Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) (Petition 369 of 2019) [2020] KEHC 9228 (KLR) (Constitutional and Human Rights) (6 February 2020) (Judgment)

Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 9228 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 369 OF 2019

LA ACHODE, JA MAKAU & EC MWITA, JJ

FEBRUARY 6, 2020

BETWEEN

ADRIAN KAMOTHO NJENGA ..... PETITIONER

AND

THE HON ATTORNEY GENERAL ..... RESPONDENT

AND

JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

THE HON CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

JUDGMENT

1. This is the second time in the short history of our 2010 Constitution that this Court is being called upon to resolve a stalemate between the President, a State officer, and the Judicial Service Commission, a State organ, over the appointment of judges to superior courts. The first dispute arose in 2014 and now the current stalemate, five years later.

2. On 23rd July and 13th August 2019, the Judicial Service Commission, recommended persons for appointment as judges of the Court of Appeal, Environment and Land Court, and Employment and Labour Relations Court, and forwarded the names to the President for appointment as required by the Constitution and the Judicial Service Act. However, the President has not appointed them.

3. Adrian Kamotho Njenga, the Petitioner, a citizen and a public interest litigant, has filed a Petition dated 18th September, 2019 against the Attorney General, the principal advisor and legal representative to the National Government in civil matters, the Respondent, to have the stalemate resolved. He has joined in the petition, the Judicial Service Commission, a constitutional Commission established under Article 172 (1) of the Constitution, whose mandate is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice, the 1st Interested Party. The petitioner has also joined the Chief Justice and President of the Supreme Court of Kenya, who is head of the Judiciary, and the chairperson of the 1st Interested Party, as the 2nd Interested Party, and The Law Society of Kenya, a statutory body established under section 3(1) of the Law Society of Kenya Act, with the mandate to uphold the Constitution and advance the rule of law and the administration of justice, and protect and assist members of the public in matters relating to, or ancillary and incidental to the law, as the 3rd Interested Party.

The petition

4. The Petitioner avers in the petition and deposes in his supporting affidavit sworn on 18th September 2019, that the Petition has been brought in recognition of his obligation to defend the Constitution and the rule of Law in Kenya. He states that vide Kenya Gazette Notice Nos. 1420, 1421 and 1422 of 15th February, 2019, the 2nd Interested Party, as head of the Judiciary, declared vacancies in the office of Judge of the Court of Appeal, Judge of the Environment and Land Court (ELC) and Judge of the Employment and Labour Relations Court (ELRC).

5. The 1st Interested Party then advertised the vacancies and called for applications from qualified interested persons within a set timeline. Upon the close of the period for applications, the 1st Interested Party reviewed the applications and published a list of applicants shortlisted for interviews for the respective declared vacancies.

6. The Petitioner states that the 1st Interested Party conducted interviews, and on 23rd July, 2019, recommended 11 persons for appointment as Judges of the Court of Appeal and forwarded the names to the President for formal appointment as required by Article 166(1) (b) of the Constitution. He further states that after concluding interviews for the ELC and ELRC, on 13th August 2018, the 1st Interested Party recommended for appointment as judges, 20 persons for the ELC and 10 persons for the ELRC, and forwarded the names to the President for formal appointment as required by Article 166(1)(b).

7. It is the Petitioner's case that the President has not appointed the persons recommended by the 1st Interested Party to their positions as judges. According to the Petitioner, the President has failed to act within a reasonable time, in the performance of a critical constitutional function as required by the Constitution.

8. It is the Petitioner's view that a reasonable timeline for performing a constitutionally prescribed act is fourteen days. He states that failure to discharge a constitutional obligation within that period constitutes unreasonable and unjustifiable delay, given the urgent need to plug the extreme deficit of judges in the superior courts.

9. The Petitioner further avers, that the President's failure to effect the 1st Interested Party's recommendations violates his fundamental rights, those of persons designated as judges of the superior courts and the public at large, to proper administration of justice; that the action violates the principles of the rule of law, social justice, good governance, equality, transparency and accountability under

Article 10 of the Constitution. He also argues that the failure to appoint violates the wider citizenry's right of access to justice as guaranteed by Article 48 of the Constitution.

10. The Petitioner states that the inordinate delay in appointing the persons recommended by the 1st Interested Party as judges of the superior courts, and the continued existence of vacancies in the office of the Judges of those courts, is weighing heavily and negatively on the administration of justice in the country. This, he argues, requires that the process of appointment be finalized with utmost urgency and without further delay.

11. The Petitioner blames the President for a discernible historical pattern of delay in the appointment of judges whenever recommended by the 1st Interested Party. This, he asserts, is oppressive to the designated judges and against public interest, thus it is a violation or threat to violate the Constitution.

12. The Petitioner has therefore sought the following reliefs:

1. A declaration that the President's failure to appoint the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court on 13th August, 2019 violates Articles 1, 2(1), 3(1), 10, 47, 48, 73, 131(2), 166(1)(b) and 259(8) of the Constitution.

2. A declaration that having been duly recommended for appointment as required by the Constitution and the law, and the President having failed to appoint them as constitutionally mandated, the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court, on 13th August, 2019, are at liberty to assume office as Judge of the Court of Appeal, Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Courts respectively, as recommended by the Judicial Service Commission.

3. An order that the Respondent and the Interested Parties take immediate measures and/or steps to enable the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court, on 13th August, 2019 discharge their constitutional mandate.

4. Costs and incidentals be provided for.

5. Any other orders/reliefs that may be just and expedient.

The Petitioner's submissions

13. The Petitioner submits, relying on his affidavit sworn on 18th September, 2019 and his written submissions dated 11th October, 2019 in support of the Petition. He argues that the President's failure to appoint judges of the Superior Courts recommended by the 1st Interested Party, is a conspiracy to sabotage and frustrate the Judiciary in executing its constitutional mandate.

14. It is the Petitioner's submission that constitutional values and principles bind the President and failure to appoint the persons recommended as judges, violates their constitutional rights and the public right of access to justice. The Petitioner further argues that the delay in appointments relating to constitutional offices in the Judiciary has become a recurrent subject of public concern and is against pronouncements by the Court on the conduct of the process of appointment of judges of superior courts.

15. According to the Petitioner, the timeline within which to actualise appointments of judges as recommended by the 1st Interested Party has been settled, and should not be an issue anymore. He relies on the decision in Law Society of Kenya v Attorney General & 2 others, Petition No 313 of 2014

[2016] eKLR, to argue that the Respondent in that case who is the same Respondent in the present petition, having not appealed against that decision, the decision is binding and the President is acting in violation of that decision.

16. The Petitioner goes on to argue, that the persons recommended by the 1st 1nterested Party as Judges of the respective superior Courts, and whose names were forwarded to the President, should have been appointed without delay. According to him, the President's action to withhold the appointments has cost citizens irredeemable opportunity to have justice served; caused case backlog and continues to affect career progression of the persons recommended for appointment.

17. According to the Petitioner, by virtue of Article 173(4) of the Constitution, the Judiciary enjoys financial autonomy and the Respondent's claim that the Judiciary needed assurance in terms of budget from the Treasury before declaring the vacancies is a misapprehension of the Constitution. He submits that once the Judiciary's budgetary estimate is approved by Parliament, it becomes a charge on the Consolidated Fund, and is payable directly to the Judiciary. He argues that once approved, Treasury cannot dictate how the Judiciary uses its funds.

18. The Petitioner asserts that the 1st Interested Party is a diligent constitutional commission keen to execute its mandate, but is frustrated by the unjustifiable failure by the President to perform the final act of formalizing the appointments of persons recommended as judges of the superior courts.

19. The Petitioner contends that Article 259(8) of the Constitution is categorical that where a timeframe for performing a required act is not prescribed, the act should be done without unreasonable delay. He asserts that the apparent inordinate delay in the current circumstances, offends the letter and spirit of the Constitution and no justifiable reason can be advanced for the delay.

20. The Petitioner urges that the Court should entrench constitutionalism by fashioning innovative remedies to secure the values and principles set out in the Constitution. He cites the decision in Law Society of Kenya v Attorney General & another; Mohammed Abdulahi Warsame & another; Constitutional Petition No. 307 of 2018 [2019] eKLR, as an example where the court issued an appropriate order of mandamus to enable the 1st Interested Party therein to assume office as a Commissioner in order to perform his constitutional duties.

21. To buttress his argument, the Petitioner also cites the decision of the Constitutional Court of South Africa in Minister of Health & others v Treatment Action Campaign & others [2002] ZACC 15; 2002(5) SA 721 BCLR (CC), which cited Fose v Minister of Safety & Security [1977] ZACC 6. In those cases the court stated that courts may fashion appropriate relief which 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.

22. On jurisdiction, the Petitioner submits that jurisdiction is a preliminary issue, and therefore, the Respondent cannot accede to it only when it suits him. The Petitioner contends that the Respondent has prosecuted two similar Petitions before this court without raising the issue of jurisdiction. In his view, the question of constitutionality of the President's action falls squarely on this court.

23. The Petitioner urges that the instant Petition is an express challenge to arbitrary violation of the Constitution and a downright trampling of citizenry rights, and for that reason, the court should allow the petition with costs against the Respondent.

The 1st and 2nd Interested Parties' Case

24. Ms Anne Amadi, the Chief Registrar of the Judiciary and Secretary to the 1st Interested Party, made various depositions on behalf of the 1st and 2nd Interested Parties in an affidavit sworn on 4th November, 2019 in support of the Petition. The 1st and 2nd Interested Parties also filed written submissions dated and filed on 9th December, 2019 in support of the Petition.

25. In the replying affidavit, Ms Amadi outlines the procedure the 1st Interested Party followed to determine the persons it recommended to the President for appointment as Judges of the Court of Appeal, ELC and ELRC. She also deposes that although the 1st Interested Party received a letter from the National Intelligence Service (NIS), raising concerns about the suitability of some of the persons shortlisted for interviews, the NIS did not give details of the concerns and, therefore, the 1st Interested Party could not act on their letter without details which would have enabled those adversely mentioned to respond.

26. In their submissions, the 1st and 2nd Interested Parties submit that the 1st Interested Party is unique in its membership and composition; that the 1st Interested Party was designed by the framers of our Constitution to have representation from the Judiciary, Attorney General, two representatives appointed by the President to represent the public, a nominee of the Public Service Commission and representation from the statutory body responsible for professional regulation of advocates, to safeguard the independence of the Judiciary.

27. It is further submitted that under Articles 248 and 249 of the Constitution, the 1st Interested Party is an independent constitutional Commission that is subject only to the Constitution and the law, and not subject to direction or control of any person or authority. It is stated that the 1st Interested Party is guided by Article 252 of the Constitution which makes provisions for the general functions and powers of the Commissions and independent offices established by the Constitution.

28. Further submission is to the effect that under Article 171(1) (a) of the Constitution, the 1st Interested Party has the mandate to promote and facilitate the independence of the Judiciary and the efficient, transparent and effective administration of justice. It is argued that it is pursuant to this mandate that the 1st Interested Party recommends to the President, persons for appointment as judges.

29. It is the 1st and 2nd Interested Parties' case that there has been an acute shortage of Judges in the Court of Appeal, the ELC and the ELRC as detailed in the annual State of the Judiciary Reports filed before Parliament and presented to the President. According to the State of the Judiciary and the Administration of Justice Report (SOJAR) for 2017-2018, insufficient human resource capacity was flagged as one of challenges facing the Judiciary and, therefore, the need for human resource capacity improvement through hiring of optimal number of judges and magistrates.

30. It is their further case that the National Assembly Departmental Committee on Justice and Legal Affairs considered the 2017-2018 SOJAR and prepared a report dated 9th May 2019 titled "Report on the Consideration of the 2017/2018 Report of the Judiciary on State of the Judiciary and the Administration of Justice"; observing that the current 32 judges in the ELC and the 12 judges in the ELRC are inadequate to expeditiously deal with the cases in those courts. It is urged that after considering the challenges faced by the Judiciary, the Committee recommended that the National Assembly and the National Treasury do allocate adequate resources to enable the Judiciary recruit additional Judges and Magistrates for the expeditious determination of cases.

31. The 1st and 2nd Interested Parties urge the court to consider that every citizen has the right of access to justice and judicial services throughout the Country as guaranteed under Article 48 of the

Constitution. They argue that in safeguarding this fundamental right, the Court should note that the decentralization of the Court of Appeal is vital in ensuring access to justice for litigants who exercise their right of appeal. Further that the Judicial Service Act contemplates the establishment of at least one High Court Station in each of the 47 counties, but nearly half of the counties do not have any High Court station currently.

32. According to the 1st and 2nd Interested Parties, by a letter dated 16th November, 2016, the 1st Interested Party requested the then President of the Court of Appeal, the current Respondent, to submit a paper on the number of judges in post and the optimal appointment against the workload in the Court of Appeal to inform the recruitment of new judges.

33. They submit that in his letter dated 23rd May, 2017, the Respondent, then the President of the Court of Appeal, wrote to the 1st Interested Party justifying the need to urgently appoint a minimum of six Judges to that Court given that between the years 2010 and 2017, 3 Judges of that court had retired; one was to retire in December 2017, and three other Judges of the Court were expected to retire in the next three years. At the time, the Court of Appeal had three stations outside Nairobi with three Judges posted to each station.

34. In this regard, the letter stated that there was need for a fourth Judge to be posted to each of the stations to enable those stations operate independently without having to rely on Nairobi in cases of recusals, indisposition or other factors which had resulted in failure to constitute benches to conduct proceedings.

35. The 1st and 2nd Interested Parties also referred to the "Court of Appeal Performance Report for the 3rd & 4th Quarter 2018/2019 & 1st Quarter 2019/2020", presented to the 1st Interested Party by the current President of the Court of Appeal on 15th October, 2019; noting that the Court of Appeal was operating with only 18 judges: that one judge retired in August 2019, another retired in October 2019 and one more was expected to retire by the end of 2019.

36. They submit that the report made it clear that by December 2019 that Court would have 15 judges against the minimum constitutional establishment of 12 and the maximum of 30 provided for in law. In the circumstances, they argue that the Court of Appeal has been unable to constitute a bench to hear cases in Nyeri, Meru, Busia, Eldoret, Nakuru and Kisii sub-registries leading to closure of those sub-registries.

37. It is further submitted that the "Performance Report for the ELC Court 3rd & 4th Quarters 2018/19 and 1st Quarter 2019/20" presented to the 1st Interested Party in January 2019 by the Presiding Judge of the ELC, requested it to consider appointment of more judges to boost the current number of judges serving in the 26 court stations throughout the country against a total case load of 20,435 cases. It is submitted that as at January 2019, there was a crisis in the ELC Division in Nairobi and as a result, judges were allocating hearing dates in 2020. This, they submit, demonstrates the dire need for more judges in that court.

38. The 1st and 2nd Interested Parties also refer to a progress report presented by the Principle Judge of the ELRC in January 2019. The report highlights the shortage of judges as the court's biggest challenge with only 12 judges serving the entire country. According to them, as at January 2019, that Court had a backlog of 9,309 cases countrywide. They also submit that in October 2019, the Principal Judge presented the 3rd and 4th Quarter Progress Report which confirmed that there was a shortage of judges in the court and that appointment of additional 10 judges would assist the court to reduce case backlog.

39. They further submit that the requests by the President of the Court of Appeal, Presiding Judge of the ELC and the Principal Judge ELRC were considered as well as the availability of resources before the

declaration of 11 vacancies in the Court of Appeal, 20 vacancies in the ELC and 10 vacancies in the ELRC.

40. According to 1st and 2nd Interested Parties, a letter dated 16th April, 2018 forwarded to the National Assembly the Judiciary Programme Based Budget (PBB) for the MTEF period 2018/19 - 2020/21 and the Judiciary Recurrent Budget Estimates and Projects for the Financial Year 2018/2019. In the proposed budget estimates, the National Assembly was notified of the inadequate number of Judicial Officers and staff which had hampered the expeditious disposal of cases; that the Judiciary required more resources to establish an additional 107 court stations across the country and recruit over 2000 judicial officers and staff. The National Treasury did not object to the proposal.

41. The 1st and 2nd Interested Parties assert that the 1st Interested Party complied with constitutional and statutory requirements before recommending the persons for appointment.

42. The 1st and 2nd Interested Parties, in particular, argue that Public Announcements were published on 18th April, 2019, requesting members of the public to submit any information of interest against any of the shortlisted applicants for consideration; that letters dated 29th April, 2019, were sent to various agencies, namely; Ethics and Anti-Corruption Commission; The National Intelligence Service; The Judiciary Ombudsman; The Kenya National Commission on Human Rights; The Advocates Complaints Commission; The Kenya Revenue Authority; Higher Education Loans Board; The Law Society of Kenya; Sheria Sacco Limited and The Law Society of Kenya Sacco, requesting for information and background checks on all the shortlisted applicants for the vacancies in the various courts.

43. It is further submitted that the 1st Interested Party considered and deliberated on all the reports and information received from members of the public and state agencies before making a decision on the applicants. According to the 1st and 2nd Interested Parties, a letter dated 5th July, 2019 was received from the NIS to the effect that it had received adverse reports against some of the Applicants but did not furnish the reports, nor were any particulars of the alleged adverse reports provided to the 1st Interested Party to enable the affected persons respond as required by Article 47 of the Constitution and section 4(3)(g) of the Fair Administrative Action Act.

44. They submit that the NIS was given an opportunity to provide particulars of the adverse reports since the entire exercise of recruitment of Judges was time bound, but in its letter dated 21st July, 2019, the NIS declined stating that it had discharged its obligation in its first letter.

45. It also submits that the interviews were conducted publicly, broadcast on all television stations and streamlined online on digital platforms, to ensure the process was transparent. They urge that after a rigorous vetting process including comprehensive consideration of the Applicants' characters, integrity and professional qualifications, the 1st Interested Party discharged its constitutional mandate as required by the Constitution and the Judicial Service Act and recommended the successful persons for appointment as Judges.

46. They assert that by a letter dated 23rd July, 2019, the 1st Interested Party recommended to the President 11 persons for appointment as Judges of the Court of Appeal together with a detailed report on the recruitment and selection process. It also forwarded 20 names of persons recommended for appointment as Judges of the ELC together with a detailed report on the recruitment and selection process, and names of 10 persons recommended for appointment as Judges of the ELRC, together with a detailed report on the recruitment and selection process through letters dated 13th August, 2019 respectively.

47. They further submit that section 30 of the Judicial Service Act provides the statutory framework for the transparent appointment of Judges; that the comprehensive recruitment and subsequent recommendation of persons for appointment, is set out in detail under paragraphs 1 – 16 of the First Schedule to the Act.

48. The 1st and 2nd Interested Parties maintain that under PART VI of the First Schedule to the Act there is no provision for the President to reject or disapprove of any of the persons recommended for appointment. They argue that the appointment process referred to in the replying affidavit of Mr Joseph Kinyua is not envisioned under the Constitution or the Act; that under the Constitution, the duty of the President in the appointment of judges is ceremonial and is only intended to formalize the appointment of the persons recommended by the 1st Interested Party.

49. They rely on a publication titled "Kenya Democracy and Political Participation: a Review by AfriMap, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), by Professor Karuti Kanyinga, for the submission that under the 2010 Constitution, the 1st Interested Party exudes more credibility in its operations, particularly because of the concept of the nomination of judges before their formal appointment by the President, unlike under the former Constitution.

50. The 1st and 2nd Interested Parties rely on decisions in Justice Alliance of South Africa v President of Republic of South Africa and Others (consolidated with) Freedom Under Law v President of Republic of South Africa and Others and Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others (CCT 53/11) and Karahunga v Attorney General [2014] UGCC 13.

51. They also rely on Law Society of Kenya v Attorney General & 2 others (supra), for the submission that the issue of the role of the President and the reasonable time for the appointment of judges recommended by the 1st Interested Party had been settled in that petition.

52. In their view, the duties and functions of the President spelt out under Article 132 of the Constitution do not include the power to vet the suitability of persons recommended for appointment as judges by the 1st Interested Party. They assert that any rejection or disapproval by the President, of the persons recommended for appointment, subverts the constitutional independence of the judiciary. Further that failure to formalize the appointment of Judges goes against the solemn constitutional duty of the President under Article 131(2)(e) of the Constitution to ensure protection of human rights, fundamental freedoms and the rule of law.

53. They agree with the Petitioner's position that the President's inordinate delay to formalize the appointment of the Judges, undermines the constitutional role of the 1st Interested Party in safeguarding and promoting independence of the Judiciary. They urge the court to defer to the Constitution and intervene by making appropriate orders. They argue that although the doctrine of separation of powers is part of our Constitutional design, the court is empowered to intervene when there is an imminent threat to the Constitution.

54. The 1st and 2nd Interested Parties rely on the decision in Re the Matter of Speaker of the Senate & another, Advisory opinion No 2 of 2013 [2013] eKLR, paragraphs 57, 59 and 64 on separation of powers. They also rely on the decision of the Constitutional Court of South Africa in Hugh Glenister v President of the Republic of South Africa & 11 Others [2008] CCT 41/2008, to buttress this point.

The 3rd Interested Party's Case

55. The 3rd Interested Party supports the Petition through a replying affidavit by Ms Mercy K Wambua, its Chief Executive Officer, sworn on 6th December, 2019. Ms Wambua deposes that the 3rd Interested

Party is mandated under section 4 of the Law Society of Kenya Act, to, inter alia, assist the government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya, and that the substratum of this Petition, therefore, relates to members of the Law Society of Kenya.

56. Ms. Wambua echoes the depositions in Ms. Amadi's affidavit, and contends that the process leading to the recommendation involved a widely consultative approach that included consultations between the 1st and 3rd Interested Parties. She states that the President and members of public had adequate opportunity to express their reservations with regard to the applicants during the interview process; that in any case, the President has Commissioners in the 1st Interested Party, one of whom is the Respondent and, therefore, the President had adequate opportunity to express reservations with regards to any applicant during the recruitment process through his representatives.

57. The 3rd Interested Party contends that recommendations by the 1st Interested Party to the President with regards to appointment of Judges as contemplated under Article 172(1) of the Constitution, is an inextricable constitutional decision that the President must abide by. It further states that as head of state, the President's role in the appointment of Judges is ceremonial.

58. On the allegation that the President received adverse reports with regard to certain applicants, MS Wambua states that the Constitution has in-built mechanisms for the removal and or disciplining of errant judicial officers under Article 168, which mechanisms have not been triggered against any of the judges recommended for appointment to the Court of Appeal. It is also argued that there exist legal mechanisms to deal with any integrity breaches with regard to advocates and members of the 3rd Interested Party, which have not been engaged with regard to any advocates alleged to have chequered records and have been recommended for appointment as judges.

59. In its submissions, the 3rd Interested Party argues that the judicial appointment mechanism in the Constitution guarantees the main pillars of judicial independence, namely; functional and financial independence. To this end, it argues, the Constitution makes the process of appointment of judges a collegiate affair involving the President, the 1st Interested Party and members of the public, and in the case of the Chief Justice and Deputy Chief Justice, Parliament.

60. Relying on the decision of the Constitutional Court of South Africa of New National Party v Government of the Republic of South Africa and Others (1999) ZACC 5; 1999(3) SA 191; 199(5) BCLR 489, paragraphs 74 and 162, the 3rd Interested Party submits that functional independence means, that the 1st Interested Party must have administrative independence and freedom from interference from political institutions or individuals.

61. It is the 3rd Interested Party's further submission, that impugning the character of the persons recommended by the 1st Interested Party for appointment by the President amounts to interfering with a valid decision made by the 1st Interested Party. It argues that the 1st Interested Party's decision to vet, interview and select persons for appointment to the Court of Appeal, the ELC and the ELRC, was exercised in accordance with its functional independence, and cannot be impeached by the President in the manner he seeks to.

62. To this end, it relies on the decision in Law Society of Kenya v Attorney General & 2 others (supra) and Law Society of Botswana & Another v The President of Botswana & 2 others, Civil Appeal No. CACGB-031-16.

63. The 3rd Interested Party argues that in assessing any interference with the independence of the 1st Interested Party, the court ought to employ the test adopted by the Constitutional Court of South Africa in Van Rooyen No v S and Others 2002 (8) BCLR 810 CC, where while elaborating on the

test for independence, the court stated that the determining factor is whether from the standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence.

The Respondent's Case

64. The Respondent opposes the Petition through a replying affidavit by Mr Joseph K. Kinyua, Head of Public Service in the Office of the President, sworn on 18th October, 2019, and written submissions dated and filed on even date.

65. As a preliminary issue, the Respondent argues that this court ought to first address itself on whether it has jurisdiction to hear and determine the instant Petition. The Respondent submits that the concern on whether or not this court has jurisdiction to hear the Petition, stems from various decisions by this Court and others from the ELRC which have not been definitive in demarcating the jurisdiction of either courts in such matters.

66. Relying on the decision in Institute of Social Accountability & another v National Assembly & 4 others, High Court Petition No. 71 of 2014 [2015] eKLR, the Respondent submits that in determining this Petition, the court must give a purposive interpretation to the various constitutional provisions which deal with the recommendation and appointment of Judges; the powers and functions of the President and the 1st Interested Party, and the applicable principles of the Constitution that inform the appointment process.

67. In his affidavit, Mr. Kinyua deposes that the President is the Head of State and Government as provided under Article 131(1) of the Constitution, and that as head of state, the President has exclusive authority to appoint judges in Kenya on behalf of the citizenry in accordance with recommendations from the 1st Interested Party.

68. He states that there is an express constitutional intent of not providing a timeframe within which the President is to appoint judges on recommendation of the 1st Interested Party. In his view, timelines cannot, therefore, be provided by any other person or organ. According to Mr Kinyua, where time is of the essence in carrying out any constitutional function, the Constitution expressly provides so.

69. It is the Respondent's case, that as Head of State and Government, and the Principal State officer, the President is sworn to ensure fidelity to the national values and principles of governance set out under Article 10 of the Constitution. The Respondent contends that the President has not declined to perform his duties regarding appointment of persons recommended, as judges, but is merely taking steps to ensure he does so in accordance with the purposes and objects set out under the Constitution, and in a manner that brings honour to the nation, dignity to the office of the judges, and promotes public confidence in the integrity of the office, as set out in the Constitution.

70. In the Respondent's view, the issue of delay in the appointments is a matter of fact as reasonable time is case specific and dependent on the peculiar facts and circumstances of the matter. To support this position, the Respondent cites the decision in Utalii Transport Company Limited & 3 others v NIC Bank Limited & another [2014] eKLR, where the court set out what inordinate delay means.

71. The Respondent argues that by dint of Article 10 of the Constitution, no State or public officer can be contemplated to act in a ceremonial manner in the public sector. The Respondent submits that the Article enjoins consideration and observation of the national values and principles of governance in the exercise of every function, including appointments. It is further submitted that while undertaking the function of appointment of Judges, the President is sworn to take into account, inter alia,

the principles of good governance, public participation, integrity, transparency, accountability and sustainable development.

72. According to the Respondent, the Court of Appeal, as presently constituted, has met the constitutional and statutory threshold in terms of numbers; that section 4(1)(b) of the Court of Appeal (Organization and Administration) Act, provides that the Court of Appeal shall consist of not less than twelve (12) judges appointed in accordance with Articles 164(1)(a), 166(1)(b) and 166(4) of the Constitution.

73. It is the Respondent's further case, that whereas section 4(3) of the Act provides that the 1st Interested Party may, from time to time, conduct or cause to be conducted a judicial needs assessment and recommend the appropriate number of judges required for appointment to the Court, the 1st Interested Party is yet to furnish the President with a report of the judicial needs assessment which was the basis of recommendations for the appointments.

74. This argument is supported by Mr. Kinyua's deposition that the President is yet to be furnished with a report of the envisaged judicial needs assessments by the 1st Interested Party which formed the basis of the recommendation for the appointments. He argues that for purposes of financial allocation, it was necessary for the 1st Interested Party to provide the bio data of the persons recommended for appointment to enable relevant State organs to project the financial implications, including salaries and pensions.

75. He states that it is imperative that there is a provision not only of the Judges' salaries, but also pension, before appointment since the remuneration and benefits payable to judges cannot be varied to their disadvantage. This, he states, is especially so, during the current times when the government is rationalizing budgets for the nation's sustainability.

76. It is contended that the process of removal of judges once appointed into office is elaborate, laborious and expensive hence the need not to rush the process of appointment; that in appropriate cases and circumstances, the recommendations by the 1st Interested Party, may be subjected to review by either the courts or the 1st Interested Party and consequently, it would be remiss of the President to appoint the judges without considering the impact to the principles of good governance, integrity, accountability, public participation and sustainable development.

77. In the Respondent's view, the prospect that the President should first appoint and thereafter consider the constitutional principles and their impact, either by way of judicial review or otherwise, would be absurd, given the irreversibility of the decision to appoint.

78. According to Mr. Kinyua, the President had received adverse reports in respect of some of the persons recommended for appointment as Judges after their names were published in the media. He states that it would be irresponsible and contrary to his oath of Office, for the President to appoint Judges or any other public or State officer to office, where serious questions have been raised about their integrity. This, he argues, is more serious for Judges who enjoy security of tenure and whose probity and integrity should be above reproach.

79. It is the Respondent's case, that the President is actively consulting with relevant State organs with a view to taking appropriate legal and administrative action, including a review of the recommendations, actions that have since been suspended pending the hearing and determination of this petition.

80. According to the Respondent, independence of the Judiciary is not only guaranteed by the mode of appointment of Judges, but also their terms of service, tenure in office, financial autonomy, mode of discipline and removal. To this end, the Respondent submits that it is important that the provisions

regarding the independence of the judiciary are looked at in a wholesome way rather than in an itemized manner. The Respondent asserts that this was the position accepted by the Court in Law Society of Kenya v Attorney General & 2 others (supra).

81. Relying on the decision in Re the matter of Speaker of the Senate & another (supra) the Respondent argues that the system of checks and balances in the Constitution is geared towards preventing autocracy and to restrain institutional tyranny. The Respondent contends that an interpretation that makes recommendations by the 1st Interested Party not subject to any other state organ in the appointment of Judges would be contrary to the architecture of the Constitution.

82. The Respondent argues that to hold that the 1st Interested Party's role in the appointment of Judges is absolute, is to negate the fundamental principle of the Constitution. In his view, the Petition is unmeritorious and should be dismissed with costs.

Analysis and Determination

83. We have considered the petition, depositions and submissions for and against the petition. In our view, the following issues arise for determination, namely;

    i. Whether the court has jurisdiction to hear and determine this petition

    ii. whether the President has mandate to review, decline or refuse to appoint persons recommended by the 1st Interested Party as judges

    iii. whether the delay or refusal by the President to appoint the persons recommended by the 1st interested party as judges, is unconstitutional

    iv. What reliefs to grant, If any

Whether the court has jurisdiction

84. The Respondent has argued through his submissions that this court has no jurisdiction to determine this petition. His concern on whether or not this court has jurisdiction to hear this Petition, stems from various decisions by this Court and those by the ELRC which have not been definitive in demarcating the jurisdiction of either court in matters such as the one before this court.

85. The Petitioner and the Interested Parties contend that this is the only court that has jurisdiction to determine this Petition. They have relied on Article 165(3) (d) of the Constitution to buttress their argument that this court has constitutional mandate to determine among others, any question respecting the interpretation of the constitution; whether any law is inconsistent with, or is in contravention of the Constitution, and the question whether anything said to be done under the authority of the Constitution or of any law, is inconsistent with, or in contravention of, the Constitution.

86. Jurisdiction is that power or authority conferred on a Court to determine disputes presented before it for resolution. That power may be conferred by the Constitution, statute or both. It may be limited in like manner. See Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] KLR 1.

87. In Re The Matter of Interim Independent Electoral Commission, [2011] eKLR, the Supreme Court stated with regard to the source of jurisdiction;

> " 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... 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..."

88. And in Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others [2012]eKLR, the same Court again stated:

> "A Court's jurisdiction flows from either the Constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation..."

89. The jurisdiction of this court is derived from the Constitution and Article 165(3) is clear on this. Sub Article (3) (d) states that this court has jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

90. It is therefore clear from the constitutional text that one of the core mandates of this court is not only to interpret the Constitution but also to determine whether actions purportedly done under the authority of the Constitution are in accord with it.

91. The issues that arise for determination in this petition, are whether, the 1st Interested Party acted in accordance with the Constitution and the law in the recruitment process and whether the President's actions of refusal or delay to appoint persons recommended by the 1st Interested Party, are in consonance with the Constitution. That, in our view, falls squarely within the mandate of this court and no other. This is the court that is clothed with jurisdiction to safeguard, protect and defend the Constitution. This court cannot, therefore, abdicate this mandate as the Respondent suggests.

92. Second, we do not find anything to suggest that the issues raised in the Petition are for determination by the ELRC as the Respondent contends. Article 162(2) directed Parliament to establish courts of the status of this court to deal with issues of (a), the environment and the use and occupation of, and title to, land and (b), employment and labour relations. Parliament was also to determine the jurisdiction of those courts. That is different from the jurisdiction of this court to interpret the Constitution and issues of compliance with it, which is conferred by the Constitution and not statute. What is before this court is a constitutional issue under Article 165(3) (d) and nothing else.

93. Third, we are unable to trace any question of employee-employer relationship in this petition that would make this matter fall within the exclusion clause in Article 165(5) which bars this court from hearing matters reserved for the exclusive jurisdiction of the courts contemplated under Article 162 (2) (a) and (b), that is; the ELC and ELRC. We therefore find no merit in the preliminary objection and consequently, dismiss it.

Whether the President has mandate to review, decline or refuse to appoint persons recommended by the 1st Interested Party, as judges

94. The Petitioner, 1st, 2nd and 3rd Interested Parties have argued that the President has no mandate to decline to appoint persons recommended or subject the list to a review. In their view, the President's action violates the principles of the Constitution and independence of the 1st interested party and that of the Judiciary.

95. The Respondent on his part maintains that the President has power to decline to appoint the persons recommended by the 1st Interested Party. In the view of the Respondent, the President's mandate is not merely ceremonial, but he has to ensure that the Constitution is complied with; that persons so recommended are of high integrity and that the President may decline if he has reason to do so.

96. The Respondent further contends that the President has not received reports on the needs assessment that informed the recruitment and attendant recommendations for appointment to the various Courts. We understand the Respondent to argue that the President and the Treasury should have been consulted before the recruitment process commenced.

97. To resolve the contestation, we must begin with the Constitution itself. Article 171 establishes the 1st Interested Party as an independent constitutional Commission whose mandate is clearly spelt out in Article 172(1) of the Constitution which provides:

> "The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall —
>
> (a) recommend to the President persons for appointment as judges;
>
> (b) review and make recommendations on the conditions of service of —
>
> (i) judges and judicial officers, other than their remuneration; and
>
> (ii) the staff of the Judiciary;
>
> (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
>
> (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and
>
> (e) advise the national government on improving the efficiency of the administration of justice

98. Sub Article 2 states that in the performance of its functions, the 1st Interested Party shall be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality.

99. In that regard, it is the 1st Interested Party's mandate to carry out interviews and recommend persons for appointment as Judges of Superior Courts. The process of recruitment of judges is provided for both under the Constitution and the Judicial service Act. The process is elaborate and in this petition, there is no suggestion by the Respondent that the Constitution and statutory process were not followed in arriving at the names of the persons recommended.

100. The affidavit of Ms Amadi has placed before the court the elaborate steps that both the 1st and 2nd Interested Parties took to have the input of the then President of the Court of Appeal, now the Respondent, who had recommended that no less than 6 Judges of appeal be appointed. That was on 23rd May 2017. Subsequently, the current President of the Court of Appeal is of the same view that the Court needs more human resource in form of recruitment of more Judges to bolster the numbers in that court for optimal performance.

101. Further, the Presiding Judge of the ELC and the Principal Judge of the ELRC also gave their input and were clear that the numbers they had in their courts were inadequate. Following those consultations, the 2nd Interested Party determined that there was need to recruit 11 Judges to Court of Appeal, 20 to the ELC and 10 to the ELRC and declared vacancies to this effect.

102. The 1st Interested Party then advertised the vacancies, called for applications from interested persons, conducted interviews and recommended to the President, persons for appointment as judges of the respective superior Courts. Prior to conducting interviews, the 1st Interested Party called for information from members of the public, institutions and agencies which it considered before making the recommendations.

103. It is on record from both the 1st Interested Party and the Respondent, that the NIS wrote to the 1st Interested party informing it that there were adverse reports on a number of the applicants. The 1st Interested Party requested for particulars of the adverse reports in its possession but the NIS declined to disclose the adverse reports arguing that it had discharged its obligation in its first letter.

104. This, in our view, seems to be the main reason why the President has declined or delayed to make the appointments. This is also clearly discernible from the affidavit of Mr Joseph Kinyua. The argument the Respondent raises through that affidavit, is that due to the adverse integrity reports against some of the persons recommended for appointment, the President cannot formalize the appointments. There is a deposition to the effect that the President is even contemplating legal and administrative actions which he has however withheld pending the determination of this petition.

105. In 2010, the people of Kenya gave to themselves a transformative Constitution that ushered in a different constitutional architecture with independent commissions and offices that exercise mandate on their behalf. One of these independent commissions is the 1st interested party. It was bestowed with the mandate of ensuring the independence of the Judiciary through recruitment, discipline of judicial officers and staff and initiating the removal process of Judges.

106. The 1st Interested Party was, therefore, given constitutional operational and financial independence to enable it discharge its mandate without direction or control from any person or authority. This means that in the exercise of its operational independence conferred by the Constitution and the law, the 1st Interested Party is not subject to interference from any person or authority.

107. With regard to the appointment of judges, Article 172(1)(a) confers on the 1st Interested Party the mandate to recommend to the President persons for appointment as judges. Article 166(1) provides for the appointment of the Chief Justice, Deputy Chief Justice and all other judges of superior courts as follows:

> "(1) The President shall appoint—
>
> (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
>
> (b) all other judges, in accordance with the recommendation of the Judicial Service Commission."(Emphasis)

108. The Article is clear that appointments are to be as recommended by the 1st Interested Party. The 1st Interested Party is an independent organ that enjoys independence when it comes to recruitment of judges of superior courts. This mandate is protected by the Constitution and the 1st Interested Party

does not have to seek anyone's permission when discharging this mandate. Its fidelity is only to the Constitution and the law. This is clear from the Constitutional text.

109. Article 249(1) provides for the objects of commissions and independent offices, thus:

> " The objects of the commissions and the independent offices are to—
>
> (a) protect the sovereignty of the people;
>
> (b) secure the observance by all State organs of democratic values and principles; and
>
> (c) promote constitutionalism."

110. The Article is clear that the objects of the commissions, including the 1st Interested Party are to protect the sovereignty of the people, including their sovereign will; secure observance by State organs, including the Presidency, of democratic values and principles in the Constitution and, most importantly, promote constitutionalism.

111. Sub Article (2) is emphatic that:

> " The commissions and the holders of independent offices—
>
> (a) are subject only to this Constitution and the law; and
>
> (b) are independent and not subject to direction or control by any person or authority."

112. The 1st Interested Party is independent in the discharge of the functions allocated to it by the Constitution and the law. It is not subject to any person or authority. That explains why ours is a transformative Constitution that allocates functions and mandate, roots for its observance and infuses constitutionalism in it.

113. Eric Kibet and Professor Charles Fombad, in their scholarly article; Transformative constitutionalism and the adjudication of constitutional rights in Africa; African Human Rights Journal Vol. 17 No. 2. Pretoria, 2017 opine that:

> " The quest to strike a balance between anarchy, on the one hand, and tyranny, on the other, is a key preoccupation of constitutional law and the core of constitutionalism. The primary function of constitutions is to strike this balance by establishing power maps for the exercise of public power in a fashion that ensures that the government is neither too weak nor despotic. Thus, constitutions create state institutions, allocate to them powers and, importantly, define the limits of their powers. In this sense, constitutionalism is the notion of government limited by law. It posits that it is possible and, indeed, desirable, that government should be limited by law, the constitution sitting at the top in the hierarchy of law."

114. The Constitution has drawn a power map between the 1st Interested Party's mandate to carry out interviews and recommend persons for appointment and the President's duty to appoint the persons so recommended as judges of the superior courts. The Constitution does not allocate the President any power or mandate to comment on or review the decisions made by the 1st Interested Party. The Constitution does not even give him power to decline to appoint the persons recommended to the position of judge of superior courts.

115. To that extent, therefore, the 1st Interested Party has the sole mandate to call for applications, conduct interviews and recommend suitable persons for appointment as Judges in accordance with Article

166(1)(b) as read with Article 172(1)(a). The 1st Interested party's mandate in the recruitment of Judges of superior courts is not subject to direction or control of any person or authority. This independence is guaranteed in clear and plain language in Article 249(2).

116. In the discharge of its mandate, the 1st Interested Party is subject only to the Constitution and the law. Article 10 (2) requires transparency, accountability and public participation in the discharge of the recruitment mandate. It was in appreciation of these founding values, that the 1st Interested Party advertised the vacancies, invited applications from qualified persons, called for information from members of the public, institutions and agencies, conducted interviews and made public the names of those it had recommended for appointment as Judges of the various superior courts before forwarding those names to the President for formal appointment.

117. The fact that the 1st Interested Party conducted the process in an open and transparent manner and complied with the requirement of merit has not been impugned by the Respondent at all. There is not even a suggestion that those recommended for appointment, do not meet the merit criteria. The argument is that there is some doubt on the integrity of some of the persons recommended for appointment.

118. As we have already explained, the public and institutions were given an opportunity to volunteer information that would assist the 1st Interested Party make a decision on the appointments. The NIS wrote a letter hinting that there were adverse reports about some applicants but did not give details even after it was afforded an opportunity to do so. The 1st Interested Party made a decision based on the information available before it.

119. The 1st Interested Party could not act on the letter by the NIS as this would have violated the Constitution and the law. We say this because we operate in a constitutional democracy. Article 19 is clear that rights belong to individuals and are not granted by the State and must be respected by all State organs. Article 47(1) confers on every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The information the NIS said it had, and the manner of dealing with it, was an administrative action. That is, the persons adversely mentioned, if at all, were entitled to an action that was lawful and procedurally fair.

120. Secondly, they had the right to seek to be appointed judges of superior courts and any adverse information the NIS may have had, would have affected this right and for that reason, Article 47(2) is clear that where a right or fundamental freedom of a person is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

121. The information the NIS allegedly had, was likely to affect the rights of the persons the letter adverted to. For that reason, the 1st Interested Party was under a constitutional obligation to inform the affected persons the nature of the adverse information against them to enable them respond to the allegations before it made a decision. Without the NIS disclosing the adverse information, even after being asked to do so, the 1st Interested Party could not use information it did not have against the applicants in violation of their constitutional rights and fundamental freedoms.

122. Our Constitution is not a docile document. Article 2(1) declares it the supreme law of the Republic that binds all persons and State organs at both levels of government. Article 3(1) obligates every person to respect, uphold and defend the Constitution. Further, the founding principles in Article 10(2) bind all State organs, State officers, public officers and all persons whenever they interpret the Constitution, enact or interpret a law or formulate public policy.

123. The NIS as an organ established under the Constitution, is required to act in a manner consistent with the Constitution. Section 3(1) of the National Intelligence Service Act, 2012, provides that:

> " The Service shall, in fulfilling its mandate, observe and uphold the Bill of Rights, values and principles of governance under Article 10(2), the values and principles of public service under Article 232(1) and the principles of national security in Article 238(2) of the Constitution..."

124. The NIS is also required by section 3(1)(c) of the Act, to comply with the constitutional standards of human rights and fundamental freedoms. Article 47 falls within the Bill of Rights that the NIS is required to comply with. The principles in Article 10(2) include transparency, accountability and good governance that bind the NIS.

125. In that regard, we have no doubt that the founding values in our constitutional architecture leave no room for mob lynching. We say so since transparency and accountability means that every State organ, State officer, public officer, institution or agency, must account for its actions, including those who hold the view that some of the persons recommended for appointment as judges have integrity issues. The persons adverted to in the said letter, were entitled to know what the allegations against them were and to respond to them. Opaque statements or allegations of lack of integrity, without disclosure of what the specific issues were, runs counter to the spirit of the Constitution and its expansive Bill of Rights.

126. The NIS, having voluntarily alluded to the existence of some adverse information about some of the applicants, yet declined to disclose the particulars when called upon to do so by the 1st interested party, it acted contrary to the dictates of the Constitution and its own statute which require it to act in accordance with the Constitution and observe the highest standards of human rights and fundamental freedoms.

12. Mr Bitta, counsel for the Respondent, attempted to justify the decision by the NIS declining to disclose the information on grounds that its statute prohibits it from disclosing "classified" information. Section 63(1) of the Act provides that;

> " A person who is or was a member of the Service shall not without the authority of the Director-General disclose or communicate, whether in Kenya or elsewhere, classified information or any information the disclosure of which is detrimental to national security."

128. Section 2 of the Act defines "classified information" as "information of a particular security classification, whose unauthorized disclosure would prejudice national security." We are in great difficulty to understand how allegations of lack of integrity on the part of some of the applicants, can be "classified" information that would prejudice or compromise national security if disclosed to an independent State organ to enable it discharge its constitutional mandate. Suppression of such information, if true, would only incapacitate the State organ in the discharge of its mandate and threaten compliance with the Constitution.

129. The President seeks to rely on reports that are undisclosed and, therefore, unknown to the 1st Interested Party and those said to be adversely mentioned. This cannot justify the President's refusal to appoint the persons recommended as judges. The refusal to appoint, in our respectful view, not only threatens, but also interferes with the operational independence of the 1st Interested Party.

130. The issue of the independence of Commissions and Independent Offices is critical in the performance of functions and discharge of mandate of these organs and is not to be interfered with at any cost. The

Supreme Court stressed on the purpose of the independence clause in Re the matter of the Interim Independent Electoral Commission; Supreme. Court Advisory Opinion No. 2 of 2011; [2011] eKLR, thus:

> "(59) It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...
>
> 60. The several independent Commissions and offices are intended to serve as "people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause".

131. The court observed, however, that for due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance, and that, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest.

132. Further, in Communications Commission of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR), the Supreme Court emphasised about the independence, stating:

> (169) Therefore, "independence" is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance."

133. The Court went on to state regarding the attainment of that independence:

> "[170] How is the shield of independence to be attained? In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain "independence" in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these "other safeguards" can singly guarantee "independence". It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence."

134. In that regard, the 1st Interested Party's independence is not a matter of conjecture or speculation. It is a constitutional imperative that cannot be interfered with by any person, organ or authority. It is constitutionally guaranteed and protected. The fundamental question, therefore, is whether having made recommendations of persons to be appointed as Judges, the President can decline or refuse to appoint them.

135. According to the affidavit by Mr Joseph Kinyua and submissions made on behalf of the Respondent, the President has mandate to decline to make appointments as recommended by the 1st Interested Party.

Their argument is that the President, as head of state and government, is mandated to ensure that the Constitution is complied with. In their view, the President received adverse reports about some of the applicants and it was his obligation to withhold his authority of appointing the persons recommended by the 1st Interested Party as judges of the various superior courts.

136. We are unable to agree with the Respondent that the President has constitutional or legal mandate to act contrary to the 1st Interested Party's decision recommending persons for appointment as judges made in accordance with the Constitution and the law. It has not been demonstrated to this court, that there is any provision in the Constitution or statute that confers such power on the President.

137. Adverse reports, if any, against some, or any of the persons recommended for appointment, should have been placed before the 1st Interested Party, the only State organ that is constitutionally mandated to determine suitability of persons to recommend for appointment as judges. Once the NIS declined to give the information, the 1st Interested Party had no basis whatsoever to make adverse findings against any of the persons said to be adversely mentioned. In the circumstances the 1st Interested Party properly discharged its mandate as required by the Constitution and the Judicial Service Act.

138. We state without hesitation, that integrity is one of the founding values in our Constitution. In our view, lack of integrity cannot be "classified information", and there was no justification for not disclosing such information to the 1st Interested Party. As we have already stated, classified information must have something to do with national security and that certainly, cannot include an allegation that one has no integrity.

139. This Court has held before, and we respectfully agree, that the 1st Interested Party's decision recommending persons for appointment by the President as judges, is not subject to review, reconsideration or second guessing by the President. In Law Society of Kenya v Attorney General & 2 others (supra), a petition that dealt with the same issue as the one before this court, and after observing that the President is represented in 1st Interested Party by the Attorney General and three other members appointed by him, the court stated:

> " [71]It is our view that the President having taken part in the nomination process through his said appointees, once the Commission nominates the persons to be appointed as Judges, the President's role is then limited to appointment, swearing in and gazettement of the said persons as Judges of the High Court. He cannot therefore purport to "process", "vet", "approve" or "disapprove" the said nominees. At that stage the issue of consultation with the Chief Justice, also a member of the Judicial Service Commission, does not arise."

140. The court then went on to hold:

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

141. We entirely agree with the above proposition of the law, that once the 1st Interested Party makes recommendations, the President has no other option but to formalize the appointments. He cannot change the list, review it or reject some names. He cannot even decide who to appoint and who not to appoint. He must appoint the persons as recommended and forwarded to him by the 1st Interested

Party. Paragraph 16 of the First Schedule to the Judicial Service Act is clear that even the 1st Interested Party "shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee."

142. That means once the recommendations were made and forwarded to the President, the 1st Interested Party became functus officio and the President was bound by the Constitution and the law to appoint the persons recommended as Judges. The President is responsible for the formal act of appointing the judges in our jurisdiction. Our Legal framework clearly sets out the relationship between the prior selection process conducted by the 1st Interested Party and the role of the President at this final stage.

143. Article 172(1)(a), is that one of the core mandates of the 1st Interested Party is to recommend to the President persons for appointment as judges. Thereafter, Article 166(1)(b) provides in mandatory terms that, "the President shall appoint all other judges, in accordance with the recommendation of the Judicial Service Commission." Our understanding of the Constitution and the law is that the 1st Interested Party is required to present the President with a single, binding recommendation for each vacancy. We therefore find and hold, that the President has no residual legal power to question or reject names recommended to him by the 1st Interested Party for appointment as judges in accordance with the Constitution.

144. We agree with the court in the above decision that the constitutional scheme in coming up with this new way of appointing judges was intended to avoid sliding back to the old system where appointment of Judges could not be traced to any particular criteria. To accede to the position taken by the Respondent in this petition, that the President has any powers in determining who to appoint, would amount to allowing a proposition to take the people of Kenya back to an era they overwhelmingly discarded when they enacted and adopted the current Constitution. This would certainly amount to this court acting contrary to the Constitution.

Whether the delay or refusal to appoint the persons recommended is unconstitutional

145. The Petitioner and the Interested Parties argue that the delay in making the appointments is inordinate and, therefore, unconstitutional. The Respondent, on his part, argues that there is no time limit set by the Constitution to making the appointments. In the Respondent's view, unlike in the case of appointment of judges, where the Constitution contemplates that actions be taken within a given timeline, it has stated so. He contends that there is no delay in the appointments herein and, therefore, there is nothing unconstitutional.

146. Well, the Respondent's argument may appear attractive but it misses the point. Recommendations were made on 23rd July2019 and 13th August 2019 respectively, but the President had not appointed the persons recommended by the time of filing and hearing of this petition. Whereas it is true that the Constitution does not set the time within which the President should formalise the appointments, our reading of the mandate of the 1st Interested Party and that of the President, is that the appointment must be immediate because the President plays no other role in the process, except to formally appoint the persons recommended by the 1st Interested Party as required by Article 166(1)(b) of the Constitution

147. The people of Kenya did not expect the President to delay appointment of judges given that the persons so recommended are intended to serve the citizenry immediately in dispensing justice. The people may not have assigned time lines within which to formalise the appointment of judges because they did not expect the President to delay such appointments once he receives recommendation from the 1st Interested Party. The fact that there is no time limit, however, cannot be used to delay appointments done in accordance with the Constitution and the law.

148. Even if the Respondent was to successfully argue that there is no timeline and, therefore, the President can take as much time as he likes without violating the Constitution, then he needs to be reminded of Article 259(8) which provides that:

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

149. In our view, the appointment of judges by the President, should be immediate and as soon as the recommendations are forwarded to him by the 1st Interested Party. That is the spirit of Article 259(8) of the Constitution, which demands that actions be taken without unreasonable delay, and as often as the occasion arises. The President is only required to put in place plans to appoint the persons recommended as judges. Such plans cannot take much time and, therefore, in our considered view, the reasonable time contemplated by the Constitution, should be within 14 days from the date recommendations are received to the President.

150. Article 259 demands that the Constitution be interpreted in a manner that accords with its values and principles and, therefore, all actions by State organs, State officers and public officers must be done in accordance with the Constitution. Article 259(3) commands that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.

151. In that regard, when the Constitution uses the words 'reasonable time' and "as often as occasion arises", any action delayed beyond 14 days cannot be deemed to be within reasonable time.

152. This view was shared by this court in Law Society of Kenya v Attorney General & 2 others (supra) where the court stated:

> " (94) In determining what is reasonable time therefore, it is our view that the timelines stipulated in the Constitution ought to act as a guide. Under Article 263 of the Constitution, the Constitution was to be promulgated within fourteen days of its gazettement. Under Article 115(1) the President is required to assent to a Bill within fourteen days after receipt thereof. Under Article 114(1) the President is required, within fourteen days after a vacancy in the office of Deputy President arises, to nominate a person to fill the vacancy. Under Article 158(4) of the Constitution, on receipt and examination of the petition for removal of the Director of Public Prosecutions, the President is required to, within fourteen days, suspend the Director of Public Prosecutions from office and, acting in accordance with the advice of the Public Service Commission, appoint a tribunal. Similarly, under Article 168(5), the President is required, within fourteen days after receiving the petition for removal of a Judge, to suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission, appoint a Tribunal."

153. The Court went on to state:

> " (95) In our view the spirit of the Constitution is that when it comes to matters of national interest, the thread that runs across the constitutional timelines with respect to purely procedural matters where what is required is more or less a seal of approval or formalisation of a decision already substantially made, is that fourteen days period is generally reasonable."

154. The court then concluded thus:

(96) "Taking the cue from the said provisions it is our view that to subject persons who have been nominated for appointment as Judges for a waiting period of more that(sic) five months as was the case herein, is clearly unreasonable. It subjects the said nominees to unnecessary anxiety. In arriving at this decision, we take into account the strict timelines given to the Commission in undertaking the process of nomination of Judges. Such strict timelines show the seriousness with which the appointment of Judges ought to be treated. Accordingly, all the players in the chain of the appointment process ought to expedite the process of appointment of Judges taking into account the important role played by the Judiciary in the administration of justice in any democratic system of governance."

154. In the premise, we find and hold that the delay in appointing the persons recommended by the 1st Interested Party, is unreasonable and, therefore, unconstitutional.

155. In coming to this conclusions, we are guided by the Supreme Court observation in Communication Commission of Kenya & 5 others v Royal Media Services & 5 others (supra) that" the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. Further in Speaker of the Senate & Another v. Attorney-General & 4 Others (supra) the same court was clear that:

> " [156]...Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents"

Reliefs to grant

156. The Petitioner, supported by the Interested Parties, urge this court to issue; a declaration to the effect that the President's failure to appoint the persons recommended by the 1st Interested Party as Judges, violates the Constitution; a declaration that the persons recommended be deemed duly appointed and should assume duties as judges of the respective superior courts, and a declaration that the Respondent and the Interested Parties should take immediate steps to enable the persons recommended for appointment as Judges discharge their constitutional mandate. The Petitioners urge this court to follow the decision in Law Society of Kenya v Attorney General & others [2019] eKLR which was on the appointment of members of the 1st Interested Party.

157. We must point out that the requirements for appointment under Article 171, are different from those in Article 166(1) as read with Article 172(1)(a), which obligate the President as a matter of constitutional compulsion, to appoint the persons recommended to the office of judge. In that regard, the President is bound by the recommendation of the 1st Interested Party.

158. We have carefully considered the petition, the responses thereto; the submissions by all parties and the authorities relied on. We have also considered the Constitution and the law. We find that the President has no mandate to review, reconsider or decline to appoint persons recommended by the 1st Interested Party as judges. We also find that the delay by the President in appointing the persons recommended, is unreasonable and unconstitutional.

159. Taking into account the circumstances of this case, we are satisfied that the Petition is meritorious and succeeds. We therefore allow it and make the following orders, which we consider appropriate;

a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st Interested Party in accordance with Article 166(1) as read with Article 172(1)(a) of the Constitution on the persons to be appointed as Judges.

b) A declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act.

c) A declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective courts is a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution

d) Costs to the Petitioner.

DATED, SIGNED, AND DELIVERED AT NAIROBI, THIS 6TH DAY OF FEBRUARY, 2020.

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L. A. ACHODE

PRINCIPAL JUDGE.

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J. A. MAKAU

JUDGE

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E. C. MWITA

JUDGE