



**Law Society of Kenya v Attorney General & another; Warsame & another
(Interested Parties) (Petition 307 of 2018) [2019] KEHC 10881 (KLR)
(Constitutional and Human Rights) (18 January 2019) (Judgment)**

*Law Society of Kenya v Attorney General & another; Mohamed
Abdulahi Warsame & another (Interested Parties) [2019] eKLR*

Neutral citation: [2019] KEHC 10881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 307 OF 2018
EC MWITA, J
JANUARY 18, 2019**

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CHIEF JUSTICE OF THE REPUBLIC OF KENYA 2ND RESPONDENT

AND

HON JUSTICE MOHAMED ABDULAHI WARSAME INTERESTED PARTY

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

A member of the Judicial Service Commission elected or appointed to serve a second term was exempt from retaking the oath of office

The 1st interested party, having been elected as required by the law, but the President had failed to perform his duties as required by law without constitutional or legal justification, the Court should grant an appropriate relief that should deem the 1st interested party to have been appointed to enable him take his position in the JSC as a representative of Judges of the Court of Appeal. It was not the President’s act of appointment that made the 1st interested party a commissioner but his election. That was the best way to strike at the heart of the problem and discharge the Court’s obligation to respect, uphold and defend the Constitution and its essential values including the rule of law.

Reported by Chelimo Eunice



Statutes- interpretation of statutes-interpretation of section 15(2) (b) of the Judicial Service Act - whether the requirement for the President to appoint nominees as members of the Judicial Service Commission within three days of receipt of names was mandatory-whether the President was violating the law in delaying to appoint the 1st interested party -Judicial Service Act, section 15(2) (b)

Statutes- interpretation of statutes-interpretation of section 40 of the Judicial Service Act- whether members of the Judicial Service Commission were required to take oath or make affirmation upon re-election for the second term- whether the 1st interested party, having been elected to serve a second term, was exempt from retaking the oath of office in terms of section 40 of the Judicial Service Act before assuming office- Judicial Service Act, 2011, section 40
Constitutional Law-interpretation of constitutional provisions-interpretation of article 23 as read with articles 22, 165(3) (d)(ii) & 159(2) of the Constitution – a claim that the Court could not grant the reliefs sought since the President’s action could only be supervised by the National Assembly and that the alleged violations did not fall within the ambit of article 23- whether violation of the Bill of Rights included the right of representation at the Judicial Service Commission and the right to represent the electorate in the Commission -whether in the circumstances, the Court could grant the reliefs sought-Constitution of Kenya 2010, articles 22, 23, 159(2) & 165(3) (d)(ii)

Civil practice and procedure – res judicata – rationale of res judicata – elements of res judicata - what was the rationale for the doctrine of res judicata - what were the elements for the doctrine of res judicata - whether the matters raised in the instant petition were res judicata for addressing the issues raised in the Petition No. 106 of 2018 (consolidated with Petition No 119 of 2018)– Civil Procedure Act, section 7

Brief facts

The petitioner averred that the 1st interested party was elected as the representative of the Court of Appeal to the Judicial Service Commission (JSC), but there had been inordinate delay in gazetting him with a view to finalizing the process of appointing him as a member of the JSC, an action the petitioner contended, was unconstitutional. In the alternative, the petitioner averred that the 1st interested party, who was re-elected for the second term, was exempt from re-taking the oath of office before assuming office as a member of the JSC. The 1st respondent opposed the petition contending that it was *res judicata* based on the fact that the Court had dealt with Petition No. 106 of the 2018 (consolidated with Petition No. 119 of 2018), and in his view, that decision determined the issue at hand.

Issues

- i. Whether a member of Judicial Service Commission elected or appointed to serve a second term was exempt from retaking the oath of office.
- ii. Whether it was mandatory for the President to appoint a person as a member of the Judicial Service Commission upon receipt of his name, and whether his inaction violated the law.
- iii. Whether the matters raised in the instant petition were *res judicata* for addressing the issues raised in the Petition No. 106 of 2018 (consolidated with Petition No 119 of 2018).
- iv. Whether violation of the Bill of Rights included the right of representation at the Judicial Service Commission and the right to represent the electorate in the said Commission.

Relevant provisions of the Law

Judicial Service Act;

Section 15; Procedure of appointment;

(2) Where the nominations are to be made by bodies specified under article 171(2)(b), (c), (d), (f) and (g) of the Constitution—

(a) the respective nominating body shall submit the name of its nominee to the President; and

(b) the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.

Section 40;



(1) *The Chairperson and members of the Commission shall, on first appointment, take the oath or make the affirmation in the form prescribed in the Third Schedule to the Constitution.*

(2) *The Chief Registrar and such other judicial officers and staff of the Commission as the Commission may require so to do, shall, on first appointment, take the oath or make the affirmation in the prescribed form.*

Civil Procedure Act;

Section 7;

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.

Held

1. Section 7 of the Civil Procedure Act barred subsequent proceedings that were similar to those in former suits, between same parties or substantially same parties and over similar or nearly similar issues and which had been heard and determined by a court of competent jurisdiction to hear such matters.
2. For a suit to be *res judicata*, the subsequent suit ought to raise similar or substantially similar issues to those in the former suit; the suit ought to be between the same parties and relate to the same subject matter and the issues ought to have been conclusively determined by a court of competent jurisdiction.
3. Although Petition No. 106 of 2018 (consolidated with Petition No 119 of 2018), was between same parties as in the instant petition (except the 2nd respondent), it primarily raised the question of interpretation of various articles of the Constitution, including articles 171(2)(c) and 250. The question of the delay or omission in appointing the 1st interested party which was the central issue in the instant petition and whether the President's inaction violated the law were not issues presented for determination in those former petitions. Thus, the instant petition was not *res judicata* as contemplated by section 7 of the Civil Procedure Act.
4. In electing the 1st interested party as their representative in JSC, the Judges of the Court of Appeal were exercising their constitutional right in accordance with article 171(2) (c) of the Constitution. That article gave them the right of representation in the JSC and their representative was identified through that election.
5. The National Assembly, as the representative of the people, enacted the Judicial Service Act so that under section 15(2) (b), names of those elected and nominated as required by the Constitution were to be sent to the President who would then formally appoint them within 3 days of receipt of the names. The President received the 1st interested party's name for appointment but forwarded it to the National Assembly for approval on the basis that the 1st interested party required such approval under article 250(2) of the Constitution. That action was the subject of the two Petitions Nos. 106 of 2018 and 119 of 2018 which however concluded that there was no constitutional requirement for such approval and further, that section 15(2) of the Judicial Service Act was not unconstitutional. What remained was for the President to formally appoint the 1st interested party which he did not.
6. The President was a state officer and, as head of state and government, he exercised delegated authority from the people and he was bound to act in accordance with the Constitution which was the supreme law. Article 3(1) obligated every person, including the President, to respect, uphold and defend the Constitution. Kenya was a democratic state founded on the essential values in article 10 of the Constitution, including the rule of law which required that the country be governed through observance of the laws.
7. Article 131(2) of the Constitution required the President to respect, uphold and safeguard the Constitution and ensure the protection of human rights and fundamental freedoms and the rule of law. Those were constitutional commands that bound any person acting as President.



8. The 1st interested party was elected in a manner specified by the Constitution as a member of an independent constitutional Commission, established under the Constitution. The Judicial Service Act, a legislation enacted by the National Assembly, required the President to appoint the 1st interested party to take his place as a representative of the Court of Appeal in the JSC within three days of receipt of his name. He had not done so ten months since his re-election.
9. The President was a servant of the Constitution and the law who had not only the obligation to uphold, respect and defend the Constitution, but also the duty to ensure protection of human rights, fundamental freedoms and the rule of law. Actions by the President, any other state officer or public officer had to be legally justifiable as the essence of the rule of law and democratic governance demanded by the Constitution.
10. The Constitution required justification of every governmental or public action, taken or not taken. Actions of any state officer or public officer, including that of the President, had to meet the constitutional test of justification as an incidence of the rule of law and a founding value in the Constitution.
11. The President had not appointed the 1st interested party as was required by the law. He had not attempted to justify his inaction which was in violation of section 15(2) (b) of the Judicial Service Act and did not, in any way, advance constitutionalism, the rule of law or inspire peoples' confidence in the discharge of his duties as demanded by the law. The inaction further denied the JSC an important member, thus violated the right of the Judges of the Court of Appeal to be represented in JSC, which undermined the independence and integrity of JSC.
12. The President's act of commission or omission, if allowed, had the potential of not only interfering with the independence of the JSC, but also that of the Judiciary as guaranteed by the Constitution.
13. In exercising its judicial authority, the Court in Petition No. 106 of 2018 (consolidated with Petition No 119 of 2018) determined the issue surrounding the 1st interested party's election and any potential approval by the National Assembly, as well as the constitutionality of section 15(2) of the Judicial Service Act. That determination was final unless set aside on appeal. In that regard, there remained no extra judicial discretion on the part of the President to exercise in so far as the 1st interested party's election to JSC was concerned. He was required by law to appoint the 1st interested party and that requirement was mandatory. Section 15(2) (b) of the Judicial Service Act was mandatory.
14. The 1st interested party's election conferred on him a right and a provision would be construed to be mandatory if failure to adhere to a requirement contained in it would take away a vested right of a party and, in effect, scuttle the administration of justice. In that regard, the President's delay in appointing the 1st interested party took away his vested right to represent the Judges of the Court of Appeal in JSC thus tended to scuttle the administration of justice.
15. The President had no other role to play once the 1st interested party was elected as a member of the JSC as required by the Constitution and the law and the name forwarded to him, except to put in place mechanisms to have him formally appointed as required by section 15(2)(b) of the Judicial Service Act.
16. The President's inaction violated the sovereign will of the Kenyan people. Parliament legislated on behalf of the people and, in that regard, enacted section 15(2) of the Judicial Service Act in exercise of its delegated authority. In essence it was the people of Kenya who enacted section 15(2) of the Act on the appointment of members of the JSC. By his inaction, delay or refusal to appoint the 1st interested party, the President was defying the people of Kenya on whose behalf section 15(2) (b) was enacted, which did not inspire confidence in the country, as a true democracy.
17. The President was not also living up to his oath of office, to bear true allegiance to the Republic; to obey, preserve, protect and defend the Constitution and laws of the Republic. The President undertook to diligently serve the people and do justice to all in accordance with the laws. His inaction was not, therefore, in keeping with the law. Neither was he doing justice to the 1st interested party and the Judges of the Court of Appeal who elected him. He was not doing justice to the people of Kenya who were



- to be served by the JSC, the 1st interested party was elected to serve in. To decline to appoint the 1st interested party without constitutional justification, the President was also not acting in accordance with the values and principles in article 10 of the Constitution. Thus, the President was violating the Constitution and its essential values including the rule of law.
18. Section 40 of the Judicial Service Act showed that the chairperson and members of the JSC were required to take the oath on their first appointment. The same thing applied to the Chief Registrar, judicial officers and other staff of the JSC. The section did not make it mandatory for a member elected or appointed to serve a second term to take the oath of office. The section did not require any other interpretation other than giving the words their ordinary meaning as used in the Judicial Service Act in the absence of any ambiguity arising from the words in that provision. A member of JSC elected or appointed to serve a second term, did not have to take the oath of office again.
 19. The Court could grant the reliefs sought since the Constitution had assigned functions to state organs, including the Court. The Court was assigned the function of interpreting the Constitution and the laws and settling disputes brought before it. Article 165(3)(d)(ii) of the Constitution conferred on the Court jurisdiction to determine the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution. The Court was also required by article 159(2) of the Constitution to ensure that the purpose and principles of the Constitution were protected and promoted.
 20. The Court was the custodian and protector of the Constitution and the rule of law. In discharging that mandate, the Court exercised jurisdiction conferred on it by the Constitution, including to determine the question of whether the President's action was in conformity with the law. And where it was not satisfied, the Court ought to prescribe a remedy following such a determination.
 21. Article 23(1) of the Constitution gave the Court jurisdiction to hear applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(3) of the Constitution further gave the Court power to grant an appropriate relief as circumstances of the case demanded. The Court had jurisdiction to redress any violations occasioned by the President's inaction. The Judiciary performed a vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and was the watchdog over the Constitution and its Bill of Rights, even against the State.
 22. Article 171(2) (c) of the Constitution gave the Court of Appeal the right of representation in the JSC. That was a constitutional right granted to that court and could not be taken away from them at whims. At any one time, the Court of Appeal had to have a representative in the JSC and the JSC would not be fully constituted without the Court of Appeal's representative.
 23. The 1st interested party having been elected, he acquired a right to represent his electorate in the JSC, a right flowing from the Constitution and which was constitutionally protected. Anything that infringed on that right, was a violation or a threat to violate the right of representation or to represent, which fell within the scheme of articles 22 and 23 of the Constitution and which the Court had jurisdiction to redress.
 24. The Court had jurisdiction to grant any relief for purposes of enforcing the Constitution and or redressing violation of fundamental rights and freedoms. There was no injustice that the Constitution was powerless to redress.
 25. It was the duty of the Court to settle disputes and for that reason, the Court could come in where a state organ, state officer or public officer acted in a manner that violated the law. The Court would not stand by and watch because exercise of administrative power called on the state, its organs and public officers to observe the principle of legality which was an incidence of the rule of law and a founding value in the Constitution.
 26. Appropriate relief should be an effective remedy for purposes of enforcing the Constitution, human rights and the rule of law. In determining appropriate relief, courts should carefully analyse the nature



of the constitutional infringement, and strike effectively at its source. Thus, the Court ought to grant a relief that would effectively strike at the source of the violation as a way of enforcing the Constitution and strike a blow to any future incentives for any state organ, state officer or public officer to violate, infringe and or frustrate a legitimate constitutional or legal process.

27. It was not the mandate of the 1st respondent to appoint the 1st interested party, thus, he would not be compelled to do so. The most effective remedy should not be to direct the 1st respondent to do that which he had failed to advise the President to do. Rather, the Court should grant a remedy that would bring the constitutional process to a conclusion, do away with any further or potential stalemate and enable an independent constitutional commission function at its optimal in the discharge its constitutional mandate.
28. The 1st interested party, having been elected as required by the law, but the President had failed to perform his duties as required by law without constitutional or legal justification, the Court should grant an appropriate relief that should deem the 1st interested party to have been appointed to enable him take his position in the JSC as a representative of Judges of the Court of Appeal. It was not the President's act of appointment that made the 1st interested party a commissioner but his election. That was the best way to strike at the heart of the problem and discharge the Court's obligation to respect, uphold and defend the Constitution and its essential values including the rule of law.

Petition allowed.

Orders

1. *A declaration was issued that the President's failure to appoint the 1st interested party as required by section 15(2)(b) of the Judicial Service Act, 2011, was in violation of articles 1, 2(1), 3(1), 10, 47, 73, 75(1), 131(2), 132(4)(a), 171 and 172 of the Constitution and was, therefore, unconstitutional and invalid.*
2. *A declaration was issued that the 1st interested party, a state officer elected to serve a second term based on his re-election, was exempted under section 40(1) of the Judicial Service Act, 2011, from retaking the oath of office before assuming the office of Commissioner in the Judicial Service Commission.*
3. *A declaration was issued that the 1st interested party, having been duly elected Commissioner of Judicial Service Commission as required by the Constitution and the law, and the President having failed to appoint him in violation of mandatory timelines set by section 15(2) (b) of the Judicial Service Act, the 1st interested party was deemed to have been appointed and was at liberty to take his position as a Commissioner of the Judicial Service Commission, representing judges of the Court of Appeal.*
4. *An order of mandamus was issued compelling the 2nd respondent and the 2nd interested party to take immediate measures and or steps to enable the 1st interested party take office as a Commissioner of the Judicial Service Commission and discharge his constitutional mandate.*
5. *The 1st Respondent was ordered to bear costs of the petition.*

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. In a Petition dated 5th September 2018 and filed in court on the same day, The Law Society of Kenya, the petitioner, sued the Attorney General, the 1st respondent, the principal advisor to the government and legal representative of the National Government in Civil proceedings with the mandate to promote,



protect and uphold the rule of law and defend Public Interest in the country and The Chief Justice of the Republic of Kenya as the 2nd respondent. Justice Mohammed Abdulahi Warsame and the Judicial Service Commission are named as 1st and 2nd interested parties respectively.

2. The Petitioner avers that the 1st interested party was elected on 9th March 2018 as the representative of the Court of Appeal to the Judicial Service Commission, the 2nd interested party, an independent constitutional commission, but despite this fact, there has been inordinate delay in gazetting him (the 1st interested party) with a view to finalizing the process of appointing him as a member of the Judicial Service Commission, an action the petitioner contends, is unconstitutional.
3. The petitioner avers, in the alternative, that the 1st interested party, who was re-elected for the second term, is exempt from the operations of section 40 of the Judicial Service Act, 2011 from re-taking the oath of office before assuming office as a member of the Commission.
4. It is the petitioner's case that the people of Kenya aspired for a government based on essential values of human rights, equality, freedom, democracy social justice and the rule of law; that all sovereign power belongs to people and is exercised on their behalf and only in accordance with the constitution as the Supreme Law and within the confines of national values and principles outlined in Article 10 of the constitution.
5. The petitioner further avers that although the 1st interested party was elected on 9th March 2018 and his name forwarded to the President for appointment as required by section 15(2) of the Judicial Service Act, the President purported to send his name to the National Assembly for approval, an action that was challenged and the court held that the 1st interested party was not subject to approval by the National Assembly. It is the petitioner's contention that the President was, therefore, required to appoint the 1st interested party within three days after receiving the name as required by section 15(2) (b) of the Act but he has not.
6. The petition also blames the 2nd respondent for not exempting the 1st interested party from re-taking the oath of office despite the fact that section 40 of the Judicial Service Act does not make taking of oath on re-election or re-appointment mandatory.
7. The petitioner pleads, therefore, that the President's failure to formally point the 1st interested party is a violation of the rule of law and good governance which are essential national values in our constitution. The petitioner also contends that the President's inordinate delay in formally appointing the 1st interested party is a violation of the 1st interested party's right to fair administrative action and further that the President's inaction is a violation of his obligations under Article 131 of the constitution to respect, uphold and safe guard the sovereignty of the Republic and ensure protection of human rights and fundamental freedoms and the rule of law. It is contended that the President has acted ultra vires section 15(2) of the JSC Act and that his omission violates the tenets of separation of powers and judicial independence.
8. The petitioner, therefore, sought the following reliefs:
 - i. A declaration be and is hereby issued that the President's failure to appoint the 1st interested party under section 15(2)(a) and (b) of the Judicial Service Act, 2011 is in violation of Articles 1, 10, 47, 73, 75(1), 131(2), 132(4)(a), 171 and 172 of the Constitution of Kenya, 2010.
 - ii. A declaration be and is hereby issued that the 1st interested party who is a state office serving a second appointment based on his re-election is exempted under section 40 of the Judicial Service Act, 2011 from retaking the oath of office before assuming the office of commissioner in the Judicial Service Commission.



- iii. In the alternative, an order of mandamus be and is hereby issued to compel the 1st respondent to appoint the 1st Interested party as a member of the 2nd interested party within 48 hours of the court's order or such reasonable time or period as the Honourable court shall direct; in default a declaration be and is hereby issued that the 1st interested party be and is hereby deemed to have been duly appointed.
- iv. An order of mandamus be and is hereby issued to compel the 2nd respondent to swear in the 1st interested party into office as a member of the 2nd interested party within 3 days of the court's order or within such reasonable time or period as the Honourable court shall direct.
- v. Costs of the petition against the 1st respondent.

1st Respondent's Response

9. The 1st respondent filed grounds of opposition dated 18th November 2018 and filed in court on the same day, contending that the matter is res judicata on account of the decision in Petition No 106 of 2018 consolidated with Petition No 119 of 2018; that the petition is grossly misconceived; is a non-starter and that the orders sought therein are misplaced in so far as they are intended to enforce the judgment in Petition Nos. 106 and 119 both of 2018 (consolidated).
10. The 1st respondent further contends that the reliefs sought are misplaced in the context of the present petition as they are limited by Article 23(3) of the constitution; that the petition is not ripe for judicial intervention and the same should be dismissed since the petitioner has an alternative remedy under Article 95 as read with Article 119 of the constitution.
11. It is the 1st respondent's case that the court's jurisdiction under Article 165(d) (i) and (ii) has not been properly invoked and that the matter is not justiciable to the extent that under the doctrine of separation of powers between the three arms of government, courts are restrained to issue orders that would intrude into or interfere with constitutional functions, duties and roles of the other branches of government.
12. The 1st respondent further contended that the President exercised prerogative appointive powers as head of state under Article 132(1) (f) of the constitution and is politically answerable to the National Assembly in exercise of its oversight role under Article 95 of the constitution.

Petitioner's submissions

13. Mr Ochiel, learned counsel for the petitioner, submitted highlighting their written submissions dated 6th November 2018 and filed in court on the same day, that the petition raises a single question of whether the delay in appointing the 1st interested party as a member of the 2nd interested party is unconstitutional and a violation of the law in particular section 15(2) of the Judicial Service Act. Referring to the Court's decision in Petition No 106 of 2018 consolidated with Petition No 119 of 2018, learned counsel contended that the court had determined that the 1st interested party was not subject to approval by the National Assembly thus leaving the matter of his appointment to the President, but which the President had failed to do. Learned counsel argued, therefore, that this is a justiciable matter for the court's determination and relied on the case of Attorney General v Andrew Maina Githinji [2016]eKLR for the submission that a cause of action is a factual situation, the existence of which entitles a person to obtain a remedy against another person.
14. Mr. Ochiel contended that the question of delay in appointing the 1st interested party was not in issue in Petition No 106 of 2018 Consolidated with Petition No 119 of 2018, as to make the present petition



- res judicata. He relied on the decision in *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015]eKLR on the issue of res judicata, arguing that the defence of res judicata should be raised in the clearest cases because causes of action keep on mutating. Learned counsel contended, therefore, that the issue in the present petition is different from those determined in Petition No 106 of 2018 consolidated with Petition No.119 of 2018.
15. Mr Ochiel went on to submit that the President's omission in appointing the 1st interested party is a violation of the rule of law and good governance enshrined in Article 10(2) of the constitution. Counsel relied on an article by Etienne Mureinik "A bridge to where? Introducing the Interim Bill of Rights" (1994), 10 *South African Journal on Human Rights*, 32), for the submission that the constitution has established a culture of justification. Learned counsel contended, therefore, that the President's action cannot be justified under Articles 10, 131(2) (a), 132(4) (a) as read with Article 3 of the constitution.
 16. According to learned counsel, Article 131(2)(a) requires the President to respect, uphold and safeguard the constitution, while Article 132(4) (a) obligates the President to perform constitutional or statutory functions as conferred on him. He relied on the report of the Secretary General to UN Security Council on the "Rule of Law and Functional Justice in conflict and post conflict societies" for the submission that all persons, including the state, are accountable to publicly promulgated laws and should avoid arbitrariness. He argued that the decision not to appoint the 1st interested party, is arbitrary and a violation of the right to fair administrative action guaranteed in Article 47(1) of the constitution and section 4 of the Fair Administrative Action Act, thus the action is subject to review by courts under section 7(2) of the FAAA.
 17. Mr Ochiel argued that having been elected on 9th March 2018, the 1st interested party has been kept out JSC since then which is unreasonable and relied on the case of *Republic v Cabinet Secretary Ministry of Interior and Coordination of National Government Functions Ex parte Patricia Olga Howson* [2013] eKLR, where a delay of 5 months was found to be unreasonable. He contended that the omission to appoint the 1st interested party is a violation by the President of his obligations under Article 131. Reliance was placed on the case of *Law Society of Kenya v Attorney General & 2 others* [2016]eKLR where the President was faulted for delaying in appointing Judges recommended by JSC.
 18. Learned counsel was of the view, that failure by the President to appoint the 1st interested party encroaches on the independence of the judiciary guaranteed under Articles 159, 160 and 172 of the constitution. He contended that since JSC oversees the independence of the judiciary, the omission to appoint the 1st interested party is meant to undermine the integrity of JSC and by extension the independence of the judiciary.
 19. He referred to the case of *Re The Matter of Interim Independent Electoral and Boundaries Commission* [2011] eKLR on the Kenya's history with an all -powerful executive which had emasculated other organs of state and to avoid this, JSC was clothed with constitutional independence under Article 249 of the constitution.
 20. Regarding interpretation of section 40 of the Judicial Service Act, learned counsel contended that it is meant to give effect to Article 171(4) of the constitution in that members are to hold office for a term of 5 years renewable once so that members are to take oath of office on first appointment only. Learned counsel argued that Parliament was aware of the possibility of a member serving for two term hence those serving a second term do not have to re-take oath of office. He relied on the case of *FIDA- Kenya Attorney General* [2018] eKLR on literal interpretation.



1st Respondent's Submissions

21. Mr Kuria, learned counsel for the 1st respondent submitted, also highlighting their written submissions dated 23rd November 2018 and filed in court on 26th November 2018, that the petition is res judicata on account of the decision in Petition No 106 of 2018 (consolidated with Petition No 119 of 2018), since the issue raised in the present petition is same as that determined in the said petitions.
22. According to learned counsel, given the wider scope in Petition No 106 of 2018 (consolidated), the present petition is res judicata in terms of section 7 of the Civil Procedure Act. He also relied on the decision in the case of John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others (supra), for the same submission. He contended that if the petitioner had intended for more orders, they should have sought these in the earlier petitions.
23. Secondly, Mr. Kuria submitted that the extent and scope of Article 23 and the orders the court can grant, and the prayers sought in the present petition to compel the President to comply with the law, cannot be granted since there is an alternative remedy. He contended that orders of mandamus can only be granted where there is violation of fundamental rights and freedoms.
24. Mr Kuria further contended that the invocation of the court's jurisdiction in the present petition is in the form of enforcement and not violation. He submitted, therefore, that the issue before court is not justiciable, arguing that the impugned actions can only be performed by the President under Article 131 of the constitution and section 15(2) (b) of the Judicial Service Act,
25. Learned Counsel relied on the case of Embu County Assembly V Martin Nyaga Wamboia [2018] eKLR, to contend that court orders should not be issued in vain. According to learned counsel, given that the President has violated the constitution, no orders can be given to redress the violation. Learned counsel further argued that the President is accountable under Article 95 to the National Assembly hence the court cannot sanction the President to comply with the constitution.
26. Mr Kuria went on to contend that the petitioner should have petitioned the National Assembly to ensure that the President complies with the law. Relying on the decision of Speaker of the Senate and another v Attorney General [2015]eKLR, learned counsel submitted that the petitioner should have let the other organ of state deal with the matter,
27. Mr Wamaasa, learned counsel for the 2nd respondent and 2nd interested party offered no response or submissions, leaving the matter to court.

Analysis and Determination

28. I have considered this petition, the response and submissions by counsel for the parties. I have also considered the authorities relied on by both sides. Two questions arise for determination. First; whether this petition is res judicata. And, second; whether the President is violating the constitution and the law in delaying to appoint the 1st interested party, and, depending on the answers to the above questions, what remedy if any, the court should grant.

Whether this Petition is res-judicata

29. The petitioner is the Law Society of Kenya, a body corporate established under the Law Society of Kenya Act. One of its mandates is to advise the government on the rule of law and constitutionalism. It therefore brought this petition in exercise of its mandate under its establishing legislation to question the President's delay in appointing the 1st interested party as a member of JSC as required by section 15(2)(b) of the Judicial Service Act.



30. The 1st respondent has opposed this petition contending that it is res judicata. This objection is based on the fact that this court had dealt with Petition No 106 of the 2018 (consolidated with Petition No 119 of 2018), and in the respondent's view, that decision determined the issue at hand. The respondent has relied on the provisions of section 7 of the Civil Procedure Act and the decision in *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (supra) to support this argument.
31. The petitioner has on its part has argued that this is a fresh cause of action and that the issue it raises was not decided in Petition No 106 of 2018. The petitioner contends that the issue in the former petition was not about the delay in appointing the 1st interested party as a member of JSC, but whether the 1st interested party, having been elected as a member of the Commission was subject to approval by the National Assembly before his appointment. The petitioner, therefore, distinguished the present petition from the former one.
32. Section 7 of the Civil Procedure Act bars subsequent proceedings that are similar to those in former suits, between same parties or substantially same parties and over similar or nearly similar issues and which have been heard and determined by a court of competent jurisdiction to hear such matters. The section provides;
- “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.”
33. For a suit to be res judicata, the subsequent suit must raise similar or substantially similar issues to those in the former suit; the suit must be between the same parties and relate to the same subject matter and the issues must have been conclusively determined by a court of competent jurisdiction. There are many decisions on this point and the court, need not be labour them.
34. Petition No. 106 of 2018 (consolidated with Petition No 119 of 2018) although between same parties in the present petition except the 2nd Respondent, he Petitions primarily raised the question of interpretation of various Articles of the constitution, that is; Articles 171(2)(c) and 250 of the constitution. The question raised in those Petitions was whether just like other Commissioners appointed in accordance with Article 250(2), a member of JSC elected under Article 171(2) (c) was subject to approval by the National Assembly before being appointed to take up his/her place in JSC . The other issue was whether section 15(2) of the Judicial Service Act was unconstitutional for requiring that elected members be appointed without first being subjected to approval by the National Assembly as required by Article 250(2) of the constitution.
35. It is therefore clear to me, that the question of the delay or omission in appointing the 1st interested party which is the central issue in the present petition, and whether the President's inaction violates the constitution and the law, were not issues presented for determination in the former petitions. It is, therefore, my holding that this petition is not res judicata as contemplated by section 7 of the Civil Procedure Act.



Whether the President is violating the Constitution and the Law in delaying to appoint the 1st Interested Party

36. The second question for determination is whether the President's delay to appoint the 1st interested party as a member of JSC is violating the constitution and the law. The petitioner has contended that indeed the President is violating the constitution and the law while the 1st respondent holds a contrary view.
37. According to the petitioner, Article 10 of the constitution binds the President whenever he applies or interprets the constitution, the law or implements public policy. The petitioner further contends that Article 131(2) (a) of the constitution as read with Article 132(4) (a) bestows on the President certain obligations and that his actions or omission must be justifiable under the constitution and the law which is not the case in the present circumstances. The 1st respondent on his part contends that the President exercises executive authority and that having exercised that authority or failed to act, is a matter that can only be dealt with by the National Assembly under its oversight role and not by the court.
38. To determine this question, we must first begin with the Preamble to the constitution. The people of Kenya in enacting the constitution stated clearly that they were doing so in honour of those who heroically struggled for the freedom and justice of our land, and that they were doing so recognizing their aspirations for a government "based on the essential values of human rights, equality, freedom, democracy social justice and the rule of law." And the fact that they were exercising their sovereign will to determine the form of governance their country should have.
39. The people further stated in Article 1 of the constitution that, "all sovereign power belongs to them and should be exercised only in accordance with the constitution". They went on to state that they may exercise that power either directly or indirectly through their democratically elected representatives; that they had delegated their sovereign power to state organs, namely; the National Parliament and County Assemblies; the National Executive and those in the Counties and the Judiciary and independent tribunals, all of which must exercise that power on their behalf but in accordance with the constitution.
40. The people of Kenya, therefore, chose and adopted governance in which the constitution is "Supreme", and stated as much in Article 2(1), that the "constitution is the supreme law of the Republic that binds all persons and all state organs at both levels of government". More importantly, the people were unequivocal in Article 3(1) that "every person has an obligation to respect, uphold and defend the constitution". In that regard, Article 4(2) is clear that ours is a democratic state founded on the essential values and principles in Article 10 which include "democracy and the rule of law."
41. In Article 10(1), the constitution declares that national values and principles "bind all state organs, state officers, Public officers and all persons whenever they apply or interpret the constitution, enact, apply or interpret any law or make or implement public policy decisions". In that respect, therefore, the President, as a state officer, exercises delegated authority on behalf of the people which he must do in accordance with the constitution and national values and principles in Article 10.
42. The genesis of the problem in this petition is the 1st interested party's election by Judges of the Court of Appeal as their representative in JSC, the 2nd interested party herein. The Judges of that Court were exercising their constitutional right in accordance with Article 171(2) (c) of the constitution. The Article gives them the right of representation in the JSC and their representative is identified through that election. This constitutional right was exercised on 9th March 2018 when the 1st interested party was elected by members of that Court.



43. The National Assembly as the representative of the people, enacted the Judicial Service Act so that under section 15(2) (b), names of those elected and nominated as required by the constitution are to be sent to the President who should then formally appoint them within three days of receipt of the names. It is not in dispute that the President received the 1st interested party's name for appointment but forwarded it to the National Assembly for approval on the basis that the 1st interested party required such approval under Article 250(2) of the constitution.
44. That action was the subject of the two Petitions Nos. 106 of 2018 and 119 of 2018 which however concluded that there was no constitutional requirement for such approval and further, that section 15(2) of the Judicial Service Act is not unconstitutional. What remained was for the President to formally appoint the 1st interested party which he did not hence this petition.
45. The President is a state officer and, as head of state and government, he exercises delegated authority from the people and he is bound to act in accordance with the constitution which is the supreme law of the Republic. It is also a fact that Article 3(1) obligates every person, including the President, to respect, uphold and defend the constitution. More over our country is a democratic state founded on the essential values in Article 10 including the rule of law which requires that the country be governed through observance of the constitution and the laws.
46. In addition, Article 131(2) requires the President to (a) “respect, uphold and safeguard the constitution and (e) “ensure the protection of human rights and fundamental freedoms and the rule of law”. These are constitutional commands that bind any person acting as President of this Democratic Republic.
47. The 1st interested party was elected in a manner specified by the constitution as a member of an independent constitutional Commission, established under the constitution. The Judicial Service Act, a legislation enacted by the National Assembly of Kenya, required the President to appoint the 1st interested party to take his place as a representative of the Court of Appeal in the JSC within “three days of receipt of his name.” He has not done so ten months since his re-election.
48. The President is a servant of the constitution and the law who has not only the obligation to uphold, respect and defend the constitution, but also the duty to ensure protection of human rights, fundamental freedoms and the rule of law in our democratic state. Actions by the President, any other state officer or public officer must be legally justifiable as the essence of the rule of law and democratic governance demanded by the constitution.
49. This country has a unique constitution that requires justification of every governmental or public action, taken or not taken. In that regard, Etienne Mureinik opines in his article “A Bridge to where? Introducing the interim Bill of rights” (supra) at page 32, that;

“if the new constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to, it must lead to a culture of justification, a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion”.

(emphasis)
50. On that note, therefore, actions of any state officer or public officer in our Republic, including that of the President, must meet the constitutional test of justification as an incidence of the rule of law and a founding value in our constitution.



51. Addressing the issue of the “rule of law” in his Report to the UN Security Council, titled “The rule of law and transitional justice in conflict and post conflict societies”, The secretary General observed at page 4, that:-

“The” rule of law” ...refers to a principle of governance in which persons, institutions and entities, Public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of laws equality before the law, accountability to the law, fairness in the application of the law, separation of powers participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” (emphasis).

52. Consistent with the above view, are the words by Lord Bingham to the effect that the “rule of law” requires that “Ministers and public officers at all levels exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably”(The Rule of law, 2010 Penguin London). And in the case of Law Society of South Africa v Minister for Transport [2010]ZACC2011(2) BCLR 150 (CC), the Constitutional Court of South Africa observed that the “rule of law requires that all public power be sourced in law and that state actors exercise power within the formal bounds of the law.”
53. The President has not appointed the interested party as required by the law. He has not attempted to justify his inaction which is clearly in violation of section 15(2) (b) of the Judicial Service Act and does not, in any way, advance constitutionalism, the rule of law or inspire peoples’ confidence in the discharge of his duties as demanded by the constitution and the law. The inaction further denies the JSC an important member, thus violates the right of the Judges of the Court of Appeal to be represented in the Commission which undermines the independence and integrity of that Commission.
54. We must remember that the new constitution changed the way of doing things and made everyone subject to the constitution and the law. This also reminds us the words of the Supreme Court in Re The Matter of Interim Independent Electoral and Boundaries Commission [2011]eKLR on the independence of commissions and independent offices, when it stated that ;

“(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. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. 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”.(emphasis)

55. The President’s act of commission or omission, if allowed, has the potential of not only interfering with the independence of the Judicial Service Commission, but also that of the Judiciary as guaranteed by the constitution. Article 159(1) is clear that judicial authority is derived from the people and vested in courts and tribunals established under the constitution to be exercised on behalf of the people pursuant to Article 1 of the constitution.
56. In exercising its judicial authority, the court determined the issue surrounding the 1st interested party’s election and any potential approval by the National Assembly, as well as the constitutionality of section 15(2) of the Judicial Service Act. That determination is final unless set aside on appeal. In that regard there remained no extra judicial discretion on the part of the President to exercise in so far as the 1st interested party’s election to JSC is concerned. He was required by law to appoint the 1st interested party and this requirement is mandatory because section 15(2) (b) provided that “the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission”.
57. That section 15(2) (b) is mandatory cannot be gainsaid. The 1st interested party’s election conferred on him a right and as held by the Supreme Court of India in *State of Bihar and others v Bihar Rajya Bhumi Vijas Bank Samiti* (Civil Appeal No.7314 of 2018), a provision will be construed to be mandatory if failure to adhere to a requirement contained in it would take away a vested right of a party and, in effect, scuttle the administration of justice. In that regard, the President’s delay in appointing the 1st interested party takes away his vested right to represent the Judges of the Court of Appeal in JSC thus tends to scuttle the administration of justice in the country.
58. I also find it appropriate to mention the court’s observation in the case of *Law Society of Kenya v Attorney General & 2 others* (supra), on the way the new constitution operates in relation to appointments. While dealing with the issue of the President’s delay in appointing judges that recommended by JSC, the court held that “[72] once the nomination process is finalised, subject... 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.”(emphasis)
59. The court went on to state that the system introduced by the new constitution “is meant to avoid sliding back to the old system where the appointment of Judges could not be traced to any particular criteria. To accede to the position adopted by the 1st Respondent would amount to this Court giving a clean bill of health to the proposition to take the people of Kenya back to an era discarded by them when they enacted for themselves the current Constitution.”
60. The court was emphatic and stated;
- [74] “We therefore disabuse the Respondents of any notion that the President has extra judicial discretion to decide whether or not to appoint the persons nominated for appointment as Judges of the High Court of Kenya. Such a trajectory if, upheld would, in our view, negate the constitutional interpretation principles decreed in Articles 259 which enjoins to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
- (75) By therefore opening a window for the President, even in a small way, to decide which nominees to appoint and which ones to reject would be a relapse to old system which was overwhelmingly discarded by Kenyans in a plebiscite. It would open the window for the reintroduction of manipulation and horse-trading in the process of appointment of Judges. To



do so would open the process to contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism with the current one that is meant to espouse the values and principles of governance set out in Article 10 of the Constitution which include non-discrimination, good governance, integrity, transparency and accountability. In other words, the people of the Republic of Kenya set out to eradicate all the negative tenets of appointment of Judges which in their view had hitherto impacted negatively on the integrity of the judicial system.”

61. I fully agree with the above statements, adopt and apply them to this case only substituting the word “judges” with the word “Commissioners” to mean that the President had no other role to play once the 1st interested party person was elected as a member of the commission as required by the constitution and the law and the name forwarded to him, except to put in place mechanisms to have him formally appointed as required by section 15(2)(b) of the Judicial Service Act. (See *Law Society of Kenya v National Assembly of the Republic of Kenya & others* [2018] eKLR)
62. The President’s inaction violates the sovereign will of the people. Parliament legislates on behalf of the people and, in that regard, enacted section 15(2) of the Judicial Service Act in exercise of its delegated authority. In essence it is the people of Kenya who enacted section 15(2) of the Act on the appointment of members of the 2nd interested party. By his inaction, delay or refusal to appoint the 1st interested party, the President is defying the people of Kenya on whose behalf section 15(2) (b) was enacted, which does not inspire confidence in our country, as a true democracy.
63. The President is not also living up to his oath of office, to bear true allegiance to the Republic; to obey, preserve, protect and defend the constitution and laws of the Republic. Moreover, the President under took to diligently serve the people and do justice to all in accordance with the constitution and the laws. His inaction is not, therefore, in keeping with the constitution and the law. Neither is he doing justice to the 1st interested party and the Judges of the Court of Appeal who elected him. He is not doing justice to the people of Kenya who are to be served by the Commission the 1st interested party is elected to serve in. To decline to appoint the 1st interested party without constitutional justification, the President is also not acting in accordance with the values and principles in Article 10 of our constitution. It is, therefore, my finding, and I so hold, that the President is violating the constitution and its essential values including the rule of law.

Reliefs sought

64. Having come to the above conclusion, the last question is what orders the court should grant. The petitioner has sought two main reliefs in the form of declarations and alternative reliefs. Apart from the general declaration on violation, the petition has urged the court to declare that the 1st interested party, having been elected as a state officer for a second term, is exempt from retaking the oath of office in terms of section 40 of the Judicial Service Act before assuming office. In essence the petitioner asks the court to determine whether a person elected for a second term should still take the oath before assuming office. In the alternative, the petitioner seeks an order of mandamus compelling the 1st respondent to appoint the 1st interested party as a member of JSC and an order compelling the 2nd respondent to swear the 1st interested party as such a member.
65. The 1st respondent has on his part contended that the court cannot grant such reliefs since the President having exercised his prerogative powers, his action can only be supervised by the National Assembly. In the view of the 1st respondent, the petitioner should have petitioned the National Assembly for action in terms of Article 95 of the constitution rather than instituting this petition.



Section 40 of Judicial Service Act

66. Does section 40 require a member elected to serve a second term to take a new oath? The section provides as follows;
1. “The Chairperson and members of the Commission shall, on first appointment, take the oath or make the affirmation in the form prescribed in the Third Schedule to the Constitution.
 - (2) The Chief Registrar and such other judicial officers and staff of the Commission as the Commission may require so to do, shall, on first appointment, take the oath or make the affirmation in the prescribed form.”
67. The plain reading of this section shows that the chair person and members of the commission are required to take the oath on their first appointment. The same thing applies to the Chief Registrar, judicial officers and other staff of the commission as the Commission may direct. The section does not, in my view, make it mandatory for a member elected or appointed to serve a second term to take the oath of office. The section does not, therefore, require any other interpretation other than giving the words their ordinary meaning as used in the Act in the absence of any ambiguity arising from the words in that provision. It is my finding that a member of JSC elected or appointed to serve a second term, does not have to take the oath of office again.
68. Regarding the 1st respondent’s contention that this court cannot grant the reliefs sought, I must state here, that we operate in a constitutional democracy which requires state officers and public officer to act only in accordance with the constitution and the law. In that respect, the constitution and no other, has assigned functions to state organs, including this court. The court is assigned the function of interpreting the constitution and the laws and settling disputes brought before it. Article 165(3) (d)(ii) confers on the court jurisdiction to determine “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, the Constitution;” The court is also required by Article 159(2), to ensure that the purpose and principles of the constitution are protected and promoted.
69. In that regard, this court is the custodian and protector of the constitution and the rule of law. I find support of this view in the Supreme Court of Canada observation in *Mackeigan v Hickman* [1989] SCR 796, that “courts are the protectors of the Constitution and the fundamental values embedded in it, that is; the rule of law, fundamental justice and preservation of the democratic process”. In discharging that mandate, the court exercises jurisdiction conferred on it by the constitution including to determine the question of whether the President’s action is in conformity with the constitution and the law. And where it is not satisfied, the court must prescribe a remedy following such a determination.
70. It is in that spirit that Article 23(1) grants the court jurisdiction, (in accordance with Article 165), to hear applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(3) further gives the court power to grant an “appropriate relief” as circumstances of the case demand. It is, therefore, this court that has jurisdiction to redress any violations occasioned by the President’s inaction. It is also in recognition of the unique mandate of the courts that Kriegler, J observed in *S v Mamobolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC), that “the judiciary performs a vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, is the watchdog over the Constitution and its Bill of Rights, even against the State.”
71. The 1st respondent also takes the view that Article 23 relates to violation of the Bill of Rights and, according to him, this petition does not fall within the ambit of Article 23. With great respect, this court



does not subscribe to this view. Article 23 must be looked at in context. Our constitutional scheme is such that the constitution is supreme and must be seen, read and interpreted as such. Article 171(2) (c) gives the Court of Appeal the right of representation in the Judicial Service Commission. This is a constitutional right granted to that Court and cannot be taken away from them at whims. At any one time, that Court must have a representative in the commission and the commission will not be fully constituted without that Court's representative since that is the constitution speaking.

72. Secondly, the 1st interested party having been elected, he acquired a right to represent his electorate in the Commission, a right flowing from the constitution and which is constitutionally protected. Anything that tends to infringe on that right, is a violation or a threat to violate the right of representation or to represent, which falls within the scheme of Articles 22 and 23 of the constitution and which this court has jurisdiction to redress.
73. From the constitutional stand point, therefore, this court has jurisdiction to grant any relief for purposes of enforcing the constitution and or redressing violation of fundamental rights and freedoms. That is why Mutunga, CJ, stated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others*[2013] eKLR, that “there is no injustice that the Constitution of Kenya is powerless to redress.”
74. Mr. Kuria further submitted that the court should not enter into the arena of separation of powers because, in their view, the President's action can only be questioned by the National Assembly in exercise of its oversight role. Although that may be a novel constitutional principle, it is, however, clear from the constitution itself, that it is the duty of the court to settle disputes and, for that reason, the court will come in where a state organ, state officer or public officer acts in a manner that violates the constitution and the law. The court will not stand by and watch because exercise of administrative power calls on the state, its organs and public officers to observe the principle of legality which is an incidence of the rule of law and a founding value in our constitution. “Where exercise of public power is at variance with this principle, it is inconsistent with the constitution and, therefore, invalid. This will lead to a review of that administrative action and may be nullified”. (*State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40)
75. And more importantly, as the Constitutional Court of South Africa observed in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC); “While the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.” This court is, therefore, under obligation not to shirk away from preventing violation of the constitution and the law by granting an appropriate relief.

Appropriate relief to grant

76. As to what an appropriate relief should be, courts have variously stated that it should be an effective remedy for purposes of enforcing the constitution, human rights and the rule of law. in *Fose v Minister of Safety and Security* [1997] (3) SA 786(CC)1997(7) BCLR 851 Ackermann, J, writing for the Court, stated that;

“(19) Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the



courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

77. And in *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; Ngcobo, J put the position thus;

“(45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source”.(emphasis)

78. Taking guidance from the above principles, this court is called upon to grant a relief that will effectively strike at the source of the violation as a way of enforcing the constitution and strike a blow to any future incentives for any state organ, state officer or public officer to violate, infringe and or frustrate a legitimate constitutional or legal process.

79. As I have already held, section 40 of the Judicial Service Act does not make it mandatory for the 1st interested party to take the oath of office now that he has been elected to serve a second term. The petitioner has asked this court to compel the 1st respondent to appoint the 1st interested party. That is not the mandate of the 1st respondent. Moreover, the stance taken by the 1st respondent in this matter is clearly at variance with his constitutional obligation to promote, protect and uphold the rule of law as well as defend public interest. In my view, the most effective remedy should not be to direct the 1st respondent to do that which he has failed to advise the President to do. Rather, the court should grant a remedy that will bring the constitutional process to a conclusion, do away with any further or potential stalemate and enable an independent constitutional commission function at its optimal in the discharge its constitutional mandate.

80. Professor H.W Wade and CF Forsy (*Administrative Law*, 10th Edition page 17) remind us that;

“[The] rule of law requires that every government authority which does some act which would otherwise be a wrong or which infringes a man’s liberty, must be able to justify it as authorised by law and in every case, it will mean authorize directly by act of Parliament; [that] every act of governmental power, i.e. every act of any person, must be shown to have a strictly legal pedigree. [and] the affected person may always resort to the courts of law and if the legal pedigree is not found to be perfectly in order, the courts will invalidate the act which he can then safely disregard.”(emphasis)

81. The President’s action has been challenged as not founded on any legal pedigree and the court has found the action to be in violation of the constitution and the law which makes it invalid, with the consequence that the 1st interested party and all those concerned can “safely disregard it”, so that an administrative act is not allowed to frustrate a constitutional process. In that regard, it is this court’s view that the 1st interested party having been elected as required by the constitution and the law, but the President has failed to perform his duties as required by law without constitutional or legal justification, the court should grant an appropriate relief that should deem the 1st interested party to have been



appointed to enable him take his position in the Commission to representative of Judges of the Court of Appeal. This view is informed by the fact that, it is not the President's act of appointment that makes the 1st interested party a commissioner but his election. That, in my view, is the best way to strike at the heart of the problem and discharge the court's obligation to respect, uphold and defend our transformative constitution and its essential values including the rule of law.

82. In the circumstances, therefore, having considered the petition, responses, submissions and the authorities relied on, as well as the constitution and the law, I am satisfied that this petition is meritorious. Consequently, the petition dated 5th September 2018 is allowed and I make the following orders, which I find appropriate in the circumstances of this case;
- i. A declaration is hereby issued that the President's failure to appoint the 1st interested party as required by section 15(2)(b) of the Judicial Service Act, 2011, is in violation of Articles 1, 2(1), 3(1), 10, 47, 73, 75(1), 131(2), 132(4)(a), 171 and 172 of the Constitution and is, therefore, unconstitutional and invalid.
 - ii. A declaration is hereby issued that the 1st interested party, a state officer elected to serve a second term based on his re-election, is exempted under section 40(1) of the Judicial Service Act, 2011, from retaking the oath of office before assuming the office of Commissioner in the Judicial Service Commission.
 - iii. A declaration is hereby issued that the 1st interested party, having been duly elected Commissioner of Judicial Service Commission as required by the constitution and the law, and the President having failed to appoint him in violation of mandatory timelines set by section 15(2) (b) of the Judicial Service Act, the 1st interested party be and is hereby deemed to have been appointed and is at liberty to take his position as a Commissioner of the Judicial Service Commission, representing Judges of the Court of Appeal.
 - iv. An order of mandamus is hereby issued compelling the 2nd respondent and the 2nd interested party to take immediate measures and or steps to enable the 1st interested party take office as a Commissioner of the 2nd interested party and discharge his constitutional mandate.
 - v. The 1st Respondent do bear costs of this Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2019

E C MWITA

JUDGE

