26 of its judgment said –

“We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme law it is our considered view that, Constitutional provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e. restrictive way – Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document.”

And in NDYANABO vs. ATTORNEY GENERAL [2001] E.A. 485 Samatta C J of Tanzania said:

"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows. First, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice EO Ayoola, a former Chief Justice of the Gambia sated … 'A timorous and unimaginative exercise of the Judicial power of constitutional interpretation leaves the Constitution a stale and sterile document'. Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental

rights must be strictly construed."
In the case of OKINDA vs. REPUBLIC [1970] E.A. 453 at p. 457, letter C, the court said –
“If a constitutional lawyer were to write about in the same strain as Dicey did about England, he would, to be accurate, have to emphasize the supremacy of the constitution rather than one organ of government. The Constitution and any Acts amending it must in the nature of things override all other laws.”
The Kadhis' Courts Act 1967, (now Chapter II, Laws of Kenya) extended the jurisdiction of the Kadhis' Court to Nyanza and Western Provinces, Rift Valley, Central, Eastern Provinces and Nairobi, areas well beyond the former Protectorate. This was clearly in breach of Section 179 (4) of the Independence Constitution and now section 66 (4) of the current Constitution.
The establishment of Kadhis' courts outside the protectorate violates Section 66(4) of the Constitution. The Kadhis' courts were intended to have territorial application within the Protectorate as defined, and on strict construction of the constitution Kadhis' courts were restricted to the former Protectorate.
Having said as much, we are keenly aware of Section 78 of the Constitution which provides for freedom of religion, for a person to manifest and propagate his religion or belief, in worship, practice and observance, at its own expense. It is our view that this provision covers all religious communities, including Muslims and our construction on this is that being the anchor or umbrella provision in the Constitution on freedom of worship, practice and observance of religion and its edicts section 66(4) of the Constitution on Kadhis’ courts is superfluous.
In our view territorial jurisdiction at this time and age in our democratic state curtails that freedom of worship or religion.
Section 3 of the Constitution declares the supremacy of the Constitution and that any law contrary thereto or inconsistent therewith is void to the extent of the inconsistency. In our view, and applying whichever view of interpretation of the Constitution, broad or liberal or purposive the meaning of the intention of the Constitution must be found in the words of the Constitution. The words of Section 179 [now section 66(4)] of the Independent Constitution are clear. Those words are reproduced in the Constitution Amendment Act 1969 (No. 5 of 1969) which consolidated all amendments or alterations made prior to that Act. And as Ghai and McAuslan say, the amendments were carried out meticulously in accordance with necessary majorities as prescribed for Bills to alter the Constitution.
Having failed to alter section 179(4) [(or now Section 66(4)] of the Constitution, the provisions of Section 4 of the Kadhis' Court Act (Chapter 11 of the Laws of Kenya) establishing and extending the jurisdiction of the Kadhis' Courts beyond the former Protectorate is contrary to and inconsistent with the said provision of the Constitution.
We recall the whisper from not so religious Melbourne, Lord Hailsham 'why not leave it alone'. However because of the clear language of Section 66(4) aforesaid we are neither able to leave it alone nor is the principle ut res magis valeat quam pereat (it is better to give effect to the provision than make it void) as a tool of interpretation of any help to us. In exercise of its declaratory jurisdiction under Section 3 of the Constitution we find and hold that Section 4(2) (b) of the Kadhis' Courts Act (Chapter 11, Laws of Kenya) is inconsistent with section 66(4) of the Constitution and is therefore void to the extent of the inconsistency.
Section 66 of the Constitution on Kadhis' courts is inconsistent with the secular nature of the state and we fully adopt as good constitutional law the decision of the court in the Mauritian case of BISHOP OF ROMAN CATHOLIC DIOCESE OF PORT LOUIS & OTHERS v. TENGUR (supra) and also the Mauritius case of BHEWA AND ANOTHER vs. GOVERNMENT OF MAURITIUS (supra) concerning what a secular state entails and the need to separate state and religion. Having regard to the values and principles of the constitution we declare that section 66 does not advance the values which characterize a secular state.
"As between the state and religion each had its own sphere, the power of law-making for the public good and the latter of religious teaching observance and practice. To the extent that Section 66 sought to give to religious principles and commandments the force and character of law, religion stepped out of its own sphere and encroached on that of law-making in the sense that it was made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion was the state religion but also the holy book of that religion was the supreme law."
On funding of Kadhis' Courts, we also adopt as good constitutional law the dictum in the case of ENGEL vs VITALE (supra);
"…… the price of religious freedom is double. It is that the church and religion shall live both and upon

that freedom. There cannot be freedom of religion, safeguarded by the State, and intervention by the church or its agencies in the State's domain or dependency on its largesse: . . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation, it vanishes with the resting.
Public money devoted to payment of religious costs, educational or not, brings the quest for more. It brings too the struggle of sect against sect the larger share or for any. Here one by numbers alone will benefit most, there another. . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominant group will achieve the dominant benefit or all will embrace the state in their dissensions."
We believe and pray that the Republic of Kenya, from East to West and from North to South shall remain a country under God's protection where all faiths, Juddeo- Christianity, Islam, Buddhism Hinduism, Bohras, Indigenous spiritualists and non-believers alike will live and practice their faith or lack of it in harmony without interference from all or any of them. For this reason we endorse and approve the statement by President Thomas Jefferson one of the founding fathers of the American Constitution made to the Baptists in 1808 that;-
"Because religious belief, or non-belief is such an important part of every person's life, freedom of religion affects every individual. State Churches use Government power to support themselves and force their views on persons of other faiths and undermine all our civil rights. Moreover, State support of the Church tends to make the clergy unresponsive to the people and leads to corruption within religion. Erecting ''the wall of separation between the Church and State is absolutely essential in a free society.''
We further declare that section 66 is in conflict with section 82 in that it has the effect of furthering one faith as against the others. However our role is declaratory only and it is only Parliament under section 47 of the constitution which can alter or amend section 66 of the Constitution or the people in a referendum. Of the right of the people, Justice Ringera (as he then was) said this in the celebrated Njoya case-
"….the constitution gives every person in Kenya an equal right to review the constitution which right embodies the right to ratify the constitution through a national referendum".
To further illustrate that point the case of Patrick Ouma Onyango & 12 Others vs. Hon. The Attorney General and 2 others (H.C. Misc. Application No. 677 of 2005 (OS), the Referendum Case (unreported) Justice Nyamu, (as he then was) Wendo and Emukule JJ. affirmed that position and a referendum was dully carried out on 21st November 2005 on the Draft Constitution. This case enshrined for the first time the procedure of enactment of a new constitution and emphasized the mandatory role of the people in enacting their constitution. The people of Kenya, Wanjiku, overwhelmingly rejected that draft Constitution in the ensuing Referendum.
However as regards Acts of Parliament we have a clear mandate to quash provisions which are inconsistent with the Constitution and to declare null and void and hence our specific action on section 4 of the Kadhis' Courts Act.
We further declare that the real anchor of freedom of worship and conscience in Kenya is not Section 66 of the Constitution but Section 78, and for this reason, Section 66 is in our view superfluous and does not add or offer any additional rights not covered by section 78 which applies to all faiths in Kenya. On the contrary at this time and age it restricts the operation of Kadhis' courts to the ten mile former Protectorate whereas section 78 has no such territorial restriction as regards freedom of conscience religion, or worship etc. Section 66 is also in our view in conflict with section 65 of the Constitution which contemplates subordinate courts of universal application in the Republic of Kenya.
CONCLUSIONS
1. In view of the discussion above, we grant the declarations sought in prayer 1 limited to declaring that section 66 is inconsistent with sections 65 and 82 and in respect of section 82 is discriminatory to the Applicants in its effect.
2. As regards paragraph 2 of the prayers we find and hold that sections 66 and 82 are inconsistent with each other, and that section 66 is superfluous but it is not the court's role to expunge it. It is the role of Parliament and the citizenry in a referendum.
3. As regards prayer 3, we hold and declare that any provision similar to section 66 in any other Draft of a Constitution in word or effect is not ripe for determination
4. The enactment and the application of the Kadhis' courts to areas beyond the 10 mile Coastal strip of the Protectorate is unconstitutional.
5. We grant prayer 5 that the financial maintenance and support of the Kadhis' courts from public coffers amounts to segregation, is sectarian discriminatory and unjust as against the Applicants and others and

amounts to separate development of one religion and religious practice contrary to the principle of separation of state and religion (secularism) and is therefore contrary to the universal norms and principles of liberty and freedom of religion envisaged under sections 70, 78 and 82 of the Constitution and also against the principle of separation of state and religion as captioned by section 1A of the Constitution.

6. We also find and hold that the purported extension of the Kadhis' courts through the enactment of the Kadhis' Courts Act beyond the former Protectorate areas contravenes section 64(4) and section 4(2) (b) of the Kadhis' Courts Act and is therefore unconstitutional, null and void to the extent of the inconsistency and for that reason a declaration in terms of prayer 6 is granted.

7. We grant the declaration in prayer 7 in relation to section 66 of the Constitution.

8. We grant a declaration that any form of religious courts should not form part of the Judiciary in the Constitution as it offends the doctrine of separation of state and religion.

9. We grant prayer 13 and declare that the entrenchment of the Kadhi's courts in the Constitution elevates and uplifts the Islamic religion over and above the other religions in Kenya which is inconsistent with section 78 and 82 of the Constitution and discriminatory in its effect against the applicants and Kenyans of other religions.

10. We further find and hold that prayers 9, 10, 11, 12, 14 & 15 relating respectively to the Bomas Zero Draft and an Islamic Agenda are matters which are moot and speculative and are not justiciable and decline to grant them.

For avoidance of doubt this decision has been handed down on the basis that the role of the court is to interpret and declare the law and that the doctrine of separation of powers quite rightly prevents us from amending the law (which role rests with Parliament) or the enactment of a new constitution including its contents which role is vested in the people of Kenya.

COSTS

This is public interest litigation. There are no losers or winners. We make no order as to costs.

Dated, delivered and signed at Nairobi this 24th day of May 2010

J. G. NYAMU

JUDGE OF APPEAL

(Signed under section 64(4) of the Constitution)

R. V. P. WENDO

JUDGE

M. J. ANYARA EMUKULE

JUDGE