**Okoiti v Judicial Service Commission & another; Kiprotich & 6 others (Interested Parties) (Petition E377 of 2022) [2025] KEHC 12705 (KLR) (Constitutional and Human Rights) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12705 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E377 OF 2022**

**LN MUGAMBI, J**

**SEPTEMBER 18, 2025**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT**

**ATTORNEY GENERAL ..... 2ND RESPONDENT**

**AND**

**HON KIMARU LUKA KIPROTICH ..... INTERESTED PARTY**

**HON GACHOKA PAUL MWANIKI ..... INTERESTED PARTY**

**HON ACHODE LYDIA AWINO ..... INTERESTED PARTY**

**HON OCHIENG FREDERICK ANDAGO ..... INTERESTED PARTY**

**HON MATIVO JOHN MUTINGA ..... INTERESTED PARTY**

**HON NGENYE GRACE WANGUI ..... INTERESTED PARTY**

**HON ARONI ABIDA ALI ..... INTERESTED PARTY**

## JUDGMENT

### Introduction

1. The Petition dated 19th July 2022 is supported by the Petitioner's affidavit of similar date and a further affidavit dated 17th November 2022.

2. The Petition challenges the 1st Respondent's recruitment of the Interested Parties to be Judges of the Court of Appeal on the basis that the 1st Respondent has been carrying out recruitment process of the Judges of the Court of Appeal in a manner that discriminates against the Judges of the Employment and Labour Relations Court as well as the Environment and Land Court thus rendering the process unlawful and unconstitutional.

3. The Petitioner further averred that the 1st Respondent's discriminatory actions against Judges in the Special Courts also extend to designation of the Judges to be the Presiding Judges of the Superior Courts.

4. Consequently, the Petitioner argues that 1st Respondent's actions are unconstitutional and violate Article 10, 27, 41(a), 47(1), 73, 75 and 232 of *the Constitution*. The Petitioner thus seeks the following reliefs against the Respondents:

    i. A declaration that the JSC's impugned recruitment of the seven (7) CA judges is irregular, unfair, unlawful and unconstitutional and, therefore, invalid, null and void ab initio.

    ii. A declaration that, under *the Constitution*, the JSC is bound by law to be transparent and accountable, including by holding interviews for candidates to be appointed as judges in the open and publishing and publicizing the score cards.

    iii. A declaration that the JSC should take steps to ensure there is continuous representation in the CA of judges appointed from the two specialist courts established under Article 162(2) of *the Constitution*.

    iv. An order quashing the recruitment, appointment, and swearing into office of the seven (7) CA judges.

    v. An order compelling the Respondents to pay to the Petitioner's costs of this suit.

    vi. Any other relief this Court may deem just to grant.

**Petitioner's Case**

5. The Petitioner avers that the 1st Respondent advertised for 6 vacancies for Court of Appeal Judges. 63 candidates applied and out of this 31 were shortlisted for interviews. Subsequently, 7 candidates were recommended for appointment by the President, being the Interested Parties herein. The Interested Parties were thereafter appointed by the President vide a Gazette Notice No.8665 dated 19th July 2022.

6. According to the Petitioner, *the Constitution* does not envisage a scenario where the 1st Respondent can appoint 7 people to fill 6 vacancies. In his view, the 7th slot was deliberately hidden from the public to achieve their improper motives while advancing corrupt practices. The Petitioner asserts that this is a blatant display of impunity by the 1st Respondent which is unconstitutional and casts doubt on the recruitment process.

7. The Petitioner further contends that despite 4 Employment and Labour Relations Court Judges and 2 Environment and Land Court being shortlisted, none was appointed in the end. He claims that this has become the 1st Respondent's norm, where only High Court Judges are appointed to the exclusion of the Judges in the Special Courts. He asserts that this action which runs a foul the spirit of Article 162(2) of *the Constitution*, curtails the enrichment of diversity in the Court of Appeal from the expertise of Judges from the Special Courts.

8. Additionally, he accuses the 1st Respondent of failing to uphold the principles of transparency and accountability in line with Article 10 of *the Constitution*. This is since, the 1st Respondent failed to disclose the scores of each candidate. He adds that the interviews were not done openly and thus theorizes that the 6 appointed High Court Judges were exclusively appointed based on the Court they serve in.

9. The Petitioner further alleges that Judges from the Special Courts are equally not appointed as Presiding Judges of Court Stations like their counterparts even where they head court stations in different parts of the country. Moreover, that they have never been gazetted by the Salaries and Remuneration Commission (SRC) for extra remuneration as Presiding Judges in that case.

10. Considering this, the Petitioner argues that the 1st Respondent has discriminated and marginalized Judges from the Special Courts as though they are less qualified compared to High Court Judges. This action is alleged to have unlawfully stunted their career progression and violated their rights to equality and freedom from discrimination, human dignity, fair labour practices and a fair administrative action.

11. Accordingly, the Petitioner brings this Petition against the 1st Respondent for its failure to uphold a transparent and accountable recruitment process in relation to the Court of Appeal Judges and further discriminating against Judges in the Special Courts in these recruitments and their role. These actions are thus adjudged to be unconstitutional and in violation of Articles 10, 27, 41(a), 47(1), 73, 75 and 232 of *the Constitution*.

**1st Respondents' Case**

12. In response, the 1st Respondent filed a Replying Affidavit by the then Chief Registrar, Anne Amadi sworn on 14th February 2023.

13. The Chief Registrar swore that the instant Petition is a move by the Petitioner to use this Court to compromise the 1st Respondent's constitutional mandate as envisaged under Article 172(1) (a) of *the Constitution* as read with Section 30 and the First Schedule of the *Judicial Service Act*.

14. She stated that at the time of making the vacancy announcement, the Court of Appeal faced a severe deficit of Judges, in that it had 20 Judges against the statutory capacity of 30 Judges. In addition, out of the 20 Judges, one is a member of the 1st Respondent and 1 serves in the East African Court of Justice's Appeal Chamber. Further, she stated that in 2022, 2 Judges retired. At that point, the total number of active Judges in the Court of Appeal was 15, for the 6 Country stations.

15. She states that the Court of Appeal Judges shortfall had a negative impact on dispensation of justice in that it gave rise to a workload of 1562 cases per a single Judge in a year and also increased the time of an appeal to an average of 7 years instead of 1 year. She also notes that some stations like Nyeri did not have sitting Judges while plans to operationalize Nakuru and Eldoret stations were halted. In the end, it thus necessary that recruitment of more Judges be done.

16. On 14th March 2022 the 1st Respondent published an advertisement for recruitment of 6 Judges. The advertisement attracted 68 applicants. At its meeting dated 26th and 27th April 2022, the 1st Respondent reviewed all the applications and shortlisted 31 candidates.

17. These candidates were then vetted by the various bodies such as Ethics and Anti-Corruption Commission. Furthermore, the interviews were broadcasted live on the 1st Respondent's social media pages and process was also open to the media and the public.

18. Additionally, members of the public were invited to give their views and any information of interest concerning the candidates. She avers that the 1st Respondent received several complaints and information from the public including the vetting agencies. These were processed and served upon the respective candidates so as to provide their responses. These comments were also considered during the interviews and overall nomination of the best candidates. The 1st Respondent in addition organized forums with stakeholders from various sectors on 23rd June 2022.

19. She depones that upon conclusion of the process, the 1st Respondent selected the 7 Interested Parties. The decision to select 7 candidates is said to have been informed by the retirements of Hon. Lady Justice Roseline Nambuye on 21st May 2022 during the pendency of the recruitment process. In this regard, she states that the 1st Respondent exercised its powers under Paragraph 20(2) Part VII of the First Schedule of the *Judicial Service Act*, 2011. This decision was further guided by the need to address gender and regional balance and minority interest in the Court of Appeal. She posits that it would have been a waste of public funds to commence another recruitment exercise during the pendency of another to fill one vacancy.

20. She as well asserts that the 1st Respondent's actions were guided by Article 10, 172 and 259 of *the Constitution* and provisions of the First Schedule of the *Judicial Service Act*. She states thus that the 1st Respondent's actions in the recruitment process were constitutional.

21. It is averred that the Petitioner has not demonstrated the prejudice occasioned to him by the 1st Respondent's decision to nominate 7 candidates. Likewise, it is noted that the Petitioner did not provide any evidence to support the claim of discrimination of the Special Courts Judges.

22. That said, she states that there is no legal requirement that Judges in these Courts should have automatic slots in the Court of Appeal. Instead, the law obligates the 1st Respondent to select the best candidates as guided by their professional competence, written and oral communication skills, integrity, fairness, good Judgement among others. She notes that the 1st Respondent is further guided by merit, competitiveness, transparency and promotion of gender equality. She informs that the law does not obligate the 1st Respondent to publicize the scores of every candidate and that the same would be a violation of the right to privacy of the candidates.

23. Furthermore, she depones that the determination of allowances payable to Judges and other State Officers solely lies with the SRC and thus the issue of special duty allowance payable to Presiding Judges and Heads of Station ought to be directed to it.

24. Nonetheless, it was highlighted that no evidence had been adduced to support the claim that Judges in the Special Courts are denied special duty allowance.

**2nd Respondent's Case**

25. In reaction to the Petitioner's case, the 2nd Respondent filed grounds of opposition dated 27th July 2022 on the basis that:

    i. The High Court lacks the jurisdiction to issue orders of prohibition, prohibiting judges of the Court of Appeal who rank above the Court in the hierarchy of courts, from discharging constitutional duties.

    ii. Issuance of orders of prohibition against Judges of the Court of Appeal from performing their constitutional functions would constitute an impermissible infringement on the independence of the Judiciary contrary to express provisions of *the Constitution*.

iii. The gravamen of Gazette Notice No. 8665 of 19th July 2022 has already been given effect to and the same is not amenable to be affected in any way by a conservatory order.

iv. The Interested Parties tenure in office as Judges of the Court of Appeal is constitutionally insulated and may only be interfered with in the manner prescribed under Article 168 of *the Constitution*; therefore, beyond the purview of the jurisdiction of the High Court.

v. The Application is misconceived and bad in law.

**Interested Parties Case**

26. These Parties responses and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

**Petitioner's Submissions**

27. The Petitioner filed submissions dated 29th February 2024 and underscored the issues for determination as: whether the Petitioner has locus standi to institute and prosecute these proceedings; whether this Court has jurisdiction over this motion; whether the JSC's recruitment of the seven (7) judges to fill six (6) slots was a nullity; whether the JSC has discriminated against ELRC and ELC judges in appointments to the CoA and as Presiding Judges, and whether the JSC was not transparent and accountable in the appointment of Judges.

28. The Petitioner submitted that he has the requisite locus standi to file this Petition in public interest as it concerns constitutional issues surrounding the appointment of the Interested Parties. To buttress this point reliance was placed in Article 22 and 258 of *the Constitution*. In addition, the case of John Harun Mwau and 3 Others vs. Attorney General and 2 Others [2012] eKLR where it was held that:

> "The intent of Articles 22 and 23 of *the Constitution* is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming *the Constitution* has been violated or is threatened."

29. Like dependence was placed on John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR, Michael Osundwa Sakwa vs Chief Justice and President of the Supreme Court of Kenya & another (2016) eKLR and Kiluwa Limited & Another vs. Commissioner of Lands & 3 others, 2015 eKLR.

30. The Petitioner in the second issue first pointed out that this Petition specifically revolves around the question whether the 1st Respondent impugned actions during the recruitment process were unconstitutional thus null and void, not removal of the Interested Parties from office. On this premise, Counsel submitted that this Court has jurisdiction to answer this question in line with its mandate under Article 23 and 165(3) of *the Constitution*. Reliance was placed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where it was held that:

> "We disagree with this approach and are not prepared to hold as urged by the appellant as such an approach would pose a recharacterization risk in similar forms of constitutional litigation. In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant's appointment. This Court takes the view therefore that it is not the outcome

of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure."

31. Additional reliance was placed in Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another (2011) eKLR and Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another (2014) eKLR.

32. Turning to the third issue, the Petitioner stated that the 1st Respondent was under the obligation to follow the law in the appointment of the Interested Parties. He pointed out that the 1st Respondent had not denied it advertised for 6 posts but appointed 7 candidates.

33. The Petitioner reasoned that the retirement of Justice Nambuye was not unexpected as this was information within its knowledge well in advance. The Petitioner argued that the manner in which this was even done was contrary to Paragraph 3(1) and (2) of the First Schedule in the *Judicial Service Act* which directs that a vacancy in the office of a Judge must be notified in the Gazette and circulate the same on its website, the Law Society of Kenya and other legal associations. Thereafter invite qualified person to apply for the position. The Petitioner argues that the 1st Respondent did not adhere to this provision thus violated mandatory procedure.

34. The Petitioner contended that in carrying out its duties, the 1st Respondent is obligated to be transparent, accountable and exercise other principles of good governance. Further, that any action by the Respondents pertaining the failure to apply the law on the recruitment of judges, comes under the ambit of Article 47 of *the Constitution*. Considering this, the Petitioner argued that the appointment of the Interested Parties to fill the six advertised slots was unconstitutional. He reasoned that the 6 candidates' appointment could only have been saved if the 1st Respondent disclosed who it had appointed to fill the 7th slot.

35. Reliance was placed in Republic vs. Kenya National Examination Council, Miscellaneous Civil Application No. 328 of 2015 where it was held that:

> "That the Court can interfere where there is improper exercise of discretion is now trite. As was held by Warsame, J (as he then was) in Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by
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> i. an outright refusal to consider the relevant matter;
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> ii. a misdirection on a point of law;
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> iii. taking into account some wholly irrelevant or extraneous consideration..."

36. Comparable reliance was placed in Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Republic vs. Kenya Power & Lighting Co. Ltd. & Another (2013) eKLR, Republic vs. National Police Service Commission exparte Daniel Chacha (2016) eKLR, Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya &

6 others [2017] eKLR, and Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another [2006] eKLR.

37. On the fourth issue, the Petitioner maintained that the 1st Respondent in making the appointments had discriminated against the Judges of the Special Courts. Additionally, that these Judges are also discriminated when it comes to holding the position of Presiding Judges. Reiterating his averments, he argued that 1st Respondent had not discharged its burden of proof that there was no discrimination in terms of Section 5(7) of the *Employment Act*.

38. On the fifth issue, the Petitioner submitted that the inevitable conclusion in the circumstances of this case is that the 1st Respondent was not transparent and accountable in making the appointments. In light of this, he urged the Court to issue the appropriate relief. Reliance was placed in Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR where it was held that:

> "Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

39. Like dependence was placed in Hoffmann vs. South African Airways (CCT17/00) [2000] ZACC 17.

**1st Respondent's Submissions**

40. Muma Kanjama Advocates for the 1st Respondent filed submissions dated 28th October 2024 where the key issues were highlighted as: whether the appointment of the Interested Parties was a product of a constitutional and lawful process, whether the appointment process for Judges of the Court of Appeal discriminates against Special Court Judges, whether the 1st Respondent should retrospectively pay Presiding Judges allowances to Special Court Judges and whether the 1st Respondent is mandated to publish the score cards of the candidates.

41. Counsel submitted that the appointment of the Interested Parties was lawful and procedurally done. Counsel stated that judicial appointments are anchored in Article 166(1), 171(1), 172(1) of *the Constitution* and the process guided by the procedure set out under the First Schedule to the *Judicial Service Act*. Counsel averred that the 1st Respondent from the onset when it made its advertisement on 14th Marc 2022, had followed this procedure until the nomination of the successful candidates.

42. Counsel noted that the interviews in line with Article 10 (2)(a) & (c) of *the Constitution* had been conducted in an open and transparent manner where the general public and media had access. Also, the public was asked to issue any information and comments concerning the candidates and stakeholder engagements held thus fulfilling the public participation principle as echoed in Mugo & 14 Others v Matiang'i & another; Independent Electoral and Boundaries Commission & 19 others [2022] KEHC 158 (KLR).

43. Speaking to the additional candidate, Counsel submitted that the decision was reasonably informed by the occurrence of one more vacancy in the Court of Appeal. Counsel pointed out that Paragraph 20(2) Part Vii of the First Schedule of the *Judicial Service Act* provides that, nothing in the Schedule shall limit the inherent power of the Commission to make such decisions as may be necessary for the ends of justice or to prevent abuse of the process of the Commission.

44. Counsel contended that in making the decision to nominate an extra candidate, the 1st Respondent had lawfully and reasonably exercised its power. Counsel added that the 1st Respondent in this way, interpreted *the Constitution* as guided under Article 259 of *the Constitution*. That is as giving it leeway to recommend the additional candidate thus in line with Article 10 and 172(1) of *the Constitution*. As such, Counsel submitted that the 1st Respondent was guided by the constitutional and statutory provisions in reaching its final decision.

45. Counsel on the second issue submitted that the Petitioner's claim of discrimination of Judges of Special Court Judges was unfounded as the recruitment process is strictly guided by the dictates of Article 172(2) of *the Constitution* and qualifications set out under Article 166(4) of *the Constitution*. Counsel submitted that an analysis of these provisions makes it plain that it is not a requirement in law that Judges of the Special Court have automatic slots.

46. Be that as it may, Counsel submitted that to ascertain whether discrimination has occurred it is necessary to consider the various elements. Reliance was placed in Centre For Rights Education And Awareness (Creaw) & 7 Others V Attorney General [2011] eKLR where it was held that:

> "In support of the argument that the nominations infringed the right to equality, the petitioners cited a decision of the Constitutional Court of South Africa, Jacques Charl Hoffmann Vs. South African Airways, CCT 17 OF 2000 where the court stated:
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> "This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application."

47. Comparable dependence was placed in Harksen vs Lane No& others (1997) ZACC 12.

48. Considering this, Counsel argued that the claim of discrimination lacked merit since the 1st Respondent in making its decision was wholly guided by the dictates of the law, in which instance do not give rise to unequal or discriminatory treatment.

49. Moving to the third issue, Counsel submitted that the Petitioner had failed to adduce any evidence to support the claim that the Presiding Judges in Special Courts are denied access to allowances as those granted to the High Court. Reliance was placed in Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR where it was held that:

> "In my view the petitioner has failed to discharge the burden of prove to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not)."

50. Similar dependence was placed in Mohammed Abduba Dida v Debate Media Limited & another (2018)eKLR.

51. Finally, Counsel submitted that the 1st Respondent is not mandated to publish or publicize the scorecards of the Applicants as the same would be offensive to the provisions of Article 31 of *the Constitution*. Besides he argued that the same would prejudice the candidates future career prospects for example where the reason for disqualification would be a lack of integrity and equally such disclosure would compromise the recruitment process.

**Analysis and Determination**

52. It is my considered opinion that the issues that arise for determination in this matter are as follows:

    i. Whether this Court has jurisdiction to entertain this matter.

    ii. Whether the 1st Respondent's action of recruiting 7 Judges of the Court of Appeal instead of 6 that were advertised violated the principles of transparency, integrity and accountability hence unconstitutional and unlawful.

    iii. Whether the 1st Respondent has been biased in recruitment of Court of Appeal Judges and appointment of Presiding Judges of Superior Courts in a manner that discriminates and marginalizes Judges of the Special Courts.

    iv. Whether the Petitioner is entitled to the reliefs sought.

**1st issue- Whether this Court has jurisdiction to entertain this matter.**

53. Jurisdiction refers to the competence of the adjudicatory body to hear and determine a dispute before it. The Supreme Court In the Matter of the Interim Independent Electoral Commission [2011] KESC 1(KLR) in addressing the issue of jurisdiction thus stated:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

54. In the same way the Court of Appeal speaking to this issue in Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] KEHC 5855 (KLR) opined as follows:

> " So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile

undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the case of The Owners Of The Motor Vessel Lillian 'S' Vs. Caltex Kenya Ltd [1989] KLR 1."

55. The issue of lack jurisdiction was raised by the 2nd Respondent in its grounds of opposition in which it stated that this Court does not have the power to issue orders prohibiting the judges of the Court of Appeal who rank higher in the hierarchy of courts from discharging constitutional duties and to do so would constitute an impermissible infringement on the independence of the Judiciary contrary to express provisions of *the Constitution*. The Respondent thus argued that the Interested Parties tenure in office as Judges of the Court of Appeal was already constitutionally insulated and can only be interfered with in the manner prescribed under Article 168 of *the Constitution* and as such, it was beyond the purview of the jurisdiction of the High Court.

56. The Petitioner submitted that he has the requisite locus standi to file this Petition in public interest as it concerns constitutional issues surrounding the appointment of the Interested Parties. To buttress this point, reliance was placed in Article 22 and 258 of *the Constitution*. The Petitioner argued that the gist of the Petition was whether the 1st Respondent action during the recruitment process of the Judges of the Court of Appeal (Interested Parties) violated *the Constitution* as contradistinguished from a Petition against their removal.

57. I concur with the Petitioner that pursuant to Article 258 (1), *the Constitution* has given the mandate to every person to institute court proceedings claiming that *the Constitution* has been contravened, or is threatened with contravention. This is further reinforced by Article 3 which obligates 'Every person to respect, uphold and defend *the constitution*.

58. I believe these two provisions even without any further exposition give the Petitioner the requisite locus standi to defend *the Constitution* by way of filing Court action if he can reasonably demonstrate that constitution is under threat or is being violated.

59. Further, I am also in agreement that the nature of these proceedings having regard to the Petition is interrogative of the 1st Respondent's conduct of the recruitment of the interested parties to determine if the process met the constitutional benchmark, and thus this Court has the requisite jurisdiction to make this inquiry in view of Article 165 (3) (d) (ii) which gives it the power to hear and determine "the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of, this Constitution."

60. The fundamental issue that this Petition raises is the 1st Respondent's conduct, that is whether it carried out the exercise of recruitment of the interested parties in strict conformity with *the Constitution* and the law, namely the Judicial Service Commission Act. Once the Court determines this question that suffices, and the Court will consider appropriate reliefs while taking into consideration all the other relevant factors including the issue raised by the 2nd Respondent that after appointment of the interested parties, their removal as Judges of Appeal is governed by separate Constitutional process. The fact that the removal is governed by a different constitutional process however is not a bar for this Court from interrogating the process that led to their appointment and for this Court to pronounce itself on the issue of whether the process met the Constitutional threshold. This Court under Article 165 (3) (d) (ii) has jurisdiction pronounce itself on that specific question and make appropriate orders.

61. This Court therefore finds the 2nd Respondent misapprehended the real issue in controversy in asserting that this Court has no jurisdiction to hear and determine if the 1st Respondent complied

with *the Constitution* and the law in the manner it conducted the recruitment process of the interested parties herein.

**2nd issue- Whether the 1st Respondent's action of recruiting 7 Judges of the Court of Appeal instead of 6 that were advertised violated the principles of transparency, integrity and accountability hence unconstitutional and unlawful.**

62. Interpretation of *the Constitution* has received immense consideration in this Country and the principles are now well settled. The Supreme Court in the matter of Interim Independent Election Commission held:

> " PARA(86)
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> .....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
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> (87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
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> (88) ... Article 10 states clearly the values and principles of *the Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
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> (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation."

63. Correspondingly the Court in Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika [2024] KEHC 2890 (KLR) summarized the principles as follows:

> " 111. The developing precedent on constitutional interpretation from the superior courts has now evolved and coalesced as follows;
>
> Article 259 of *the Constitution* as a mandatory principle obliges courts to protect and promote the spirit, purposes, values and principles of *the Constitution*, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance while permitting development of the law.
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> *The Constitution* must be construed holistically, liberally, purposively and in a broad manner so as to avoid a narrow and rigid interpretation tainted with legalism.
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> *The Constitution* must be interpreted in a contextual manner, that courts are constrained by the language used and so cannot impose a meaning that the text is not reasonably capable of bearing. Furthermore, constitutional interpretation does not favour a formalistic or positivistic approach but a generous construction of the text in order to afford the fullest possible constitutional guarantees.
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> In considering the purposes, values and principles while interpreting *the Constitution*, courts must take into account the non-legal phenomena by reflecting on the history of the text.
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> Constitutional interpretation demands that no one provision of *the Constitution* should be segregated from the others or be considered alone. The provisions are to be interpreted as an integrated whole so as to effectuate the greater purpose of *the Constitution*.
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> Where there is an impugned provision in a Statute the same must as much as possible be read in conformity with *the Constitution* to avoid a clash.
>
> The court ought to examine the object and purpose of the Act (Statute) and if any statutory provision read in its context can reasonably be construed to have more than one meaning the court must prefer the meaning that best promotes the spirit and purposes of *the Constitution*. See Tinyefuza v Attorney-General Const Pet No 1 of 1996 (1997 UGCC 3) and Re Hyundai Motor Distributors (PTY) & others v Social No & others (2000) ZACC 12 2001(1) SA 545.
>
> The principles of interpretation require that the words and expressions used in a statute be interpreted according to their ordinary literal meaning in the statement and in the light of their context. See Adrian Kamotho Njenga v Kenya School of Law (2017) eKLR and Law Society of Kenya v Kenya Revenue Authority & another (2017) eKLR."
>
> 112. When the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the article(s) of *the constitution* and determine whether it meets the constitutional test. The court must also check both the purpose and effect of the Section or the Act,

and see whether any of the two could lead to the provision being declared unconstitutional. That is to say, the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision."

64. Courts have underscored the duty to abide by the law whenever a public body or Officer is bestowed with the mandate to perform or discharge a function as was emphasized in Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] KEHC 9435 (KLR) where the Court stated:

> "7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-
>
> "(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"[20]
>
> 8. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.[21] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent's are constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing its exercise of power. The Respondent's have a statutory and a moral duty to uphold the law and to comply with the law governing their operations.
>
> 9. When the constitutionality of legislation or a provision in a statute or a decision or an act or omission of a statutory or public body is challenged, the Court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"[22] the impugned legislation or provision or decision, or act or omission is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with *the Constitution* [23] and the relevant statutory provisions."

65. In the instant Petition, the Petitioner assailed the action of the 1st Respondent for appointing seven Judges of the Court of Appeal when the advertisement that it had published inviting the applications was for six Judges of the Court of Appeal.

66. The Petitioner insisted that the 1st Respondent had not denied it advertised for 6 posts but appointed 7 candidates. The Petitioner thus maintained that this was in breach of Paragraph 3(1) and (2) of the First Schedule to the *Judicial Service Act* which requires that a vacancy in the office of a Judge must be notified in the Gazzette and circulated on the 1st Respondent website, the Law Society of Kenya and other legal associations after which invitation is put for qualified persons to apply for the position.

The Petitioner thus contended that the 1st Respondent did not adhere to the aforesaid provision hence violated a mandatory procedure which incorporates transparency, accountability and upholding of principles of good governance.

67. He contended that the 6 candidates' appointment can only be saved if the 1st Respondent could disclose who it had appointed to fill the 7th slot.

68. On behalf of the 1st Respondent, it was contended that the appointment of the Interested Parties was done lawfully pursuant to Article 166(1), 171(1), 172(1) of *the Constitution* and the First Schedule to the *Judicial Service Act*. It was disclosed that the 1st Respondent made an advertisement on 14th March 2022 followed by open and transparent interviews and nomination of the successful candidates in line with Article 10 (2) (a) & (c) of *the Constitution*. It was underscored that the interviews were conducted publicly where media access was granted and the public given an opportunity provide any information and comments concerning the candidates. On the issue of the additional candidate, it was it was disclosed that it arose out of occurrence of one more vacancy at the Court of Appeal following the retirement of Justice Roseline Nambuye while the process of recruitment was still going on and to alleviate the severe shortage that was adversely affecting service delivery at the Court of Appeal, the 1st Respondent considered it prudent to exercise it discretion to fill the vacancy in the ongoing recruitment. It was argued that in doing so, the 1st Respondent acted pursuant to Paragraph 20(2) Part Vii of the First Schedule of the *Judicial Service Act* which provides that "nothing in the Schedule shall limit the inherent power of the Commission to make such decisions as may be necessary for the ends of justice or to prevent abuse of the process of the Commission."

69. *The Constitution* gives the Judicial Service Commission (JSC) the mandate to recommend the appointment of Judges. Article 166 (1) (b) gives the President the power to appoint Judges in accordance with the recommendation of the Judicial Service Commission. The Judicial Service Commission is established under Article 171 (1) of *the Constitution* and its functions are specified in Article 172 (1) a-e.

70. Under the First Schedule to the *Judicial Service Act*, Cap 8A the Rules bear the title:

> 'Provisions Relating To The Procedure For Appointment Of Judges'. Part II is on 'Vacancies and Applications' and provides as follows:
>
> Rule 3. Notice of vacancy
>
> 1. Where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within fourteen days place a notice thereof in the Gazette and the Commission shall thereafter—
>
>  a. post a notice on its website;
>
>  (b) send notice of the vacancy to the Law Society of Kenya and any other lawyers' professional associations; and
>
>  b. circulate the notice in any other appropriate manner.
>
> 2. The advertisement and the notice referred to in paragraph (1) shall—
>
>  a. describe the judicial vacancy;
>
>  b. state the constitutional and statutory requirements for the position;
>
>  c. invite all qualified persons to apply;

d. inform interested persons how to obtain applications; and

(e) set the deadline for submission of application which period shall not be less than twenty-one (21) days after the announcement of the vacancy by the Commission.

71. RULE 9 - Publication of the names of applicants

Upon the expiry of the period set for applications, the Commission shall—

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

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

(c) invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and(d)interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.

72. Rule 17. Irregularities

1. Any irregularity resulting from failure to comply with any provision of this Schedule shall not of itself render the proceedings void or invalid where the irregularity does not occasion a miscarriage of justice.

2. Where any irregularity comes to the attention of the Commission, the Commission may, and shall, if it considers any person may have been prejudiced by the irregularity, give such directions as it deems just, to cure or waive the irregularity before reaching its decision.

3. Clerical mistakes in any document recording a direction, order or decision of the Commission, or errors arising in such a document from an accidental slip or omission, may be corrected by the Chairperson, by certificate under their hand.

73. Rule 20. General power of the Commission

1. Subject to *the Constitution* and this Schedule, the Commission may regulate its own procedure and the procedure of any of its committees.

2. Nothing in this Schedule shall limit or otherwise affect the inherent power of the Commission to make such decisions as may be necessary for the ends of justice or to prevent abuse of the process of the Commission.

74. The 1st Respondent explained that a vacancy arose while the interviews which had been advertised as envisaged under Rule 3 were still going on and thus it opined that due to the severe shortage of Judges in the Court of Appeal at the time, it would interview the persons who had already applied and fill the vacancy instead of having to wait for the advertisement of the post and applications to be made again.

75. It is evident from the reading of the above rules that the 1st Respondent, may for the good reason, depart from rules and do what it considers reasonable in the interest of justice in view of the circumstances of any particular case. That power is broad but as long as is it exercised reasonably and justifiably in a given situation, the Court will have no problem with it. However, if it is arbitrarily applied, the Court will not condone it.

76. There is no dispute that one extra vacancy occurred during the recruitment process of the Interested Parties. From the uncontroverted assertion contained in the affidavit of Ann Amadi, (the Chief Registrar of the Judiciary then); there was a grave shortage of Judges in the Court of Appeal to the extent that there were only 15 out of 30 Judges of the Court of Appeal and that the waiting time for an appeal to be concluded in that Court rose from one year to seven years. When the vacancy arose as the interviews were still ongoing, the 1st Respondent found it prudent to have that position also filled through that interview process by the candidates who had already applied and shortlisted.

77. The Petitioner does complain that the 1st Respondent interviewed a person who had not applied for the position or was unqualified or that that such vacancy did not arise in the circumstances stated by the 1st Respondent. The manner of how the seventh vacancy arose are thus elaborately put in the affidavit of Ann Amadi.

78. Going through the process of advertising one position, shortlisting the applicants and interviewing them for the said one position would have been quite laborious and expensive yet there was already an avalanche of applicants that had responded to the advertisement for the previous six positions and the interviews were still taking place. I would agree with the 1st Respondent the that it is in situations like this that Rule 20 gave the 1st Respondent the right to apply its discretion to ensure quick decisions are made objectively as long as they are in made in good faith and are reasonable.

79. This Court does not find the decision taken by the 1st Respondent to be wanting in terms of transparency and accountability hence does not breach of Article 10. The decision as explained was based on objective assessment of what was the most viable option that saved public costs of a fresh recruitment, time and addressed the urgent need that was there at the moment to facilitate provision of services through improved access to justice, particularly to reduce the 7-year waiting period for cases to be heard. I would thus find that in doing so, the 1st Respondent acted properly in invoking Rule 20 (2) of the FIRST SHEDULE without unnecessary fetter to deal with the situation at hand reasonably. The decision was thus not arbitrary.

80. This position resonates well with a decision of the Employment and Labour Relations Court in a contest Sheria Mtaani Na Shadrack Wambui v Public Service Commission & 2 others [2021] KEELRC 43 (KLR) which was a case where a similar contestation was made against the employment of 350 Accountant II personnel when the advertisement had been made was only for 250 vacancies. In rejecting the argument that the decision was unlawful, the Court held as follows:

> "... Reasonably looking at it and giving this matter a holistic approach, one will not find it difficult to conclude that on the decision not to advertise the 100 [one Hundred]slots and therefore have another fresh recruitment process, but pick appointees from the pool of those that had been interviewed was in accord with the values and principles of public service as espoused under Article 232 of *the Constitution* and more specifically 232[1][b] and [c] which provide for efficient, effective and economic use of resources, and responsive, prompt, impartial and equitable provision of services..."
>
> 3rd issue- Whether the 1st Respondent has been biased in recruitment of Court of Appeal Judges and appointment of Presiding Judges of Superior Courts in a manner that discriminates and marginalizes Judges of the Special Courts.

81. The Petitioner has a duty to discharge the burden of proof of these allegations. IN Matendechele v Sunstar Hotel Nairobi [2023] KEHC 1921 (KLR) held as follows:

> " 32. Reinforcing that the legal burden of proof in constitutional Petitions is on the Petitioners, the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR stated as follows: -
>
> Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
>
> 33. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. IEBC & 2 Others (2018) eKLR as under: -
>
> > 26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
> >
> > 29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner....
>
> 39. Returning to the matter at hand, this Court hereby settles that the Petitioner bore the legal and evidential burden of proof unless the evidential burden of proof shifted to the Respondent.
>
> 40. The Court also settles that the applicable standard of proof in this matter, just like in any other Constitutional Petitions, shall be on a balance of probabilities."

82. Equally in Kiambu County Tenants Welfare Association (supra) the Court held as follows:

> " Lord Brandon in Rhesa Shipping Co SA vs Edmunds[15] remarked:-
>
> "No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."
>
> Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[16] :-
>
> "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"
>
> With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities..."

83. It was incumbent for the Petitioner to provide evidence of the alleged discrimination in violation of Article 27 of *the Constitution* which provides in part as follows:

> (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> .....
>
> 3. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

84. The Court in Federation Of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] KEHC 2099 (KLR) on the right to equality and discrimination opined as follows:

> " ...At this stage, it is important to ask ourselves, 'what is equality and what is freedom from discrimination?' The two terms have been largely defined under Article 27(1) and (2). We have also tried to state a general perspective of what the two words mean.
>
> CEDAW (1979) defines discrimination as;
>
> "Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
>
> And in the case of Jacques Charl Hoffmann Constitution Court of South Africa it was held;

> "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in the society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding, the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim..."

85. The Court continued to state that:

> On the other hand, the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society differ in many respects such as age, ability, education, height size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since *the constitution* can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid. This is in our view what has been accepted in judiciaries as the doctrine of classification which is an integral part of the equal protection clauses in almost all written constitution in the world."

86. The Constitutional Court of South Africa discoursing on this right in the Prinsloo v Van der Linde and Another (CCT4/96) [1997] ZACC 5 opined as follows:

> " 32. In Dworkin's words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.[33] We find support for the approach we advocate in the following passage from the judgment of this Court in The President of the Republic of South Africa and Another v Hugo:
>
> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of *the Constitution* and should not be forgotten or overlooked."

87. Additionally, in State of Kerala and another vs N. M. Thomas and Others Civil Appeal No.1160 of 1974 the Court observed as follows:

> " This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment

or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).

The power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. (General Manager, S. Rly v. Rangachari (1962) 2 SCR 586: AIR 1962 SC 36)...

The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons of things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not be nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

88. In the same way, the Supreme Court in Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR) expounded and guided on this right as follows:

"

"(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

" [49] Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies

on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

(48) Black's Law Dictionary, 10th Edition defines discrimination as "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." However, it must be appreciated that not all cases of distinction amount to discrimination."

89. The superior Court went on further to observe that:

" [50] In equal measure, we adopt the definition of discrimination in the High Court case of Peter K Waweru v Republic [2006] eKLR as follows:

"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, 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 accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification."

90. While the Petitioner made claims to the effect that the 1st Respondent has been discriminating the Judges of Special Courts in the designation of Presiding Judges and denying them allowances, there was no evidence that was tabled to substantiate or demonstrate this allegation. It was thus a bald allegation that was merely thrown at the Court without any corresponding proof. On that account, I find that this aspect of discrimination, the Petitioner did not discharge the burden of proof.

91. On discriminative appointments, the Petitioner argued the 1st Respondent has been perpetuating discrimination in the nomination of judges to the Court of Appeal against Judges on the Special Courts.

92. The 1st Respondent contended that the process of recruitment of Judges of Appeal is strictly guided by *the Constitution* particularly Article 172 (2) and Article 166 (4) of *the Constitution* and also the relevant statutory provisions. It was contended by the respondents that neither *the Constitution* nor the Statute requires setting aside of the specific appointments to be from the Judges of Special Courts in the recruitment of Judges of Court of Appeal.

93. *The Constitution* under Article 166 provides for the appointment of the Chief Justice, Deputy Chief Justice and other Judges. For the appointment to the Court of Appeal, *the Constitution* at Article 166 (4) provides a general guide of persons who may be appointed to be Judges of the Court of Appeal as follows:

> Article 166 (4): 'Each Judge of the Court of Appeal shall be appointed from among persons who have-
>
> a. at least ten years' experience as a Superior Court Judge; or
>
> b. at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
>
> c. held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate to ten years.

94. In addition, *the Constitution* requires under Article 232 (2) that the values and principles of public service apply to:

a) all State organs in both levels of government and

b) all State Corporations

95. The values and principles which must be observed in relation to appointments into public service under Article 232 (1) include: fair competition and merit as the basis of appointments and promotions, affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service, of men and women, the members of all ethnic groups, and persons with disabilities among others.

96. The other general guide that is provided is under Article 73 (2) which requires selection into positions of public leadership to be on the basis of personal integrity, competence and suitability.

97. These requirements are further beefed up by the 1st Schedule to the *Judicial Service Act* which sets out the criteria for evaluation in a way that standardizes the process of evaluation to ensure that every candidate is assessed based on similar factors to ensure objectivity. Part V of the 1st Schedule sets out the criteria for the evaluation of candidates by stating thus:

> Part V – Criteria For Evaluating Qualificationsof Individual Applicants
>
> 13. Criteria for evaluation of qualifications
>
> In determining the qualifications of individual applicants under *the Constitution*, the Commission shall be guided by the following criteria—
>
> (a) professional competence, the elements of which shall include—

(i) intellectual capacity;

(ii) legal judgment;

(iii) diligence;

(iv) substantive and procedural knowledge of the law;

(v) organizational and administrative skills; and

(vi) the ability to work well with a variety of people;

(b) written and oral communication skills, the elements of which shall include—

(i) the ability to communicate orally and in writing;

(ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and

(iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;

(c) integrity, the elements of which shall include—

(i) a demonstrable consistent history of honesty and high moral character in professional and personal life;

(ii) respect for professional duties, arising under the codes of professional and judicial conduct; and

(iii) ability to understand the need to maintain propriety and the appearance of propriety;

(d) fairness, the elements of which shall include—

(i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and

(ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;

(e) good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;

(f) legal and life experience elements of which shall include—

(i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and

(ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of demonstrable interests and cultural backgrounds, and in areas outside the legal field; and

(g) demonstrable commitment to public and community service elements which shall include the extent to which a Judge or Magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.

98. There was no evidence by the Petitioner that the 1st Respondent in recommending the interested parties who happened to be all from the High Court overlooked any of the above criteria in order to favour them as against the other Judges from other Superior Courts. Neither *the Constitution* nor *Judicial Service Act* segregates any Judges whether from the Special Courts or the High Court when it comes being considered for appointment to the Court of Appeal. In fact for candidates who are Superior Court Judges, neither countitution in JSC Act distinguished between Judges of Superior Court who would want to proceed to the Court of Appeal, they are subject to the same criteria of experience, professional competence, integrity, fairness, and a demonstrable commitment to public service. To allow the demarcation or differentiation the suggested by petition is a kin to hearing quotas based on the category of the Courts which is a deviation from the Constitutional and legal requirements and an invitation to sneak in an unconstitutional criteria in recruitment of the Judges of the Court of Appeal. All Judges applying for the position of Judge of Appeal must compete for the positions uniformly as per criteria set out in the Constitutional and the law and best performers picked objectively without introducing discriminative criteria that is not is neither in *the Constitution* or legislation. The demand for any special quota to be set aside for Judges of Special Courts whenever the recruitment of Judges of Court of Appeal is taking place would be unconstitutional; they must compete for the positions available as Judges of superior courts, no positions in the Court of Appeal are reserved for Special Courts or the High Court Judges. Both *the Constitution* and the law has established a merit-based system where a judge's experience, qualifications and integrity among others are what the 1st Respondent must be looking for in a candidate from superior court and not the fact that they come from a specific superior court.

99. There was no evidence that interested parties who were the successful candidates passed the interview just because they were Judges of the High Court. There is no evidence that the candidates who hailed from Special Courts did well but got rejected based on the Courts they belonged to. In the absence of the evidence that the 1st Respondent was biased against any candidate or that it evaluated them differently, then this Petition is merely speculative and lacks merit. This was not a competition between Judges from different courts. Courts but individuals that had applied for those positions and those who outshined their colleagues based on legal criteria that was used to evaluate them were picked and recommended for appointment as Judges of Appeal. It will be a Constitutional deviation and thus unconstitutional to demand that specific quotas be created in the Court of Appeal to be filled by Judges from Special Courts in recruitment of Judges of that Court. Had the drafters of this Constitution found this necessary, they would have said so in no uncertain terms. To purport to do so through the Court is tantamount to asking this Court to amend *the Constitution* through the backdoor.

100. The other issue that was raised concerned the appointment of Presiding Judges of Courts. The Petitioner argued that Judges of Special Courts are being discriminated against as they do not get appointments as Presiding Judges.

101. Firstly, it is necessary to establish the legal basis for the appointment of Presiding Judges. Parliament enacted the High Court (Organization and Administration Act) Cap 8 C whose preamble states that it is:

> "An Act of Parliament to give effect to Article 165 (1)(a) and (b) of *the Constitution*; to provide for the organization and administration of the High Court of Kenya and for connected purposes"

102. Article 165 (1) establishes the High Court while 165 (1) (b) directs that it shall be organized and administered in a manner prescribed by an Act of Parliament.

103. The Act that specifies the organization and the manner of the administration of the High Court is thus the High Court (Organization and Administration Act) Cap. 8C.

104. On what administrative function means, Section 2 of the High Court (organization and Administrative Act) Cap 8C provides:

> "administrative function" in relation to the Chief Justice, Principal Judge, presiding judge or a judge means the discharge of non-judicial functions assigned under this or other law, which are necessary to facilitate the exercise of the judicial authority by the Court;

105. Which essentially means that such functions must assigned either under the said Act or any other law, hence cannot therefore be assumed or implied. The law assigning the function must be identified as assigning the functions of administration.

'Court' as used in the Act 'means the High Court of Kenya established by Article 165 of *the Constitution*.'

106. Section 12 (2) specifies the composition of a Court Station as follows:

A station of the Court shall consist of—

a. a Presiding Judge, appointed by the Chief Justice from amongst the judges of the Court, who shall be head of the station;

(b) such number of judges as the Chief Justice may, in consultation with the Principal Judge, determine;

(c) a Deputy Registrar who shall be responsible to the Presiding Judge in the discharge of the functions of the office; and

(d) officers appointed under Section 24.

4. The filing of appeals, bail applications, and references from the subordinate courts, tribunals and other bodies or authorities within the regions designated by the Chief Justice under the Rules, shall be made at the High Court station with the corresponding supervisory jurisdiction.

107. Reading this provision, it requires the Chief Justice to appoint the Presiding Judge from among the Judges of the Court (Section 2 defines 'Court' to mean High Court). Such Judge becomes the 'Presiding Judge of the High Court and sub-section 3 requires that the the filing of appeals, bail applications, and references from subordinate courts, tribunals and other bodies or authorities within regions designated by the Chief Justice under the Rules, shall be made at the High Court Station with corresponding jurisdiction.

108. The phrase 'Presiding Judge' is thus defined under Section 2 to mean:

> " mean a Judge presiding over a court station or a division appointed or designated by the Chief Justice under Section 8 or 14"

109. Having regard therefore to the law, the Presiding Judges of the High Court Station can only be Judges of that Court pursuant to the High Court (Organization & Administration Act) Cap 8C. It should be appreciated that it is *the Constitution* that directed Parliament under Article 165 (1) (b) to enact a law providing for how the High Court shall be administered and organized and thus the role of administering High Court Stations cannot under both *the Constitution* and the Act be assigned to any other person other than the Judges of the Court. To deal with that matter otherwise would not only be unconstitutional but also a direct contravention of the provisions of the Act.

110. The *High Court (Organization and Administration) Act*, Cap 8C thus requires, and reasonably so, that Judges of the Court (meaning the High Court) be the Presiding Judges of that Court.

111. The Petitioner has not challenged or demonstrated the unconstitutionality of the provision requiring the Chief Justice to appoint the Presiding Judges from the Judges of the Court ('Court' means High Court per definition in Section 2 of the *High Court (Organization and Administration) Act*). Specialized Courts Judges do not fall within that definition.

112. In fact, looking at both the *Environment and Land Court Act*, Section 6 only provides for only one Presiding Judge of that Court. It states:

Presiding Judge

1. The Presiding Judge shall be elected in accordance with Article 165(2) of *the Constitution*.
2. The Presiding Judge shall hold office for a non-renewable term of five years.
3. The Presiding Judge shall have supervisory powers over the Court and shall report to the Chief Justice.

(4) In the absence of the Presiding Judge or in the event of a vacancy in the office of the Presiding Judge, the judges of the Court may elect any other Judge of the Court to exercise the functions of the Presiding Judge.

113. 'Court' under Section 2 of the Environment and Court Act means the Environment and Land Court established under Section 4 pursuant to Article 162(2)(b). It is thus not the High Court for which Section 8E and 14 would apply.

114. Under the *Employment and Labour Relations Court Act*, Cap 8E; the came case applies. The Act provides for the position of one principal Judge and other Judges; it does not create the positions of Presiding Judges. It states:

Composition of the Court

1. The Court shall consist of —

a. the Principal Judge; and

b. such number of Judges as may be determined and recruited by the Judicial Service Commission and appointed in accordance with Article 166(1) of *the Constitution*.

2. The Principal Judge shall be elected in accordance with the procedure prescribed in Article 165(2) of *the Constitution*.

3. The Principal Judge shall hold office for a term of not more than five years and shall be eligible for re-election for one further term of five years.

(4) The Principal Judge shall have supervisory powers over the Court and shall be answerable to the Chief Justice.

(5) In the absence of the Principal Judge or in the event of a vacancy in the office of the Principal Judge, the Judges of the Court may elect any other Judge to have and exercise and perform the powers and functions of the Principal Judge, and who shall be deemed to be the Principal Judge.

115. Court under this Act is not the High Court. Under Section 2, "Court" means the Employment and Labour Relations Court established under Section 4.

116. As was held in Peter K. Waweru -Vs-Republic (2006) eKLR which cited Black's Law Dictionary 11th Edition;

> " Discrimination" in constitutional law the effect of a stature or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.
>
> A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

117. Further in Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR the Court explained:

> " Discrimination... will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."

118. Equal treatment does not mean identical treatment in all the circumstances. In fact, not all the High Court Judges end up becoming Presiding Judges. A Judge of a Court of equal status is not a Judge of the High Court. The Supreme Court in R v Karisa Chengo & 2 others (Petition 5 of 2015) 2017 KESC (KLR) 26th May, 2017 acknowledged thus:

> " 78 ....If indeed *the Constitution* intended that Judges should swear oaths of allegiance to all superior Courts in general, then it would have expressly stated so; and if a common service-arrangement between the High Court and the specialized Courts existed, then it would be possible, by dint of sheer administrative directions, to designate Judges in the latter category, from time to time, to serve, say in the Family, Criminal, Commercial, or Civil Division, of the High Court.

79. It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed..."

119. Hence a reasonable distinction exists between the High Court and the Specialized Courts. The contention that the failure to appoint the Judges of Special Court to be Presiding Judges of High Court stations is thus fallacious from both Constitutional and a Statutory viewpoint. The supervisory jurisdiction which gives the High Court the responsibility of directing, guiding and where necessary review administrative decisions concerning the fair administration of justice within its areas of administrative jurisdiction is not a shared responsibility with the Specialized Courts. The High Court is vested with the Constitutional and statutory responsibility to support, guide and supervise subordinate courts within its realm.

120. A reading of Article 165 (6) & 7 reveals that it is the High Court has oversight function over subordinate courts, other persons or bodies exercising judicial or quasi-judicial functions, a fact which reinforced by Section 12(4) of High Court Organization and Administrative Act.

121. The exercise of this supervisory role gives the High Court the mandate oversees all the processes, administrative or judicial to ensure the protection of the administration of justice. This extends to monitoring the operations of the subordinate courts within its territorial jurisdiction so as to ensure there is proper case management hence it is not just judicial responsibility but a combination of both judicial and administrative aspects that have an impact on the fair administration of justice. That explains why the drafters of *the Constitution* generously couched Article 165 (7) which gave the High Court extensive latitude to make any order or give any direction it considers appropriate for purposes of ensuring the fair administration of justice of legislative went ahead to reinforce that through Section 12 (1) of High Court (Organization and Administrative) Act.

122. The fact that therefore that the High Court Organization and Administration Act, 2015 designated that Presiding Judges of High Court Stations be drawn from among the Judges appointed to the High Court does not therefore translate to discrimination as it fits within the constitutional scheme that recognizes that the High Court has a wider mandate to superintend over all Courts below it, including over any person, body or authority exercising a judicial or quasi-judicial function falling within the High Court's territorial realm. Given therefore the High Court's overarching superintendence role, the differential treatment cannot be said to violate equality rights under *the Constitution* as this role originates from *the Constitution* itself.

123. Indeed, save for one position that is provided for the Presiding Judge of the Environment and Land Court and the Principal Judge for the Employment and Labour Relations Court no other Presiding Judge positions have been created in the Statutes establishing the Special Courts. It is only the High Court Organization and Administrative structure that provides for those positions in consonance with the Constitutional design.

124. Collegiality of Judges and comity of Courts is important but this can only be nurtured within the Constitutional boundaries or the legal framework that has been put in place. The operational limits dictated by *the Constitution* or the law must always be respected. As was held in Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] KEHC 9435 (KLR):

"

> "7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality.... Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and Another where the court held as follows:-
>
> "the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"[20]

125. The discretionary authority vested on the Chief Justice to assign Presiding Judges for High Court Stations or Divisions has to be exercised within the limitations of *the Constitution* and the legislation in place as pointed out in the foregoing.

126. In the circumstances, this Court finds no merit in this Petition and is hereby dismissed in its entirety.

127. I make no orders as to costs since this is a public interest litigation.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.**

**.....**

**L N MUGAMBI**

**JUDGE**

*Constitutional Petition No. E377 of 2022 – Judgment Page 22 of 22*