



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E361 OF 2020**

**IN THE MATTER OF : ARTICLES 2(1), 2(2), 2(4), 3(1), 10(1), 10(2), 19, 20(1), 20(2), 20(3),  
(b), 21(1), 22(1), 23(1), 24(1), 165(b), 258(1) & 259 OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF : THE ALLEGED CONTRAVENTION OF ARTICLES 25(c), 27(1),  
27(2), 27(4), 28, 29(a)(b)(d), 31, 35, 40(1)(3), 47(1)(2), 49(1)(a)(c)(d)(h), 50(2 & 4),**

**51, 73, 73(2)(b) and 75(1) OF THE CONSTITUTION OF KENYA;**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURE RULES, AS READ  
TOGETHER WITH CHAPTER FOUR OF THE CONSTITUTION OF KENYA);**

**IN THE MATTER OF: THE ALLEGED VIOLATION BY THE DIRECTOR OF CRIMINAL  
INVESTIGATIONS AND THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE,  
CONTRAVENTION OF THE CRIMINAL PROCEDURE CODE CAP 75, LAWS OF KENYA,  
NATIONAL POLICE SERVICE ACT CAP 84 AND THE NATIONAL POLICE STANDING ORDERS;**

**IN THE MATTER OF: THE ALLEGED VIOLATION BY THE DIRECTOR OF PUBLIC  
PROSECUTIONS, THE OFFICE OF THE DIRECTOR OF PUBLIC OF PROSECUTIONS**

**ACT NO.2 OF 2013, THE CODE OF CONDUCT AND ETHICS FOR PUBLIC**

**PROSECUTORS REVISED, 2015 AND THE GUIDELINES ON THE**

**DECISION TO CHARGE 2019;**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF SECTION**

**4(2, 3 & 4) OF THE FAIR ADMINISTRATION ACT;**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF THE PETITIONER RIGHTS  
UNDER SECTION 45 OF THE LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA;**

IN THE MATTER OF: THE EVIDENCE ACT CAP 80, LAWS OF KENYA;

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE

ACTIONS ACT OF KENYA NO. 4 OF 2015;

-BETWEEN-

SARAH WAIRIMU KAMOTHO.....PETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

IN THE HIGH COURT, CRIMINAL DIVISION AT

MILIMANI HIGH COURT IN NAIROBI.....5<sup>TH</sup> RESPONDENT

BERNARD COHEN.....1<sup>ST</sup> INTERESTED PARTY

SHARON VAN TIENHOVEN-COHEN.....2<sup>ND</sup> INTERESTED PARTY

GABRIELE HANAH VAN STRATEN-COHEN.....3<sup>RD</sup> INTERESTED PARTY

RULING

**PETITION**

1. The Petitioner through a Petition dated 3<sup>rd</sup> November, 2020 and duly filed on 6<sup>th</sup> November 2020 supported by an affidavit sworn by Sarah Wairimu Kamotho Cohen on 3<sup>rd</sup> November 2020 prays for:-

*a) A Declaration that the Petitioner's right to a fair trial as guaranteed under Article 50 of the Constitution of Kenya has been violated, and infringed upon by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein.*

*b) A declaration that the Petitioner's right to property under Article 40 of the Constitution of Kenya has been violated and infringed upon by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent herein.*

*c) A declaration that the Petitioner's rights under Article 27, 28, 29, 31, 35, 47, 49 and 51 has been violated and infringed upon by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein.*

*d) An order of prohibition do issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and/or any other authority, body or persons from prosecuting or continuing to prosecute the Petitioner in High Court Criminal Case No. 60 of 2020, Republic vs. Sarah Wairimu Kamotho Cohen, or in any other matter relating to the suspected murder of the late Tob Chichou Cohen.*

*e) An order of prohibition do issue to the 5<sup>th</sup> Respondent from hearing or continuing to hear High Court Criminal Case No. 60 of 2020, Republic vs. Sarah Wairimu Kamotho Cohen as it relates to the Petitioner herein.*

*f) An order do issue that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do take an inventory and account of all property that was taken over by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 10<sup>th</sup> September, 2019, which inventory shall be witnessed by the Deputy Registrar of this Honourable Court.*

*g) An order do issue directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to hand over possession of the Petitioner's jointly owned and matrimonial property, situate on L. R. No. 2951/449 at Farasi Lane, Mugumoini close, Lower Kabete and all the contents therein as at 10<sup>th</sup> September 2019, to the Petitioner unconditionally.*

*h) An order do issue directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to hand over the two pet dogs, namely ‘Major’ and ‘Snow’, being a cross Labrador/Rottweiler breed and a cross Rottweiler/Doberman Pincher, respectively to the Petitioner unconditionally.*

*i) An order do issue compelling the 4<sup>th</sup> Respondent to advise the Registrar of Births and Deaths, Department of Civil registration to issue a Death Certificate with the date indicated as “unknown” to the Petitioner.*

*j) A declaration that the Petitioner is entitled to general, exemplary and punitive damages against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents as may be assessed by this Honourable Court for the unjustified physical and psychological suffering.*

*k) An award for compensation against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents as may be assessed by this Honourable Court for gross violations of the Petitioner’s fundamental rights and freedoms as specified in this Petition, of not less than Ksh.500 million.*

*l) An award of exemplary, aggravated and or punitive damages for blatant, callous, oppressive and high handed violation of the Petitioner’s constitutional rights and illegal conduct by employees, officers, servants and/or agents of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.*

*m) An award of exemplary, aggravated and or punitive damages against the individual employees, officers, servants and/or agents of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for the blatant, callous, oppressive and high handed violation of the Petitioner’s constitutional rights.*

*n) Interest on the general, exemplary, aggravated, and or punitive, and special damages from the date of filing suit.*

*o) The costs of and incidental to the Petition be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in any event.*

*p) Such further or other relief as the Honourable Constitutional Court may deem fit, just and expedient to grant.*

#### **THE PETITIONER’S APPLICATION**

2. The Petitioner through an application dated 3<sup>rd</sup> November, 2020, seeks the following orders:-

*a) Spent*

*b) THAT pending the hearing and determination, inter partes, of this application, an order be issued staying the criminal proceedings against the Petitioner in the High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another.*

*c) THAT pending hearing and determination, inter partes, of the application, an order be issued calling for the Court file in High Court Criminal Case No. 60 of 2019 Republic -vs- Sarah Wairimu Kamotho Cohen and Another to this division.*

*d) THAT this Honourable Court be pleased to certify that the Petition herein raises substantial questions of constitutional law, and forthwith refer the case to His Lordship the Honourable Chief Justice, for appointment of a bench of an uneven number of Judges being not less than three (3) judges of the High court, pursuant to Article 165(4) of the Constitution of Kenya 2010.*

*e) THAT pending the hearing and determination of the Petition herein, an order be issued staying the proceedings against the Petitioner in High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another.*

*f) THAT pending the hearing and determination of the Petition herein, an order be issued calling for the court file in High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another to this division;*

*g) THAT pending the hearing and determination of the Petition herein, a mandatory injunction do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to take an inventory in the presence of the Petitioner and Deputy Registrar of the Honourable Court, to provide to the Honourable Court a comprehensive list of all the fixtures, movables, motor vehicles and contents howsoever described in and upon L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete, being the jointly owned matrimonial home of the Petitioner and the deceased, to avoid theft, vandalism, further wastage and destruction due to neglect and lack of maintenance while in the possession of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents and officers working under their control and command.*

*h) THAT pending hearing and determination of the Petition herein, a mandatory injunction do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to release L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete, to the possession and exclusive control of the Petitioner, being the jointly owned matrimonial home of the Petitioner and the deceased, to the Petitioner in line with the authority of In re Estate of Stephen Kerosi Makori (deceased) (2018) eKLR, where it was held, that, pending the determination of succession proceedings a surviving spouse retains possession of matrimonial property. In the Petitioner’s case for the eventual distribution of the 50% share belonging to the Estate of the Deceased, to avoid further wastage and destruction due to neglect, lack of maintenance and possible theft and vandalism while in possession of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and officers working under their control and command.*

i) THAT pending hearing and determination of the Petition herein, a mandatory injunction do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents to release motor vehicle, Porsche Cayenne Reg. No. KBW 171 G, owned by and registered in the name of the Petitioner, to the Petitioner, to avoid further wastage and destruction due to lack of maintenance, possible theft and vandalism while in possession the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and officers working under their control and command.

j) THAT pending the hearing and determination of the Petition herein, a mandatory injunction do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to authorize the immediate release of the two pet dogs, namely 'Major' and 'Snow', being a cross Labrador/Rottweiler breed and a cross Rottweiler/Doberman Pincher, respectively, being held at Kenya Society for the Protection and Care of Animals (hereinafter KSPCA) in Karen, to the exclusive possession and control of the Petitioner.

k) THAT pending hearing and determination of the Petition herein, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do jointly and severally provide an undertaking or banker's guarantee for costs and damages for the ongoing waste, damage, neglect and possible vandalism and theft to the jointly owned and matrimonial property of the Petitioner being L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete, and all its contents to the tune of Kshs. 500,000,000/=.

l) THAT pending the hearing and determination of this Petition, the 4<sup>th</sup> Respondent be restrained from advising the Registrar of Births and Deaths, Department of Civil Registration to issue a Death Certificate to the siblings of the deceased and or any other person.

m) THAT the costs of the application be awarded to the Petitioner.

3. The Application is supported further by the affidavit of **Sarah Wairimu Kamotho Cohen** of even date and a supplementary affidavit dated 19<sup>th</sup> November, 2020.

#### **THE PETITIONER'S CASE**

4. The gist of the Petitioner's case is that she is the 1<sup>st</sup> Accused in **High Court Criminal Case No. 60 of 2020, Republic –vs- Sarah Wairimu Kamotho Cohen and Peter Karanja** where she has been charged with the murder of her late husband Tob Chichou Cohen (herein referred to as the deceased).

5. The Petitioner has also adumbrated how contrary to the presumption of innocence until proven guilty as per **Article 50(2) (a) of the Constitution**, the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in undertaking investigations in her case was dramatic, unduly and prejudicially sensationalized and very often accompanied with press statements and leaks to the media on the nature of investigations.

6. The Petitioner also agitated on the allegation that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were publicly dictating to the 3<sup>rd</sup> Respondent the timing of and decision to prosecute in violation of **Article 157 of the Constitution**.

7. The applicant aver that internal directions issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with respect to the conduct of criminal prosecutions to their officers proves beyond doubt that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents took responsibility in violation of her rights to fair trial as provided under **Articles 49 and 50 of the Constitution**, while the 3<sup>rd</sup> Respondent bore equal responsibility for failing to exercise his constitutional authority over the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to ensure strict compliance of the constitution.

8. The Petitioner relies on **Machakos High Court Petition No. 90 of 2020**. In the matter of **Eng. Geoffrey K. Sang** where the court declared the Director of Criminal Investigations has no power and authority to institute criminal proceedings before a court of law without prior consent of the Director of Public Prosecution and that it is on this background against which the charge of murder was preferred against her by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents without an iota of evidence being supplied to her or her advocates.

9. It is further averred as a result of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' actions, there has been a blatant, continued and systematic violations of the Petitioner's constitutional and fundamental rights inter alia, **Articles 25(c), 27(1), 27(2), 27(4), 28, 29(a)(b)(d), 31, 35, 40(1)(3), 47(1) (2), 49(1)(a)(c)(d)(h), 50(2 & 4) of the Constitution** rendering it impossible for Petitioner to prepare her defense or have a fair and impartial hearing in the circumstances or the future.

10. It is on the basis of the above-mentioned alleged constitutional violations that the Petitioner seeks an order of prohibition against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, prohibiting them from prosecuting or continuing to prosecute her in the **High Court Criminal Case No. 60 of 2020, Republic –vs- Sarah Wairimu Kamotho Cohen** or in any other case for the said offence or related offences.

11. The Petitioner also avers that the deceased and her jointly owned all that property known as **L. R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete**, which property was purchased on 7<sup>th</sup> June, 2000 and by mutual agreement, registered in the deceased's name, and thereafter held in trust by him as their matrimonial home. It is further contended that in the year 2006, the Petitioner and the deceased began developing the property and erected their matrimonial home where they resided with their daughter.

12. It is urged that in violation of **Articles 35, 40 and 50 of the Constitution** and in abuse of the powers of their state offices, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have refused to furnish the Petitioner with and to the Honourable Court, a comprehensive inventory of all the contents / items seized at the petitioner's home known as **L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete**, despite having taken over possessions of the said home and have also refused to hand over possession of the matrimonial home in the pretext that it is a crime scene.

13. The Petitioner has also stated in violation of **Articles 40(3) and 73(2) of the Constitution** and in abuse of the powers of their State Offices, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents maliciously took over possession of the Petitioner's personal motor vehicle **Porsche Cayenne Reg No. KBW 171 G**, under the false pretense that the same was in connection with the crime.

14. The Petitioner further avers, in violation of **Article 73(2)(b) of the Constitution** and in abuse of the powers of their State Offices, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, obstructed the progression of **Succession Cause No. 1546 of 2019**, in which the Petitioner through an Application dated 16<sup>th</sup> December, 2019, sought orders for, inter alia;- restraining the 1<sup>st</sup> and 3<sup>rd</sup> Respondents from howsoever, selling, transferring, or in any manner dealing with the Deceased's Estate by refusing to provide an undertaking to the Petitioner or succession court that they would not interfere with, or hand over the Petitioner's personal and jointly owned matrimonial property to the siblings of the deceased.

15. The Petitioner also asserts that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents embarked on a false media campaign in various newspapers that portrayed her as a criminal overriding her presumption of innocence before being proven guilty.

16. In a nutshell, the Petitioner avers that as a result of the violation of **Articles 25(c), 27(1), 27(2), 27(4), 28, 29(a)(b)(d), 31, 35, 40(1)(3), 47(1)(2), 49(1)(a)(c)(d)(h), 50(2 & 4), 51, 73, 73(2)(b) and 75(1) of the Constitution** by the Respondents the filing of this suit has been deemed a necessity to afford her a fair trial.

#### **THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' CASE**

17. The **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents** filed a **preliminary objection** dated **27<sup>th</sup> November, 2020**, raising the issue of jurisdiction and averred that this court lacks jurisdiction to hear and determine the petition pursuant to **Articles 23 and 165 of the Constitution** on grounds that;

*i. The petition is misconceived and an abuse of the court process.*

*ii. The Petition raises matters that are subjudice and res-judicata.*

*iii. This honourable court has no jurisdiction to grant an order in a matter that is pending before a court of concurrent jurisdiction.*

*iv. This honourable court has no jurisdiction to grant reliefs and orders sought in a matter pending before a court of competent and concurrent jurisdiction.*

18. The **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents** also filed a Replying affidavit dated **27<sup>th</sup> November, 2020** sworn by one **No. 236730 IP. Maxwell Otieno**, the investigating officer in **High Court Criminal Case No. 60 of 2020 Republic –vs- Sarah Wairimu Cohen and Another**.

19. In the reply, the respondents aver that the deceased Tob Cohen was a successful businessman from the Kingdom of Netherlands and had lived in Kenya for over **30 years** holding various prestigious positions including that of CEO of Philips Group of Companies before meeting his unfortunate and gruesome death at his residence located along Farasi Lane, in Mungomoini Close, where he was found inside an underground water tank.

20. It is further deponed that on the **30<sup>th</sup> July, 2019** when the embassy of the Kingdom of Netherlands went to the Kileleshwa Police Station to report the disappearance of Mr. Tob Cohen, they were referred to the Directorate of Criminal Investigations, Headquarters.

21. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that **Section 35 of the National Police Service Act No. 11A of 2011**, provides for the functions of the Director of Criminal Investigations as follows;-

***The Directorate shall—***

***(a) collect and provide criminal intelligence;***

***(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;***

***(c) maintain law and order;***

***(d) detect and prevent crime;***

***(e) apprehend offenders;***

***(f) maintain criminal records;***

***(g) conduct forensic analysis;***

***(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;***

*(i) co-ordinate country Interpol Affairs;*

*(j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and*

*(k) perform any other function conferred on it by any other written law.*

22. The Respondents state that they commenced investigations and established that the deceased Tob Cohen was last confirmed to be at his residence at around 2:30am on the material night of the 19<sup>th</sup> / 20<sup>th</sup> July, 2019, whilst in the company of the Petitioner.

23. The Respondents further aver that it is that point that the Petitioner became a prime suspect and was arraigned before the **High Court at Nairobi on the charge of Murder contrary to Section 203** as read with **Section 204 of the Penal Code cap 63 Laws of Kenya**.

24. The Respondents contend that on the **18<sup>th</sup> September, 2019**, the post mortem examination was conducted on the body of the deceased which revealed significant injuries and broken bones and the cause of death was established to be due to multiple injuries due to blunt force trauma.

25. It is asserted that the manner in which the deceased met his death was one of premeditated intention to kill him and the fact that the Petitioner and her accomplices threw deceased's body in a water tank in an attempt to cover up the incident clearly indicates a guilty mind.

26. It is urged in general that all the issues raised in the petitioner's application were being handled by the concurrent Courts with competent jurisdiction, some of which had already been ruled on, thus **(Succession cause no. 1546 of 2019 through a ruling dated 2<sup>nd</sup> March, 2020 delivered by Lady Justice Achode on her inheritance property issues) and High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Peter Karanja** which is an ongoing criminal trial pending determination by the High Court, in Criminal Division.

27. The Respondents aver that the Petitioner's application and Petition is aimed at deliberately delaying her criminal case and that the issues in the Petitioner's Application and Petition could be heard and determined by the trial court which has been conferred with jurisdiction as per **Article 23 of the Constitution**.

28. It is Respondents contention that the orders and reliefs sought in the application and petition are untenable because the petitioner seeks to oust the original jurisdiction of the trial Court which is a court of competent and concurrent jurisdiction.

29. It is therefore stated that the Petitioner's application does not raise any substantial questions of law to warrant for an appointment of an uneven number of judges to hear her Petition.

30. The Respondents therefore pray that the Petitioner's Notice of Motion Application and petition be dismissed in its entirety with costs.

#### **THE 4<sup>TH</sup> AND 5<sup>TH</sup> RESPONDENT S' CASE**

31. The **4<sup>th</sup> and 5<sup>th</sup> Respondent's** filed their grounds of opposition dated **26<sup>th</sup> November, 2020**, opposing the Petitioner's application on grounds that the same has not met the threshold to be referred to the Chief Justice under **Article 165(4) of the Constitution**.

32. It is averred that the issues and facts raised are not so complex and difficult to the extent that they can be said to raise a 'substantial question of law worthy of being heard by a three judge bench and that the grant of such orders would amount to an abuse of the Court process and a violation of **Article 159(2) (6) of the Constitution**.

33. The Respondents contend that the applicant has not established a prima facie case with a likelihood of success to warrant grant of the stay orders.

34. It is stated further that the Petitioner's application is frivolous, bad in law, misconceived and incompetent and for those reasons it ought to be dismissed with costs.

#### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> INTERESTED PARTIES CASE**

35. The **1<sup>st</sup> and 2<sup>nd</sup> Interested Parties** filed grounds of opposition dated **7<sup>th</sup> December, 2020**, in support of the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents** preliminary objection dated **27<sup>th</sup> November, 2020**.

36. It is urged that the Petition and its accompanying notice of motion application is wholly misconceived, frivolous, vexatious and a gross abuse of the court process.

37. It is further stated that the Petitioner through her Petition and application offends the principles of res judicata in that Lady Justice S. N. Mutuku vide a Ruling on a Bail Application by the Petitioner herein delivered on 11<sup>th</sup> October, 2019 in **Nairobi HCCr.C No. 60 of 2019: Republic versus Sarah Wairimu Kamotho** (Annexure MO-6 of the 1st , 2nd and 3rd Respondents' Replying Affidavit dated 27th November, 2020) directed as follows:-

**“iv. The accused shall not go any where near the matrimonial home being Plot LR Number 2951/449 along Farasi Lane in Mugomoini Close Nairobi ”**

Lady Justice Achode in *Nairobi HCSC No. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen* whilst striking out the Petitioner's Application dated 17<sup>th</sup> December, 2019 which sought an injunction restraining the sale, transfer or in any manner dealing with the deceased's assets for being incompetent and incurably defective held as follows:

**“29.While this court is clothed with jurisdiction with regard to property constituting the estates of a deceased person in testate and intestate succession, the jurisdiction does not extend to the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, in the conduct of their investigative powers conferred by law, should deal with the property of a deceased person..... Once the Respondents have concluded their investigations the property will revert to the person entitled to it under the law of succession ...”** (Emphasis added)

38. It is asserted that the Petitioner has not preferred any appeal to the two rulings in the Court of Appeal which is court properly clothed with jurisdiction to hear and overturn or uphold the said rulings.

39. The Intended Parties further argue that the Petitioner through her Petition and Application offends the principles of *res subjudice* in the sense that she sought to litigate on matters directly and substantially in issue in *Nairobi High Court Criminal Case No. 60 of 2019 Republic –vs- Sarah Wairimu Kamotho Cohen and Peter Karanja and Nairobi High Court Succession cause no. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen* which were instituted prior to the institution of this instant suit.

40. It is contended that this Court cannot purport to sit as a supervisor or superintendent of a concurrent court with equal status and jurisdiction.

41. In view whereof the interested parties pray that the preliminary objection dated 27<sup>th</sup> November, 2020 be upheld and that the petitioner's petition and application herein be dismissed with costs to the Respondents and interested parties.

#### **THE PETITIONER/APPLICANT'S SUBMISSIONS**

42. The Petitioner in her submissions dated 18<sup>th</sup> January, 2021, the Petitioners with respects to the issue of whether the petition is misconceived, an abuse of the court process and whether this Honourable Court has the jurisdiction to hear and determine the matter averred that **Article 165 (3) (a) and (b) of the Constitution of Kenya** bestows upon the High Court unlimited original jurisdiction in criminal and civil matters and the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

43. The Petitioner aver that the Honourable Chief Justice, in establishing the Constitutional and Human Rights Division did not create a Constitutional Court capable of supervising the High Court, but rather that the creation of the Division was merely administrative in nature and for purpose of efficient disposal of cases and management of the cause list. As such, the High Court, Constitutional and Human Rights Division, like any other Division of the High Court under **Article 165(6) of the Constitution of Kenya** has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court, which, under **Article 162 (1) of the Constitution**, consists of the Supreme Court, the Court of Appeal, the High Court and courts of equal status, that is, the Employment and Labour Relations Court and the Environment and Land Court.

44. The Petitioner placed reliance on this proposition in the decision of the Court of Appeal case of *Peter Nganga Muiruri v. Credit Bank Limited & 2 Others [2008] eKLR*, where the appellate court opined;

**“Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them.”**

45. The Petitioner argue that the Respondents in making their submissions failed to disclose to this Honourable Court, that both the High Court Criminal Division and the High Court, Family Division have pronounced that they do not have jurisdiction to determine the issues which are raised by the Petitioner for determination in the instant suit and have further pronounced that theirs is not the right forum in which to canvas the issues raised by the Petitioner.

46. The Petitioner sought to rely in a Ruling dated 16<sup>th</sup> January, 2020 delivered in the *High Court Criminal Case No. 60 of 2019, Republic vs, Sarah Wairimu Kamotho Cohen and Peter Karanja*, on the Petitioner's application dated 12<sup>th</sup> November, 2019, where Honourable Justice Mutuku held in part;

**“This court is not clothed with the jurisdiction to determine who owns and who does not own the property and whatever is in that property.**

**“Once the forensic examination it is my belief that it may not be necessary to have the police at the premises unless for some reasonable course this becomes necessary with the authority of the court. This court is not able to grant this prayer until it is satisfied itself that doing so will not compromise fair trial in this matter or infringe on rights of other parties. For the same reason that this court lacks jurisdiction to grant some of the prayers sought”. It is noteworthy, the application touched on the deceased property L.R. No. 2951/449, at Farasi Lane, Mugomoini Close, Lower Kabete, which was also a crime scene. (Emphasis**

added)

47. The applicant also referred to a **Succession Cause No. 1546 of 2019**, where, in the application dated 16<sup>th</sup> January, 2020, the court held in part;

***“From the ruling of Mutuku J sitting in the Criminal Court it is evident that as at the date of the ruling, the suit property was still secured as a scene of crime. While this court is clothed with jurisdiction with regard to property constituting the estates of a deceased person in testate and intestate succession, the jurisdiction does not extend to the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, in the conduct of their investigative powers conferred by law, should deal with the property of a deceased person. As stated by Mutuku J, the forensic examination of the scene of crime is not in perpetuity. Once the Respondents have concluded their investigations, the property will revert to the person entitled to it under the law of succession.”***

48. The Petitioner’s averment is that it is on these grounds that the right forum on ventilating issues with respect to the violations of the petitioner’s right to property as per **Article 40 of the Constitution** justified the filing of the instant Petition.

49. The Petitioner submits that it cannot be said that identical claims were raised by the Petitioner which were substantively determined on merit. It is urged that the Petitioner had raised substantial questions as to the violation of her constitutional rights in the Petition dated 3<sup>rd</sup> November, 2020, the issues of which have not been heard or determined by a court of competent jurisdiction, so as to qualify to be barred by the doctrine of *res judicata*.

50. In addition it is contended that the questions raised on the constitutional violations were not substantively determined by any other Court and are therefore not *res subjudice*.

51. The Petitioner pray that the preliminary objection dated 27<sup>th</sup> November, 2020 be dismissed.

#### **THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS’ SUBMISSIONS**

52. The **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents** in submissions dated 10<sup>th</sup> December, 2020, submit with respect to the issue of whether this Honourable Court has jurisdiction to issue a mandatory injunction against a court of concurrent and competent jurisdiction that the same would amount to usurping the functions of the trial court which equally has jurisdiction to grant similar orders.

53. In support of their proposition they place reliance in the case of ***Uwe Meixner & another vs Attorney General (2005) eKLR***.

54. With respect to the issue of whether this Honorable Court can usurp and divest the original jurisdiction of a court with concurrent jurisdiction, the Respondents rely on the case of ***S A J VS A O G & 2 others (2013) e KLR***, where the court stated;

***“From a perusal of the relevant files, it is clear to us that the petition is yet to be determined and the parties have not exhausted the forum accorded to them by the law. The Court of Appeal ought to have referred the matter back to the High Court for the determination of the questions it flagged as matters of general public importance.”***

***“If this court were to consider the matters raised, we would not be providing our further input, but merely undermining the role of the other courts, and encroaching on the unlimited original jurisdiction of the High Court, which is provided for under Article 165 (3) of the constitution”*** (Emphasis added)

55. It is argued that the trial court that has long been seized with the matter, has had the advantage of assessing the facts and legal arguments placed before it. It is stated that the trial Court, just as the court herein has been established under **Article 165 (3) (b) of the Constitution** and has the jurisdiction to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*; and therefore the trial court is vested with the jurisdiction to grant the prayers sought in the Petition.

56. The Respondents in addition, with respect to whether this Honorable Court established as the Constitutional and Human Rights Division has the jurisdiction to superintend, guide, direct, shepherd, mend the mistakes of other High Courts in Kenya, they relied on the case of ***Robert Mwangi vs Shepherd Catering Limited & Another (2012) eKLR*** where it was stated as follows;

***“I do not know how often and for how long this has to be repeated: that the Constitutional and Human Rights Division of the High Court is just an administrative division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court”*** (Emphasis added)

*The Court also referred to the case of Philip Kipchirchir Moi vs Attorney General & Another Petition No. 65 of 2012, where the court held:*

***“I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.”*** (Emphasis mine)

57. The Respondents therefore urge that it is for this reason that this Court lacks concurrent jurisdiction and supervisory powers to the trial

courts.

58. In addition and with respect to the issue of whether this Honorable court has the jurisdiction to call for and examine the proceedings of a court of concurrent jurisdiction, in **High Court Criminal case 60 of 2019** it is contended that **Article 165(7) of the Constitution** divests powers to the High Court to recall proceedings from any subordinate court but not another division of the high court with concurrent and equal jurisdiction.

59. The gist of submissions by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is that all High Courts are equal in power and status regardless of the divisions as per **Article 165 of the Constitution** and sought that the preliminary objection to be allowed.

#### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> INTERESTED PARTIES SUBMISSIONS**

60. The **1<sup>st</sup> and 2<sup>nd</sup> interested parties** in support of the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents** preliminary objection reiterated their grounds of support and averred on the issue of Whether the matter offends the well laid out principles of the Doctrine of Res judicata and Sub judice, that **Lady Justice S. N. Mutuku** vide a Ruling on a Bail Application by the Petitioner herein, delivered on **11<sup>th</sup> October, 2019** in **Nairobi HCCr.C No. 60 of 2019: Republic versus Sarah Wairimu Kamotho (Annexure MO-6 of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Replying Affidavit dated 27<sup>th</sup> November, 2020)** directed as follows:-

**"iv. The accused shall not go anywhere near the matrimonial home being Plot LR Number 2951/449 along Farasi Lane in Mugomoini Close Nairobi "**

61. Further to the above it is stated that; Lady Justice Achode in **Nairobi HCSC No. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen** whilst striking out the Petitioner's Application dated **17<sup>th</sup> December, 2019** which sought an injunction restraining the sale, transfer or in any manner dealing with the deceased's assets for being incompetent and incurably defective held as follows:

**"29. While this court is clothed with jurisdiction with regard to property constituting the estates of a deceased person in testate and intestate succession, the jurisdiction does not extend to the manner in which the 1st and 2nd Respondent, in the conduct of their investigative powers conferred by law. should deal with the property of a deceased person..... Once the Respondents have concluded their investigations the property will revert to the person entitled to it under the law of succession ..."**

62. On the principle of Res-judicata it urged that the principle of Res-judicata is encapsulated in **Section 7 of the Civil Procedure Act** which provides as follows:-

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

63. In support of the above principle the Interested Parties rely on the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Sotel Limited & 3 others 2017 eKLR**, where this Honourable Court stated;

**"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;**

- a) The suit or issue was directly and substantially in issue in the former suit**
- b) That former suit was between the same parties or parties under whom they or any of them claim.**
- c) Those parties were litigating under the same title.**
- d) The issue was heard and finally determined in the former suit**
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

64. It is contended that the Petitioner has previously sought similar prayers relating to the afore-stated properties and more particularly, **Land Reference Number 2951/449 at Farasi Lane, Mugumoini Close, Lower Kabete** and that the afore-stated Property has been the subject of two (2) Court Rulings which the Petitioner has not challenged by way of appeal in the Court of Appeal or Review under the Civil Procedure Rules and that the petitioner was attempting to mischievously appeal the two rulings to defeat justice.

65. On issue of **subjudice** the 1<sup>st</sup> and 2<sup>nd</sup> interested parties assert that the Petitioner sought to litigate on matters directly and substantially in issue in **Nairobi High Court Criminal Case No. 60 of 2019 Republic –vs- Sarah Wairimu Kamotho Cohen and Peter Karanja and Nairobi High Court Succession cause no. 1546 of 2019**: In the matter of the **Estate of Tob Chichou Cohen**, which was instituted prior to the institution of this instant suit. The interested Parties in support of the proposition placed reliance on the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (2020) eKLR** and **Section 6 of the Civil Procedure Act**.

66. In addition the Interested Parties referred to **Article 165(6) of the Constitution of Kenya, 2010** where it is stated in plain language that this Honourable Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi judicial function but **not over a Superior Court**. Superior Courts in terms of **Article 162 (1) of the Constitution** are; the **Supreme Court, the Court of Appeal, the High Court and Courts of equal status** namely; **the Employment and Labour Relations Court and the Environment and Land Court**, therefore this Honourable Court should not entertain the Petitioner's Petition and Application which infers supervising and usurping the powers and functions of the trial Court.

67. The Interested Parties sought that the Petitioner's petition and application be dismissed with costs.

### **THE 3<sup>RD</sup> INTERESTED PARTIES SUBMISSION**

68. The 3<sup>rd</sup> Interested Party equally supports the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents preliminary objection dated 27<sup>th</sup> November, 2020.

69. The 3<sup>rd</sup> Interested Party argues on the issue of whether the court has jurisdiction to supervise, superintend, guide or direct other High Courts, to wit the High Court division in conduct of the **High Court Criminal case no.60 of 2019 Republic versus Sarah Wairimu Kamotho & another**, that this court is a creature of **Article 165 of the Constitution** and so is the High Court Criminal Division, therefore this Court's jurisdiction or authority is drawn from the Constitution and thus both courts exercise concurrent jurisdiction being courts of equal status.

70. To buttress the aforesaid proposition the 3<sup>rd</sup> Interested Party referred to the case of **Ernest Kevin Luchidio versus Attorney General & 2 others [2015] eKLR** where Justice Mrima observed *that jurisdiction is everything. Taking jurisdiction as a cage and a court as an animal, the animal can, but only move within the cage. That is what jurisdiction is all about.*

71. It is therefore urged that this Court lacks the specific jurisdiction to order for the stay of the **High Court Criminal case no.60 of 2019 Republic versus Sarah Wairimu Kamotho & another**.

72. Reliance in support is placed in the case of **Joseph Lendrix Waswa versus Republic [2020] eKLR** where the Supreme Court unanimously warned against the stay of criminal proceedings on the basis of pending appeals. The court proceeded to express its dissatisfaction with interlocutory appeals which end up frustrating criminal proceedings and making meaningless the constitutional desire for expeditious trials.

73. It is 3<sup>rd</sup> Interested Party's position that the Court should look at the greater public interest and ignore the tactics employed by the petitioner to delay the expeditious determination of her criminal trial.

### **ANALYSIS AND DETERMINATION**

74. Having carefully considered the Petitioner's Application and the Petition herein, the Respondents' responses, the Interested Parties responses and the parties oral and written submissions and from the aforesaid, I find that the following issues arise for determination:-

- a) **Whether this Honorable Court can issue a mandatory injunction against a Court of concurrent and competent jurisdiction.**
- b) **Whether this Honorable Court established as the Constitutional and Human Rights Division has jurisdiction to superintend, guide, direct, shepherd, mend the mistakes of other High Courts in Kenya.**
- c) **Whether this Court has jurisdiction to hear issues already determined or pending determination that are sub judice or Res judicata by court of competent and concurrent jurisdiction.**
- d) **Whether the Petition herein raises substantial questions of constitutional law to warrant a referral of this matter to the Honourable Chief Justice, for appointment of a bench of an uneven number of Judges.**
- e) **Whether the Preliminary Objection by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should be upheld.**

#### **A. WHETHER THIS HONORABLE COURT CAN ISSUE A MANDATORY INJUNCTION AGAINST A COURT OF CONCURRENT AND COMPETENT JURISDICTION.**

75. The Petitioner's application dated 3<sup>rd</sup> November 2020 seeks several orders amongst which include the following:-

- a) **THAT pending the hearing and determination, inter partes, of this application, an order be issued staying the criminal proceedings against the Petitioner in the High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another**
- b) **THAT pending hearing and determination, inter partes, of the application, an order be issued calling for the Court file in High Court Criminal Case No. 60 of 2019 Republic Vs. Sarah Wairimu Kamotho Cohen and Another to this division.**
- c) **THAT pending the hearing and determination of the Petition herein, an order be issued staying the proceedings against the Petitioner in High Court Criminal Case No. 60 of 2020, Republic –vs- Sarah Wairimu Kamotho Cohen and Another.**
- d) **THAT pending the hearing and determination of the Petition herein, an order be issued calling for the court file in High**

76. The Petitioner is briefly seeking issuance of mandatory injunction against the High Court, a Court of competent and concurrent jurisdiction. It is Petitioner's request for this Court's interference with the jurisdiction of the High Court Criminal Division, which is currently seized with hearing and determining the Petitioner's **High Court Criminal Case No. 60 of 2020 Republic vs. Sarah Wairimu Kamotho Cohen and Another**. It should be noted that the High Court Criminal Division is divested with hearing and determining Criminal matters, whereas the High Court Constitutional and Human Rights Division, which is not a Criminal or Civil Division; is divested with hearing and determining Constitutional Petitions. The two Divisions are both High Courts, and this begs the question, whether this Court, can issue an order against another court with equal and concurrent jurisdiction.

77. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their Preliminary Objection of 27<sup>th</sup> November 2020 has raised an issue of jurisdiction which makes determination of this issue of utmost necessity.

78. **The Black's Law Dictionary, 10<sup>th</sup> Edition by Bryon Garner on page 3739** defines **Preliminary Objection** as follows:-

***“It is an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. It goes on further to state that an objection to the Court's jurisdiction is an example of a Preliminary objection.”***

79. The Supreme Court in reaffirming on the accurate position of preliminary objection adopted with approval the holding in locus classica, celebrated case of **Mukisa Biscuit** while determining the case of **Raila Odinga & 2 Others versus Independent Electoral & Boundaries Commission & 3 Others, Petition No. 5 of 2013 (as consolidated with Petition No. 4 of 2013 and Petition No. 5 of 2013)**, paragraphs 14 where it stated as follows:-

***“The nature and scope of a preliminary issue is cogently defined in the statement of law J.A in the case of Mukisa Biscuit Manufacturing Ltd V West End Distributors Ltd (1969) EA 696 that a preliminary objection is to be raised purely on questions of law. The Court stated that: “So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”***

80. To buttress further on issue of jurisdiction in the case of **Seven Seas Technologies Limited v Eric Chege [2014] eKLR**, where the court reiterated the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:-

***“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.***

***Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

81. It therefore follows from the afore-mentioned case laws, that it is clear that jurisdiction is everything and without it this Court will not have any power to make a single step forward in any matter but has to down its tools.

82. The High Court has been established under **Article 165 of the Constitution of Kenya** which specifically states:-

**(1) There is established the High Court, which—**

**(a) shall consist of the number of judges prescribed by an Act of Parliament; and**

**(b) shall be organised and administered in the manner prescribed by an Act of Parliament.**

**Sub article 3 states; Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

**(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**

**(i) the question whether any law is inconsistent with or in contravention of this Constitution;**

**(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;

and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

Sub Article 5 states; *The High Court shall not have jurisdiction in respect of matters—*

(a) reserved for the exclusive jurisdiction of the Supreme Court under this

Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2) (these are the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court and the Environment and Land Court which are superior courts).

Sub Article 6 states; *The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

Sub Article (7) *For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

83. It is clear from the provisions of **Article 165 of the Constitution** that the scope and jurisdiction of the High Court has been well outlined in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another 12012 eKLR**, where the Court stated as follows:

*"[68] A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."*

84. It is clear from the above that the Constitution in establishing the High Court under **Article 165 of the Constitution** and outlaying its scope of its jurisdiction under **Article 165(6) of the Constitution** that the supervisory jurisdiction does not extend to other Superior Courts.

85. In the instance case, the Petitioner has contended that both High Court Criminal Division and High Court, Family Division have pronounced that they do not have jurisdiction to determine the issue raised by this Petition for determination in the instance Petition and have further pronounced that theirs is not the right forum in which to canvass the issues raised by the Petitioner. The Petitioner referred to the Ruling dated 16<sup>th</sup> January 2020, delivered by the **High Court in Criminal Case No. 60 of 2019 Republic vs. Sarah Wairimu Kamotho Cohen and Peter Karanja** on Petitioner's application dated 12<sup>th</sup> November 2019 where Hon. Justice Mutuku held in part:-

*"This court is not clothed with the jurisdiction to determine who owns and who does not own the property and whatever is in that property.*

*"Once the forensic examination it is my belief that it may not be necessary to have the police at the premises unless for some reasonable course this becomes necessary with the authority of the court. This court is not able to grant this prayer until it is satisfied itself that doing so will not compromise fair trial in this matter or infringe on rights of other parties. For the same reason that this court lacks jurisdiction to grant some of the prayers sought". It is noteworthy, the application touched on the deceased property L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete.*

86. It is noteworthy that the application subject of Ruling by the Hon. Judge was over the deceased property L.R. No.2911/449, at Farasi Lane, Mugumoini close, Lower Kabete, which was also a Crime scene.

87. The Petitioner/Applicant also referred to **Succession Cause No. 1546 of 2019**, where in her application dated 16<sup>th</sup> January, 2020, the Court held in part;

*"From the ruling of Mutuku J sitting in the Criminal Court it is evident that as at the date of the ruling, the suit property was still secured as a scene of crime. While this court is clothed with jurisdiction with regard to property constituting the estates of a deceased person in testate and intestate succession, the jurisdiction does not extend to the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, in the conduct of their investigative powers conferred by law, should deal with the property of a deceased person. As stated by Mutuku J, the forensic examination of the scene of crime is not in perpetuity. Once the Respondents have concluded their investigations, the property will revert to the person entitled to it under the law of succession."*

88. The Petitioner averment is that it is on these grounds that the right forum on ventilating the issues with respect to the violations of the Petitioner's right to property under **Article 40 of the Constitution** justified the filing of the present Petition in this Court. I find the argument

incorrect and unjustified following the Petitioner being dissatisfied with the aforesaid Ruling. She did not prefer an appeal against the said rulings but opted to file this constitutional Petition seeking similar orders to the ones sought in the earlier two applications mentioned herein above.

89. I find no difficulty in agreeing with the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents submission as well as the Interested Party's submissions that **Article 165(6) of the Constitution** limits the supervisory jurisdiction of the Constitutional Court to Subordinate Courts and has no power to exercise such supervisory jurisdiction to Superior Courts, which in this case includes other Divisions of the High Court such as the Criminal Division and Family Division. I opine that for this Court to proceed to grant the aforesaid orders as sought by the Petitioner, would in my view amount to interfering with the functions and powers of a Court with competent and concurrent jurisdiction. The Constitutional and Human Rights Division being an administrative Division of the High Court does not rank above any other High Court Division but remains a Court of concurrent jurisdiction. I further agree with the Respondents and Interested Parties averments of the Constitutional provisions, that it will be unconstitutional for this Court to purport to interfere with the Criminal proceedings, pending and ongoing in the High Court Criminal Division, which is a Court of equal status as this Court and I find that the same would amount to the usurping the function of a Court of equal status as this Court.

90. The Constitutional and Human Rights Division of the High Court is just an administration Division of the High Court, with same powers and jurisdiction as all the other Divisions in the High Court. In the case of **Robert Mwangi vs Shepherd Catering Limited & Another (2012) eKLR** Lady Justice Mumbi Ngugi as regards this point stated thus;

**"I do not know how often and for how long this has to be repeated: that the Constitutional and Human Rights Division of the High Court is just an administrative division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court"**

The Learned Judge proceeded further to state;

**"This message must be brought home to litigants, and the duty to do this lies with their legal counsel. If a party is dissatisfied with a decision or conduct of a judge sitting in any Division or station of the High Court, and alleges that there has been a violation of his or her constitutional rights, the alleged violation must be raised before the judge of the High Court Seized of the matter. If the party is still not happy with the decision of that court, then his or her remedy lies in the Court of appeal, and from there the Supreme Court as provided in the Constitution and the relevant legislation. These are the courts in our system of courts to which appellate jurisdiction is vested."** (Emphasis added)

91. **Article 23 of the Constitution** deals with authority of Courts to uphold and enforce the Bill of Rights. Under the said Article it is clearly stated that the High Court has jurisdiction in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In the instance case herein, petitioner ought to have raised all the constitutional violations raised in this petition in **High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Peter Karanja**. In case the Court declined to grant her prayers sought, the proper avenue for the petitioner would be to appeal the High Court's decision to the Court of Appeal as stipulated under **section 3** of the Appellate Jurisdiction Act.

92. Having considered the rival submission and having considered the relevant Articles and authorities relied upon by both sides herein, I find the issue herein is tandem with the requisite provisions of the Constitution, and I opine that this Honourable Court has no jurisdiction to issue orders sought against a Court with concurrent jurisdiction herein, thus the High Court Criminal Division in the **High Court Criminal case No. 60 of 2019 Republic vs. Sarah Wairimu Kamotho Cohen and Peter Karanja**.

#### **B. WHETHER THIS HONORABLE COURT ESTABLISHED AS THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION HAS JURISDICTION TO SUPERINTEND, GUIDE, DIRECT, SHEPHERD, MEND THE MISTAKES OF OTHER HIGH COURTS IN KENYA.**

93. The Petitioner herein among other orders, seek orders for staying the Criminal proceedings against herself in the **High Court Criminal case No. 60 of 2019, Republic vs. Sarah Wairimu Kamotho Cohen and Another**; further the Petitioner seek calling of the Court file to this Division as well as being allowed to access **L. R. No. 2951/449, at Farasi Lane, Mugumoini close, Lower Kabete**, which in a Court ruling as captured in these proceedings above, has been declared in the Criminal Case as a Crime Scene subject of the Criminal proceedings.

94. Upon consideration of the above-mentioned prayers as sought by the Petitioner herein, it is clear that the Petitioner's prayers raise the issue regarding the Honourable Court's jurisdiction to superintend, guide, shepherd or mend the purported mistakes, if any, of other High Courts in Kenya, which are Courts of competent and concurrent jurisdiction to this Court.

95. The issue of Court's jurisdiction to superintend, guide, shepherd or mend the mistakes of other High Courts in Kenya was subject of a decision in **Robert Mwangi v. Shepherd Catering Limited & another (2012) eKLR** where it was stated as follows:-

**"I do not know how often and for how long this has to be repeated: that the Constitutional and Human Rights Division of the High Court is just an administrative division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court."**

The Learned Judge further adopted the decision in **Philip Kipchirchir Moi vs. Attorney General & Another Petition No. 65 of 2012**, where it was stated as follows;

**"...I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived of other**

**Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.**” (Emphasis added)

“...Nowhere is there mention of the “Constitutional Court” in the above Article (Article 165) or indeed in the whole Constitution. Neither is there mention of a superior Division of the High Court called the “Constitutional and Human Rights Division”, with wide powers over other Divisions or Stations of the High Court”.

96. The law as regards High Court was supervising another Court was pronounced clearly in the case of **Greenfield Investments Limited & Another vs State of the Republic of Kenya & 3 others(2013) eKLR**, where the learned judge stated as follows with regards to a High Court supervising another Court;-

**"In that regard, it is trite that this Court Cannot purport to sit as a supervisor or superintendent of a concurrent court or purport to determine by way of an appeal (by whatever other name called) a decision of such a Court. It baffles this Court why litigants who are ably represented by Counsel, such as the Petitioners in this case, cannot see that under Section 60 of the repealed constitution and Article 165 of the Constitution, 2010 there is only one High Court. That High Court can only exercise jurisdiction conferred on it by the Constitution and not by itself: the Chief Justice or ... Litigants."** (Emphasis added)

The learned judge proceeded and stated as follows;

**"The setting up of Divisions of the High Court at Nairobi and Mombasa does not thereby create other High Courts with some strange and unconstitutional titles such as "The Constitutional court of Kenya. Divisions are merely administrative in nature and that was why the Court of appeal in Peter Muiruri (supra) went into great length to explain that fact."**

**"This Court has consistently followed that decision in dispelling the fallacy that the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi is a special Court with extra ordinary jurisdiction to sit outside the hierarchy of courts and overturn any decision it deems unconstitutional whether it was issued by another High Court Judge, the Court of Appeal or the Supreme Court. That fallacy is well seen in this case and in answer, this court noted the case of Philip Kipchirchir Moi vs Attorney General & Another Petition No. 65 of 2012 that has already been mentioned above."**

97. The position taken in the case of **Greenfield Investment Limited & another (supra)** was firmly repeated in the case of **Peter Nganga Muiruri vs Credit Bank Limited & 2 others (2008) eKLR**, where the learned judge stated as follows;-

**"There is no provision in the Constitution which establishes what Nyamu J. referred to as a Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional Court and Judicial Review Division". It is not an independent Court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court .Instead it talks about the High Court."**

The learned judge further stated that;

**" ...In view of what we have stated above, it is quite clear that Nyamu J. 's remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court with Supervisory powers over all courts. The Hon. Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the Cause list. The Chief Justice would have no Jurisdiction to create a constitutional court as opposed to creating a division of the High Court."**

The learned judge further stated as follows;

**"Any single judge of the High Court in this Country has the jurisdiction and power to handle a Constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a constitutional court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity."** (Emphasis added)

98. Upon considering the affirmed case law, the Constitutional provisions stated herein above as well as the Petitioner’s case, I find that granting orders of stay of Criminal Proceedings in **HCCRC No. 60 of 2019 Republic vs. Sarah Wairimu Kamotho Cohen and another** as well as calling of the Court file to this division and allowing access to **L. R. 2951/449, at Farasi Lane, Mugumoini close, Lower Kabete**, would in my view amount to supervision, superintend and interfering with the jurisdiction of a superior Court with equal and concurrent jurisdiction and would be a violation of **Article 165(6) of the Constitution** by this Court. Further I find that the grant of the orders sought in the application and Petition would derail the expeditious hearing and disposal of the Criminal case. This would be a violation **Article 159(1) of the Constitution** which is equivalent to robbing off a Court of competent jurisdiction, judicial authority vested upon it to hear and determine its matters expeditiously so as not to delay justice, which our Constitution demands that justice shall not be delayed.

99. Further the **Criminal Procedure Code** in setting up the procedure applicable in conducting criminal cases clearly provides under **Section 193 A** as follows:-

**“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”**

100. Considering the aforesaid **Section 193 A of Criminal Procedure Code** and prayers sought by the Petitioner, I find the prayers sought to be in contravention of **Section 193 A of Criminal Procedure Code**, which provides that any matter in issue in any criminal proceedings is also directly and substantively in issue in any pending Civil proceedings shall not be a ground for any stay, prohibition or delay of Criminal Proceedings. The alleged Constitutional violations are in view thereof aimed at delaying the just and expeditious determination of the criminal matter at the High Court which court is also clothed with jurisdiction to determine constitutional issues raised in the Petition herein.

101. The High Court while deliberating on the functions of the offices of the DPP and DCI in the case of **Hassan Ali Joho vs. Inspector General of Police & 3 Others [2017] eKLR**, where Ogola J while deliberating on the functions of the Offices of the DPP and DCI opined thus:-  
**“The Kenyan Constitution upholds, and is based on principles of separation of powers, roles and functions for various constitutional actors. The office of the Director of Public Prosecution is an independent office with clear defined functions. In principle, it is not the work of court to interfere with other State organs unless it can be shown that they violate the constitution: each State organ must be allowed to function without interference. It is the duty of this court to protect not only the functional administrative independence of the office of the Director of Public Prosecution but also to protect the applicant and ensure that in exercise of these functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”**

**In this context, functional, administrative and operational independence entails that the Offices of DPP and DCI in exercising their autonomy and carrying out their functions they do so without receiving any instructions or orders from other State organs or bodies and have regard to inter alia public interest and not to abuse the legal process. The office of DPP must also adhere to the national values in Article 10 of the Constitution and in the context of this application principles of good governance, transparency and accountability in exercise of its functions.”**

102. Considering the nature and gravity of the charge against the Petitioner of murder contrary to **Sections 203** as read with **Section 204 of the Penal Code (Cap 63) Laws of Kenya**, being a Capital Offence, I find that her case ought to be heard expeditiously and determined by the High Court Criminal Division in **High Court Criminal case No. 60 of 2019, Republic vs. Sarah Wairimu Kamotho Cohen and Peter Karanja**, in the interest of justice. I find further that it would be a great injustice and violation of a Constitutional doctrine of separation of powers to the Respondents and the Interested Parties for this Court to interfere with the ongoing criminal proceedings in the High Court.

103. Having considered the above-mentioned issue and upon considering the case law and constitutional provisions relevant to this issue, I am of the view that this Honourable Court has no supervisory or superintendent jurisdiction over other High Courts and more specific or in particular the High Court Criminal Division determining the Petitioner’s Criminal case **High Court Criminal case No. 60 of 2019, Republic vs. Sarah Wairimu Kamotho Cohen and Peter Karanja** to warrant issuance of the orders sought in the application and the Petition.

**C. WHETHER THIS COURT HAS JURISDICTION TO HEAR ISSUES ALREADY DETERMINED OR PENDING DETERMINATION THAT ARE SUB JUDICE OR RES JUDICATA BY COURT OF COMPETENT AND CONCURRENT JURISDICTION.**

104. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in support of the above-mentioned issue seek to rely on the detailed Replying Affidavit sworn by Maxiwell Otieno dated 27<sup>th</sup> November 2020 and state that there are triable issues before the **High Court Criminal case No. 60 of 2019, and Succession Cause No. 1546 of 2019**.

105. In considering the above issue, I find that it would be proper to deal with each principle on its own. On the issue of Res judicata, the expression **“Res judicata”** means *a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Res judicata is essentially a bar to a subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.*

106. The doctrine of **Res Judicata** is defined as applying to a suit or issue in which a matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The law is as clear as a bell, that **Section 7 of the Civil Procedure Act** is mandatory in its prohibition:-

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

107. In the pleadings herein the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the 1<sup>st</sup>, and 2<sup>nd</sup> Interested Parties have raised preliminary point of law on the two principles. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties urge that Hon. Lady Justice S. M. Mutuku through a Ruling on Bail Application by the Petitioner herein delivered on **11<sup>th</sup> October, 2019** in **Nairobi HCCr.C No. 60 of 2019: Republic versus Sarah Wairimu Kamotho (Annexure MO-6 of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Replying Affidavit dated 27<sup>th</sup> November, 2020)** directed as follows:-

**“ iv. The accused shall not go anywhere near the matrimonial home being Plot LR Number 2951/449 along Farasi Lane in Mugomoini Close Nairobi ”**

108. Further Hon. Lady Justice Achode in **Nairobi HCSC No. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen** whilst

striking out the Petitioner's Application dated 17<sup>th</sup> December, 2019 which sought an injunction restraining the sale, transfer or in any manner dealing with the deceased's assets for being incompetent and incurably defective held as follows:-

**"29. While this court is clothed with jurisdiction with regard to property constituting the estates of a deceased person in testate and intestate succession, the jurisdiction does not extend to the manner in which the 1st and 2nd Respondent, in the conduct of their investigative powers conferred by law, should deal with the property of a deceased person..... Once the Respondents have concluded their investigations the property will revert to the person entitled to it under the law of succession ..."**

109. From the rulings herein above it is clear that the prayers the Petitioner seeks in the Application/Petition on plot **L. R. Number 2951/449, along Farasi Lane, in Mugumoini Close Nairobi**, is the same as the one which has been subject to two rulings issued by **Lady Justices Mutuku and Achode in Nairobi HCSC No. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen and Nairobi HCCr. Case No. 60 of 2019: Republic versus Sarah Wairimu Kamotho** respectively, which the Petitioner has not challenged by way of Appeal in the Court of Appeal or Review under the Civil Procedure Rules.

110. The Court pronounced itself on the issue of res judicata and when it can be effectively raised in the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Sotel Limited & 3 others 2017 eKLR**, where the Court stated:-

**"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:-**

**i. The suit or issue was directly and substantially in issue in the former suit**

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

**iii. Those parties were litigating under the same title.**

**iv. The issue was heard and finally determined in the former suit**

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

111. Considering the law and the two Rulings in the High Court Family and Criminal Divisions, and what the Petitioner herein seeks; thus (an Order pending hearing and determination of the Petition herein, a mandatory injunction do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to release **L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete**, to the possession and exclusive control of the Petitioner, being the jointly owned matrimonial home of the Petitioner and the deceased) among other prayers touching on **L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete**, I find that these issues are directly and substantively in issue in the two suits mentioned herein above and have been litigated upon and ruled on by two Courts of concurrent and competent jurisdiction. It is therefore a bar for this Court to rule on the same again in this petition. This makes petitioner's application Res Judicata in view of the Ruling by High Court Family Division and High Court Criminal Division.

112. I now turn to the issue of sub-judice. **Section 6 of the Civil Procedure Act** states thus:-

**"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**

113. The issue of sub-judice was considered and addressed in the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR**, where the Honourable High Court reiterated the Supreme Court case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)** where the court on the issue of **sub-judice** aptly stated: -

**The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.**

The Court averred further that;

**"The sub-judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub-judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent**

*multiplicity of proceedings.” (Emphasis added)*

114. In the instant Application / Petition the Petitioner has sought orders for staying the criminal proceedings against the her in the **High Court Criminal Case No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another**, calling of the court file to this division as well as having access to **L.R. No. 2951/449, at Farasi Lane, Mugumoini Close, Lower Kabete**, which has been declared in the Criminal Case a crime scene subject of criminal investigations by the Criminal High Court. The **High Court Criminal case No. 60 of 2019, Republic vs. Sarah Wairimu Kamotho Cohen and another** is pending hearing and determination in the High Court Criminal division where the Petitioner is the 1<sup>st</sup> Accused. The issues raised in the petitioner’s application herein are directly and substantively in issue and are similar between the same parties. This is evident from the petitioner’s supporting affidavit dated 3<sup>rd</sup> November, 2020.

115. I have considered the Petitioners arguments that the issues raised herein are not similar in the sense that they are based on constitutional violations by the Respondents but I find that the arguments do not hold water in the sense that these alleged violations could have been raised before the trial Court that the Petitioner has sued herein as the 5<sup>th</sup> Respondent. I find that the High Court Criminal Division is divested with the jurisdiction to determine the averred constitutional violations experienced by the Petitioner. I therefore find that the issues raised in this petition are substantially and directly in issue and similar between the same parties and are pending determination by a court of concurrent and equal jurisdiction to this court thereby offending the principles of sub-judice.

116. In view of the findings herein above, I find and hold that this Honourable Court has no jurisdiction to hear and determine issues raised in the application / Petition for being Res-judicata and sub-judice before a Court of competent and concurrent jurisdiction.

**D. WHETHER THE PETITION HEREIN RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW TO WARRANT A REFERRAL OF THIS MATTER TO THE HONOURABLE CHIEF JUSTICE, FOR APPOINTMENT OF A BENCH OF AN UNEVEN NUMBER OF JUDGES.**

117. The Petitioner through her application dated 3<sup>rd</sup> November 2020 has sought among other orders that this Honourable Court be pleased to certify that the Petition herein raises substantial questions of constitutional law, and forthwith refer the case to His Lordship the Honourable Chief Justice, for appointment of a bench of an uneven number of Judges being not less than three (3) judges of the High Court, pursuant to **Article 165(4) of the Constitution of Kenya 2010**.

118. **Article 165(4) of the Constitution** provides that:-

**“Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”**

119. In the case of **Wycliffe Ambetsa Oparanya & 2 others v Director Of Public Prosecutions & another [2016] eKLR**, this court reiterated the position adopted by **Majanja, J in Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** where he held that:-

**“The meaning of ‘substantial question’ must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”**

120. I have in this matter considered the first three issues raised for determination in this Petition and from the determination therefore, it is clear that I have come to conclusion that this Court is not divested with the jurisdiction to hear and determine the Petitioner’s application and the Petition on merit. I further noted and observed that the issues raised in the Petitioners application and Petition are issues that can be determined in the High court Criminal Division. In view of my findings that this Court lacks jurisdiction, I find both the Petitioner’s application and Petition do not raise any substantial questions of law to warrant this Court to refer this matter to the Honorable Chief Justice, for assigning of a bench of an uneven number of Judges to hear and determine the matter pursuant to **Article 165(4) of the Constitution of Kenya 2010**.

**E. WHETHER THE PRELIMINARY OBJECTION BY 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS SHOULD BE UPHELD.**

121. Following determination of the first four issues in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, I am satisfied that the Preliminary Objection as drawn and filed has met the threshold required to uphold the preliminary objection as raised. I find that it is clear that this Honorable Court pursuant to **Article 165(6) of the Constitution** has only supervisory jurisdiction over subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a Superior Court.

122. I find further that the issues raised in Petitioner’s application dated 3<sup>rd</sup> November 2020 and the Petition of even date are issues that can be raised in **HCCRC No. 60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another and Nairobi High Court Succession Cause No. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen**, which are High Courts divested with equal, competent and concurrent jurisdiction to hear and determine violations stipulated in the bill of rights pursuant to **Article 23 of the Constitution of Kenya**. Further if the Petitioner is dissatisfied or is aggrieved with decisions of the High Court; Family Division and/or High Court; Criminal Division she should exercise the right of appeal against such decisions, in the Court of Appeal in line with the Appellate jurisdiction Act but not to pursue the same through a Court of equal and concurrent status as is the case herein.

123. Further it has been noted and observed that the issues raised in Petitioner’s application and Petition are issues that are substantially or

directly in issue and similar to the cases in *High Court Criminal Case No.60 of 2019, Republic –vs- Sarah Wairimu Kamotho Cohen and Another and Nairobi High Court Succession Cause No. 1546 of 2019: In the matter of the Estate of Tob Chichou Cohen*, between the same parties, some of which have been ruled on and a determination made and some of which are pending hearing and determination in courts of equal, competent and concurrent jurisdictions to this Court. This makes the petitioner’s application and petition res judicata and sub-judice.

**124. In view of the conclusion that I have come to upon considering the Preliminary Objection and submissions in support as well as rival submissions, I find that the Preliminary objection by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents dated 27<sup>th</sup> November 2020 meritorious. The Preliminary Objection is accordingly upheld. Both the application and Petition are dismissed. Each party to bear its own costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MARCH, 2021.**

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**J. A. MAKAU**

**JUDGE**