REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.367 OF 2019

IN THE MATTER OF ADVOCATES DISCIPLINARY TRIBUNAL

AND

IN THE MATTER OF ARITICLES 10, 20(1), (2) AND (4); 22(1); AND 23(1) AND (3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 27, 31, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ADVOCATES ACT (CAP 16), LAWS OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE EVIDENCE ACT (CAP 80), LAWS OF KENYA

BETWEEN

MWENDE MALUKI MWINZI.....PETITIONER

– VERSUS –

THE CABINET SECRETARY,

MINISTRY OF FOREIGN AFFAIRS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA.....3RD RESPONDENT

JUDGMENT

1. Vide a petition dated 17th September, 2019, the Petitioner herein is challenging the decision of the National Assembly Departmental Committee on Defence and Foreign Relations recommending her appointment to the position of Ambassador of Kenya to the Republic of Korea on condition that she renounces her American citizenship. The Petition is supported by the Petitioner's own affidavit.

Petitioner's Case

2. A brief background of the matter is that vide a letter dated 2nd May, 2019, the Petitioner herein was appointed by His Excellency the President to be the next Ambassador of Kenya to the Republic of Korea. The Petitioner returned an acknowledgement and an acceptance letter to the offer of appointment together with her academic certificates and other testimonials as was required by the letter of appointment to the Director, Human Resource Management as the Ministry of Foreign Affairs. Thereafter, the Petitioner received a letter from the Clerk of the National Assembly dated 21st May, 2019 inviting her for vetting scheduled for 28th May, 2019 by the Departmental Committee on Defence and Foreign Relations.

3. She was required to bring originals of her national identification card, academic and professional certificates and any other documents and testimonials together with certificates of clearance from the Ethics and Anti-Corruption Commission, Kenya Revenue Authority, Higher Education Loans Board, Directorate of Criminal Investigations and a credit reference from any of the Credit Reference Bureaus. It is contended, that the Petitioner successfully went through the vetting process and the Committee thereafter recommended her appointment to the position of Ambassador of Kenya to the Republic of Korea on condition, that she renounce her America citizenship.

4. The Petitioner avers, that she was born in Milwaukee-USA in the year 1971 and by way of the American laws became an American citizen by birth, her father Maluki Mwinzi Kaluva, being a Kenyan (now deceased) and her mother Mary Christine Geil an American citizen. It is her averment, that she lived and worked in the US for about two decades before returning to Kenya where she acquired a certificate of birth of Kenya Occurring Abroad pursuant to the provisions of Article 16 of the Constitution on dual citizenship and later got a National Identity Card, her ID number being []

5. Before, that the Petitioner was an Assistant Vice President at a Wall Street Investment Bank but resigned in May 2005 to serve Twana Twitu, a non-profit organization she started to provide support, quality care and empowerment to the Orphaned and Vulnerable Children **(OVC)** in Kenya. She also served on the International Council for Orphans International Worldwide and was a member of the Kenya National Economic and Social Council **(NESC)** of Kenya, which under His Excellency President Mwai Kibaki, developed the National Vision 2030. In 2017, she contested for the Mwingi Central parliamentary seat and was cleared by **IEBC** to do so. She is currently Partner, Global Communication House.

6. It is further contended, that pursuant to Article 78 as read with Article 260 of the Constitution of Keya 2010 and Section 31(2) of the Leadership and Integrity Act, 2012, the requirement of law relating to dual citizenship are expressly restricted to state officers. Accordingly, high commissioners not being state officers, the requirements of Article 78 of the Constitution are not applicable to the Petitioner's appointment as an Ambassador. The Petitioner further contends that her US citizenship having been acquired by birth, the process of opting out is a consequence of circumstances out of her control.

7. It is therefore the Petitioner's contention, that to be appointed only on condition, that she renounces her American citizenship is unconstitutional, illegal and void. The Petitioner therefore seek the following orders:-

a) A declaration that once the Petitioner was appointed by the President and vetted by Parliament, her appointment was completed and she is entitled to posting to Korea as Ambassador of Kenya.

b) A declaration that the respondents herein have violated Articles 27, 47, 78 of the Constitution.

c) A declaration that Ambassadors are not state officers within the meaning of Article 260 of the Constitution.

d) A declaration that the Petitioner falls within the provision of Article 78(3)(b) and is appointable to a state office in the Republic of Kenya.

e) A Judicial review order of mandamus compelling the Respondents herein to designate and/or post the Petitioner as Kenya's Ambassador to the Republic of Korea.

f) Costs of the petition.

g) Any other relief that is deemed fit by the Honourable Court.

Responses

8. On its part, the 1st and 2nd Respondent filed a Replying Affidavit by **Ambassador Tom Omolo**, the Political & Diplomatic Secretary at the Ministry of Foreign Affairs headed by the 1st Respondent herein sworn on 11th October, 2019. He deponed, that the Petitioner was nominated for appointment to the position of Ambassador of Kenya to the Republic of Korea by His Excellency the President of the Republic of Kenya and the position of the Petitioner in respect to the alluded appointment is lucid and devoid of any contradiction, that is, the Petitioner is an Ambassador nominee, her appointment was subject to successful vetting by Parliament thereby a process with several stages. It was further his disposition, that an 'ambassador-designate' is an official who has been nominated to be an Ambassador/High Commissioner but who has not taken the oath of office and following her nomination pursuant to Article 132(2) (e) of the Constitution of Kenya 2010 as read with Section 6(3) of the Public Appointments (Parliamentary Approval) Act, 2011, her appointment was subject to approval by the National Assembly.

9. That vide a letter dated 21st May, 2019 addressed to the Petitioner and copied to Cabinet Secretary- Ministry of Foreign Affairs, the 3rd Respondent in execution of its mandate to approve presidential nominees for appointment under Article 132 of the Constitution of Kenya 2010, invited the Petitioner to appear before it on 28th May, 2019 for vetting. Thereafter, the Head of Public Service conveyed to the 1st Respondent the determination of the 3rd Respondent and on 12th September, 2019, the 1st Respondent was invited by the Parliamentary Committee on Implementation to give a status update on the appointment of the Petitioner whereby they were directed to ascertain the status

of the implementation of its decision within ten (10) days of the meeting. He further deposed that on 13th September, 2019, the 1st Respondent wrote a letter to the Petitioner asking her to confirm whether she had met the appointment condition imposed by the National Assembly for purposes of assisting the Ministry in answering the National Assembly on the status of the appointment in question and to enable the Head of Public Service to finalize her appointment but instead she filed the instant petition.

10. It was further his disposition, that the appointment to the position of ambassador/high commissioner is intricate and involves processes between two sovereign states, a process in the exclusive domain of the executive arm of Government and the Legislature thereby the doctrine of separation of powers and deference obliges the court to uphold the appointment processes and decisions of the two arms of Government. He further elaborated the appointment process from the nomination by the President, the Ministry of Foreign Affairs notifying the nominee and requesting in writing the concurrence of the receiving state whose communication is in the form of an agreement, vetting by the National Assembly and communicating its determination and thereafter the nominee taken through an induction programme. Upon successful vetting and receipt of the agreement, the nominee becomes an Ambassador/High Commissioner designate before triggering the final process including the letter of appointment, draft letters of credence for signature by the appointing authority for presentation by the ambassador designate to the Head of State of the receiving state.

11. Accordingly, it was his averment, that the prayers sought by the Petitioner cannot be granted on the facts presented and granting them would amount to a violation of Article 132 of the Constitution and disregarding the well established diplomatic appointments and office assumption procedures. He therefore urged the court to dismiss the petition.

12. On its part, the 3rd Respondent filed a Replying Affidavit by **Michael Sialai EBS**, the Clerk of the National Assembly sworn on 2nd October, 2019. He deponed that the Office of the Clerk of the National Assembly is an office in the Parliamentary Service Commission constitutionally mandated to run the affairs and operations of the National Assembly and provide technical and procedural advise to the Speaker of the National Assembly of Kenya and Members of the National Assembly on Parliamentary practice and procedure. It was further his disposition that the National Assembly's Departmental Committee on Foreign Relations and Defence *(hereinafter "the Committee")* established under Order 216(1) of the National Assembly Standing Orders is mandated *inter alia,* to vet and report on all appointments where the constitution or any other law require the National Assembly to approve, except those under Standing Order 204 *(Committee on Appointments).* Further, in executing mandate, it oversights the Ministries of Defence, Foreign Affairs, East Africa Community and Regional Development and the National Intelligence Service.

13. It was his averment, that the Petitioner was nominated for appointed by the President of the Republic of Kenya as the Ambassador of Kenya to the Republic of Korea, a position that requires Parliamentary approval in accordance with Article 132(2)(e) of the Constitution of Kenya 2010 and through a letter dated 9th May, 2019 the Office of the President forwarded the names of 7 nominees including the Petitioner to the National Assembly for consideration and approval as Ambassadors/High Commissioners and pursuant to Standing Order 42, the Speaker of the National Assembly informed the House about the nominees. He further avers, that the Speaker of the National Assembly afterwards forwarded the candidates' credentials to the Departmental Committee on Defence and Foreign Relations to conduct approval hearings. Thereafter, an advertisement was placed in the print media inviting members of the public to submit memoranda by way of written statement of oaths on suitability of each nominee through the office of the Clerk.

14. He further avers, that pursuant to Section 6(3) of the Public Appointments *(Parliamentary Approval)* Act No. 33 of 2011 he notified the nominees on 17th May, 2019 of the date, time and place for holding public approval hearings and on 22nd May, 2019 wrote to the Ethics and Anti-Corruption Commission, Kenya Revenue Authority, Directorate of Criminal Investigations, the Higher Education Loans Board and Registrar of Political parties requesting for information on the nominees as part of the Committee's due diligence. In considering the suitability of each nominee he avers, that the Committee considered academic background, academic credentials, professional training, experience, potential conflicts of interests, integrity, employment record and personal qualities.

15. That on 28th May, 2019, the Petitioner appeared before the Committee for the interview whereby she explained that she is a dual citizen of Kenya and the United States of America having been born in Wisconsin United States of America in 1971 and later acquired her Kenyan citizenship. It is further averred, that the Committee tabled its Report before the National Assembly on 6th June, 2019 and a motion was moved by the Chairperson of the Committee and the same debated upon before the House resolved to adopt the Report approving persons appointed as High Commissioners and Ambassadors. However, the Committee recommended the Petitioner's appointment on condition that she renounces her US citizenship to avoid potential conflict of interest under Article 75 of the Constitution of Kenya 2010. According to the Committee, an Ambassador or diplomat is a representative of the interests of a sending state and that person must be devoid of interests of any other state and must be independent and in a position to assert the positions of the sending state at all times without compromise.

16. It was also his averment, that the Petitioner during the vetting process stated that Article 78 of the Constitution of Kenya 2010, only bars state officers from holding such office while holding dual citizenship but the same does bar her from holding the office of an Ambassador. However, the 3rd Respondent observed that Article 80(c) of the Constitution gave Parliament mandate to enact legislation for application of Chapter Six of the Constitution; Section 52 of the Leadership and Integrity Act provides that the Act binds both state officers and public officers while Section 31 provides that a person who holds dual citizenship shall upon appointment to a state office, renounce their other citizenship before taking office. Further, Article 75 of the Constitution of Kenya 2010 as read with Section 12(1) provides that a state officer shall behave in a manner that avoids any conflict between personal interests and public or official duties. Lastly, they observed that **Section 101(a) (22) of the Immigration and Nationality Act (INA)** of the **USA** defines a national of the United States as a citizen of the United States or a person who though not a citizen of the United States owes permanent allegiance to the United States and an Ambassador or a diplomat is a representative of the interests of the sending state.

17. It was further his disposition, that while the Petitioner is faulting the National Assembly for giving a conditional approval by claiming that the Assembly misapprehended the provision of Article 78 of the Constitution of Kenya 2010 as read with Article 260 of the Constitution of Kenya 2010, they took issue with the conflict, that the Petitioner would face while holding public office of Ambassador of Kenya while at the same time being a citizen of the United States of America since the unique office involves representing the international and national interests of Kenya. However, it was his contention that the prerogative of the National Assembly to approve or reject the Petitioner's nomination was in accordance to Article 132 (2) (e) of the Constitution of Kenya 2010, as read with Section 3 of the Public Appointments

(Parliamentary Approval) Act No. 33 of 2011 and Standing Order 216(5)(f) of the National Assembly Standing Orders which decision was anchored by the principles set out by the Court of Appeal in **Civil Appeal No. 280 of 2013, Bishop Donald Kisaka Mwawasi vs Attorney General & 2 Others.**

18. In conclusion, he averred that if the court grants the reliefs sought, it shall directly affect the 3rd Respondent's mandate set out under Articles 94 and 95 of the Constitution, the Public Appointments *(Parliamentary Approval)* Act and the Leadership and Integrity Act. He therefore urged court to dismiss the petition.

Parties Submissions

19. Prof. Tom Ojienda, learned Counsel appearing for the Petitioner highlighted his written submissions dated 4th October, 2019. On interpretation of the Constitution of Kenya 2010, counsel cited **Article 259(1) of the Constitution** and the case of **Ndyanabo v Attorney General (2001) 2 E.A 485 at 493** where the Court of Appeal of Tanzania stated that provisions touching fundamental rights have to be interpreted in a broad and liberal manner. He also cited the case of **Whiteman v Als of Trinidad and Tobago (1991) 1 L.R.C (Const.) 536 at pg 551** where the Privy Council held, that the language of the Constitution must be construed broadly and purposively so as to give effect to its spirit and the case of **Joseph Mbalu Mutava vs Attorney General & Anor (2014) eKLR** where the court pronounced itself on the question of interpretation and held, that the principle of harmonization should be applied in interpreting the constitution, that is, all provisions bearing upon a particular subject be construed as a whole, without any one provision destroying the other but each sustaining the other.

20. Counsel further cited the case of **Marilyn Muthoni Kamuru & 2 Others v Attorney General & Anor (2016) eKLR** where the court stated that the constitution must be given full life and interpreted as a whole and the Supreme Court Advisory Opinion **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (2012) eKLR** where the court stated, that the constitution should be interpreted holistically taking into account its declared principles. He also relied on the case of **Speaker of the Senate & Anor v Attorney General & 4 Others (2013) eKLR** and the Supreme Court Reference **In the Matter of Kenya National Commission on Human Rights (2014) eKLR** for the proposition that contextual analysis of a constitutional provision is reading it alongside and against other provisions so as to maintain a rational explication of what the constitution must be taken to mean in light of its history of the issues in dispute and of prevailing circumstances. Accordingly, he urged the court to consider the purpose, effect and the principles of the constitution that emerged from interpretation of Article 78 of the Constitution on citizenship and leadership and Article 260 of the Constitution of Kenya 2010, on state officers. It was counsel's submission that Ambassadors are not state officers therefore the conditional approval by the National Assembly is unfounded in law.

21. On supremacy of the constitution, counsel cited Article 2 of the Constitution of Kenya 2010. He further relied on the case of **Re the Matter of The Interim Independent Electoral Commission (2011) eKLR** for the proposition, that the effect of the constitution's detailed provision for the rule of law in processes of governance is the legality of executive or administrative actions to be determined by the courts, which are independent of the executive branch. He also cited the case of **Speaker of National Assembly v Attorney General & 3 Others (2013) eKLR** where the Supreme Court stated that Parliament must operate under the Constitution which is the supreme law of the land and if it violates the procedural requirements of the supreme law, it is for the courts of law to assert the authority and supremacy of the constitution and the case of **Macharia vs Murathe & Anor Nairobi HCEP No. 21 of 1998 (2008) eKLR (EP) 189 (HCK)** where Mbogholi Msagha held that in a democratic country like ours governed by a written constitution, it is that constitution which is supreme and sovereign.

22. It was therefore his submission that the conditional approval of the 3rd Respondent anchored on the provisions of Section 31 and 52 of the Leadership and Integrity Act is illegal, null and void to the extent that it goes against the provisions of Article 78 (3)(b) and 260 of the Constitution of Kenya 2010. Counsel was of the view that the Act is subject to the Constitution and any interpretation, that contradicts the provisions of the Constitution is invalid, null and void. It was further submitted, that the conduct of the Respondents requiring the Petitioner to renounce her American citizenship is a patent violation of the core values contemplated in Article 10 of the Constitution of Kenya 2010 and in any event, Article 259(8) of the Constitution of Kenya 2010 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. To buttress his argument, counsel cited the case of **Law Society of Kenya v Attorney General & 2 Others (2016) eKLR** where the court held, that what is reasonable depends on the facts of a particular case but with respect to purely procedural matters where what is required is more or less a seal of approval or formalization of a decision already substantially made, fourteen days period is generally reasonable. Accordingly, he submitted that once the Petitioner was appointed by the President and vetted by parliament, her appointment was complete and she is entitled to posting to Korea as an Ambassador of Kenya.

23. On the issue whether ambassadors are state officers, counsel submitted, that the conditional approval by the National Assembly, that the Petitioner must renounce her American citizenship before she can take up her position as an ambassador is unconstitutional, illegal, null, void and not tenable in law because the office of an ambassador is not a state office according to Article 260 of the Constitution of Kenya 2010. Furthermore, there is currently no legislation in place which has designated the office of a High Commissioner or an Ambassador to be a state office and therefore the same is not a state office as per the constitution.

24. On whether the provisions of Article 78 (3) (b) of the Constitution of Kenya 2010 are applicable to the Petitioner, counsel submitted, that the Wako Draft of the Constitution, Bomas Draft of the Constitution and Kilifi Draft of the Constitution intended that those Kenyans who had no means of opting out of their birth place to be covered by the provisions of Article 78(3)(b) of the Constitution of Kenya 2010, to enable them enjoy the privileged and entrapments conferred by the Constitution. He noted that this was the essence of introducing the aspect of dual citizenship under Article 16 of the Constitution of Kenya 2010. It was further submitted, that the Petitioner was born in the United States of America and only became an American citizen by virtue of the American law. However, she grew up in Kenya and attended St. Augustine Nursery in Mombasa, Hindu Temple Preparatory School in Kitui, Central Primary School in Kitui, Kenya High School for O levels and Kyeni Girls for her **"A"** levels. She therefore only acquired her American citizenship by birth and is thus protected by Article 78(3) (b) of the Constitution of Kenya 2010.

25. Counsel cited the case of **Bishop Donald Kisaka Mwawasi v Attorney General & 2 Others (2014) eKLR** for the proposition, that the proscription in Article 78(2) of the Constitution of Kenya is for a state officer holding dual citizenship, however, that proscription is not absolute if the person is made a citizen of another country by operation of that country's law without the ability to opt out. Accordingly, he

argued that if parliament intended, that High Commissioners or Ambassadors should be regarded as state officers, nothing would have been easier than passing legislation to that effect under Article 260 of the Constitution of Kenya 2010 and even assuming the Petitioner would be regarded a state officer, she would be entitled to protection under Article 78(3) (b) of the Constitution of Kenya 2010. It was therefore submitted that the Petitioner's citizenship having been acquired by birth, she cannot opt out of it.

26. It was further submitted, that that the condition that the Petitioner renounces her American Citizenship is discriminatory and offends the provisions of Article 27 of the Constitution of Kenya 2010. It was their contention, that the other nominees for the position of Ambassadors have already been appointed by the President and deployed to their various stations while the Petitioner is yet to be deployed. In that regard, he cited the case of **Centre for Rights Education and Awareness & 2 Others v Speaker the National Assembly & 6 Others (2017) eKLR** for the proposition that equality of rights under the law for all persons is so basic to democracy and commitment to human rights. He further relied on the case of **Eric Gitari vs Non-Governmental Organizations Co-ordination Board & 4 Others (2015) eKLR** where the court held that it would have to look at the whole constitution holistically and would find that the principles of equality, dignity and non-discrimination run throughout the constitution like a golden thread.

27. It was further submitted that Article 2(5) and (6) of the Constitution of Kenya 2010 provides that international law shall from part of the Laws of Kenya and any treaty ratified by Kenya shall form part of the laws of Kenya under the constitution. He further cited Article 2 of the International Covenant on Civil and Political Rights which provides, that each party to the present covenant undertakes to respect and ensure to all individuals within its territory that their rights will be recognized without race, colour, sex, language, religion, political or other status. Further, the African on Human Rights and People's Rights Chapter 1 provides, that each individual shall be entitled to the enjoyment of the rights and freedoms recognized in the present charter without discrimination. He added, that the Universal Declaration of Human Rights also speaks against discrimination under Article 1 and 2. It was therefore submitted, that the Petitioner having met all the requirements for appointment as Ambassador was unfairly and discriminatory subjected to a condition that was unconstitutional and completely lacks any basis in law. He therefore urged court to remove the unlawful condition and protect the Petitioner's right against discrimination guaranteed by Article 27(1), (2) & (5) of the Constitution of Kenya 2010.

In conclusion, counsel cited the case of **Republic v Kenya National Examination Council ex-parte Gathenji & Others Civil Appeal No. 266 of 1996** where the court held that, the purpose of the order of mandamus is to remedy the defects of justice and will issue, so that justice may be done where there is a specific legal right or no specific legal remedy for enforcing that right. He also cited the case of **JR Case 223 of 2014 Republic v Kenya Vision 2013 Delivery Board & Anor Ex-Parte Eng. Judah Abekah (2015) eKLR** where the court stated, that, the order of mandamus will compel the performance of a duty which is imposed on a person or body of persons by a statute and where that person has failed to perform the duty to the detriment of a party who has a legal right to expect, that duty to be performed. He therefore urged court to allow the petition and grant the orders sought.

28. Mr. Moimbo Momanyi learned acting for the 1st and 2nd Respondents highlighted his written submissions dated 11th October, 2019. Counsel submitted that the President and the National Assembly acted perfectly within the law in their attempt to appoint the Petitioner and cited the case of **British American Tobacco Ltd V Cabinet Secretary for the Ministry of Health & 5 Others (2017) eKLR** which referred to the Indian case of **Maharashtra State Board v Kurmarsheth & Others (1985) CLR 1083** where the court stated that so long as the body entrusted with the task of framing rules and regulations acts within the scope of its authority, courts should not concern itself with the wisdom or efficaciousness of such rules and regulations and called upon the court to make a finding that the President and the National Assembly have legitimately played their role in the process of appointing the Petitioner as the Kenya Ambassador to South Korea under Article 132(2)(e) of the Constitution.

29. He further submitted, that pursuant to Article 132(2) (e) of the Constitution of Kenya 2010, it is the exclusive role of the President and Parliament to appoint ambassadors and there must be concurrence between the President and the National Assembly on the qualification and suitability of the nominee before appointment. Therefore, the President nominates the individual appointee then forwards the name to the National Assembly for vetting and approval; and thereafter the President performs the final acts of appointment so that if the National Assembly declined to clear the President's nominee, the process collapses. Accordingly, he argued that prayers (a) and (e) sought by the Petitioner seeking to be deemed as the duly appointed Kenya Ambassador to South Korea and if that does not suffice, the 1st and 2nd Respondent be compelled by way of an order of mandamus to designate and post the Petitioner to Seoul will be tantamount to circumventing a necessary constitutional safeguard in appointing ambassadors and usurping the authority of the 3rd Respondent and the President of Kenya.

30. It was further submitted, that granting the said orders and declarations as prayed, will amount to this court sitting in the position of the National Assembly in the vetting and approval exercise and also undertaking the final act of appointment which by law vests in His Excellency the President. Accordingly, it was submitted that this court lacks judicial power to grant the orders sought and should therefore decline to exercise its jurisdiction on the issues therein. Furthermore, he submitted that the issues raised by the Petitioner are not justiciable and the justiciability doctrine requires that courts and tribunals, at the earliest opportunity, should consider whether a set of facts placed before them espouse proper question for determination.

31. To buttress his argument, counsel cited the case of **Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others (2016) eKLR** where the late Justice Onguto determined, that the justiciability dogma prohibits the court from entertaining hypothetical, political or academic interest cases. He also cited the case of **Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Anor HCCP 628 of 2014 (2015) eKLR** where the Supreme Court cited the case of **Patrick Ouma Onyango & 12 Others v AG & 2 Others Misc. Appl No. 677 of 2005** where the court endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. Page 32, that in order for a claim to be justiciable as an article III matter, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. It was therefore his submission, that the petition herein does not present real controversy requiring the intervention of this court because it is based on issues, that are purely within the jurisdiction of the Executive and the National Assembly, it concerns a process that is incomplete and the controversy is political.

32. It was further submitted, that the declarations sought will be an affront to the twin doctrines of separation of powers and deference as enunciated by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** where the Court of Appeal in a nutshell stated, that courts must also defer to the other branches where the constitutional design so ordains. He therefore

urged court to exercise restrain over assuming/exercising its jurisdiction on this matter on account that the appointment of ambassadors is ordained by the constitution as being a matter resident in the other branches of government.

33. On whether the Petitioner qualifies for appointment under Article 78 of the Constitution of Kenya 2010 counsel submitted that, under Section 349 of the Immigration and Naturalization Act **(INA)** of the United States of America, a United States citizen can lose his or her citizenship or can be *'expatriated'* under various circumstances including, voluntary renunciation of the citizenship, applying for the citizenship of another country and thereafter being naturalized in, that country and serving in a foreign government office, in a position, that requires the taking of an oath of allegiance. He therefore argued that it is deceitful for the Petitioner to state, that she cannot opt out of her American citizenship and therefore does not fall under the exception provided for under Article 78(3) (b) of the Constitution of Kenya 2010. He further argued that the omnibus pleading that the Petitioner cannot opt out of her American citizenship lacks particulars to enable the Respondents herein respond appropriately to the issues. Counsel therefore cited the Court of Appeal decision in **Mumo Matemu vs Trusted Society of Human Rights & 5 Others (2013) eKLR** which upheld the celebrated decision in **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** on the substantive tests in constitutional petitions.

34. In conclusion, counsel cited the case of **Okiya Omtata Okoiti vs Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR** where it was held, that when granting orders of judicial review, and particularly stay, the court has a reciprocal duty to ensure that it does not hamstring statutory bodies from performing their lawful duty or duties as bestowed upon them by the relevant law. He also cited the case of **Baseline Architects Limited & 2 Others v National Hospital Insurance Fund Board Management (2008) eKLR** where the court held that there are circumstances in which the public interest must be dominant over the interest of a private individual. Accordingly, he submitted that the individual/private interest of the Petitioner herein veiled as a violation of her rights are narrow and subservient to the wider public interests of protecting the constitutional mandate of the Executive and the National Assembly under Article 132 of the Constitution. He therefore urged court to dismiss the petition.

35. Mr. Njoroge, learned Counsel appearing for the 3rd Respondent highlighted his written submission dated 4th October, 2019. He submitted, that there were four issues for determination. On whether this court had jurisdiction to determine the petition, counsel submitted that the framers of the constitution were alive to the balance of power during parliamentary approval in, that the **PSC** required senior executive appointments to be approved by parliament thus putting in place an important check on the power of the executive and the positions requiring parliamentary approval include High Commissioners, Ambassadors, Diplomatic and Consular representatives among others. It was further submitted that the approval process is not a rubberstamp mechanism but a political one requiring political processes to be conducted by other arms of Government and therefore this court should decline to adjudicate on the issues raised in the petition. Secondly, the process of appointment is yet to be concluded since the President is bound by the resolutions of the National Assembly by dint of **Article 132(2) of the Constitution of Kenya 2010.**

36. To buttress his argument, counsel cited the case of **National Assembly of Kenya & Anor vs Institute for Social Accountability & 6 Others (2017) eKLR** where the Court of Appeal held that by the principle of avoidance or constitutional avoidance, the court will not determine a constitutional question where there is some other basis upon which the question would have been disposed of. He also cited the case of **Speaker of Senate & Anor vs The Attorney General & 4 Others, Advisory Opinion No. 2 of 2013 (2013) eKLR** where Lady Justice Njoki Ndungu stated, that judicial resolution is not appropriate where it is clear in a matter such as this, that the political question doctrine will apply. Similarly, the Court of Appeal in **Pevans East Africa Limited & Anor vs. Chairman, Betting Control & Licensing Board & 7 Others (2018) eKLR** held, that where the constitution had reposed specific functions in an institution or organs of state, the court must give those institutions or organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the constitution. Also, in **Justus Kariuki Mate & Anor vs. martin Nyaga Wambora & Anor (2017) eKLR**, the Supreme Court held that the integrity of court orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State.

37. On whether an Ambassador is a state officer, counsel submitted that Article 78 of the Constitution of Kenya 2010 bars persons who hold dual citizenship from occupying state offices or being members of the defence forces of Kenya. It was further submitted, that the aim of the drafters of the Constitution was to avoid the potential conflict of interest that may arise which would affect the well-being of the country including its security. He further submitted that although there is no specific legislation establishing the office of an Ambassador under Article 260 of the Constitution of Kenya 2010, Article 80(c) of the Constitution of Kenya 2010 gives Parliament the power to operationalize Chapter Six of the Constitution which led to the enactment of the Leadership and Integrity Act. Section 52 of the Act provides that the provisions of Chapter Six of the Constitution and Part II of this Act shall apply to all public officers as if they were state officers. Section 31 further provides that a person who holds dual citizenship shall upon appointment to a state office renounce their other citizenship before taking office. He therefore submitted that the Office of an Ambassador though a public office is bound by the provisions of Section 31 of the Leadership and Integrity Act by dint of Section 52.

38. To buttress his argument, counsel cited the case of **Bishop Donald Kisaka Mwawasi vs Attorney General & 2 Others (2014) eKLR** where the Court of Appeal held, that a dual citizen is disqualified upon election or appointment to a state office from assuming office before voluntarily and officially renouncing his others citizenship howsoever granted in accordance with Kenya Citizenships and Immigration Act unless as Article 78(3) of the Constitution of Kenya 2010 provides, he has no ability under the laws of the other country to renounce citizenship of the other country. Accordingly, it was submitted, that when a dual citizen is nominated to state or public office, they ought to renounce their foreign nationality to take up the position because the drafters of the Constitution precluded state officers from holding dual citizenship solely because of national interest which include the country's security interests.

39. On whether the National Assembly can grant a conditional approval of a nominee, counsel submitted that Article 132(2) of the Constitution of Kenya 2010 mandates the National Assembly to approve persons nominated by the President for the position of High Commissioners, Ambassadors and Diplomatic and Consular Representatives among other offices. Further, the National Assembly represents the people of the constituencies and the special interests in the Assembly with its roles set out in Article 95 of the Constitution 2010, which include exercising oversight over state organs and deliberation on and resolution of issues of concern to the people of Kenya among others. It was further submitted, that the National Assembly's vetting and/or approval mandate is pursuant to laid down constitutional and statutory principles which mandate is regulated by the Public Appointments *(Parliamentary Approval)* Act, 2011.

40. It was submitted, that Section 3 of the Act provides, that an appointment under the Constitution or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by parliament in accordance with the Act. Further, Section 6 of the Act provides for factors that the Committee considers in a candidate during the approval hearings and among the factors listed is the question of nationality. Section 7 requires the National Assembly to take into consideration the suitability of the nominee having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made while Section 8 gives the National Assembly power/discretion to make recommendations in the Report.

41. It was therefore submitted, that the unique office of ambassador involves representing the international and national interests of Kenya and the Petitioner would face serious conflict of interest in advancing the interests of Kenya as against those of the **USA,** a country of which she is also a citizen. Accordingly, it was submitted that it is the prerogative of the National Assembly to approve or reject the Petitioner's nomination in accordance with Article 132(2) (e) of the Constitution as read with Section 3 of the Public Appointments *(Parliamentary Approval)* Act No. 33 of 2011 and Standing Order 216(5) (f) of the National Assembly Standing Orders.

42. Counsel further argued, that in the United States, the Senate is to be consulted on appointments made by the President to public positions including cabinet secretaries, federal judges, United State attorneys and ambassadors and the historical reasoning on the power of advice and consent by the Senate was for purpose of balancing the power in the federal government. He argued that the same is replicated in Article 132(2) (e) of our Constitution. He further submitted that Section 8 of the Act gives the National Assembly the discretion to advice the President on his nominees and the National Assembly did so by asking the nominee to renounce her American citizenship before taking up the appointment to avoid conflict of interest while undertaking her duties.

43. On whether the Petitioner has any propriety rights to the Office of the Ambassador, counsel cited the case of **Phillip K. Tunoi & Anor vs. Judicial service Commission & Anor (2016) eKLR** where Court of Appeal held, that there is was proprietary rights in public office. The Court of Appeal relied on the US case in **Mial vs Elington, 134, N.C. 131 (1903)** where the Supreme Court of North Carolina held, that a public office is not property and that an office holder has no vested property interests therein. They also relied on the case of **Gorman vs City of New York (280 App. Div. 39 (NY. App. Div. 1952)** where the Supreme Court of New York Appellate Division held that merely because a member's benefits in a pension scheme may not be constitutionally impaired does not create a constitutional right to stay in public employment. In conclusion, counsel argued that the public interest militates against the exercise of this court's determination of the issues raised in the petition as the current political process of approval and appointment is not complete and thus should be allowed to run its course since the President is yet to make the appointment formal on the advisement of the National Assembly. As such, he argued that the petition is not ripe for determination by this court. He therefore urged the court to dismiss the petition.

Analysis and Determination

44. I have carefully considered the substance of the Petition, the parties' rival affidavits and submissions and the issues the court is called upon to decide are:

> **a) What is required to the interpretation of the constitution?**
>
> **b) Whether the appointing authority under Article 132 of the Constitution of Kenya 2010 executed their mandate within the law?**
>
> **c) Whether the issue of appointment of ambassadors is within the jurisdiction of this court and whether the orders and Declarations sought can be issued?**
>
> **d) Whether an ambassador is a state officer and if not whether the issue of dual citizen still affects her?**
>
> **e) Whether the National Assembly can grant conditional approval of a nominee?**
>
> **f) What is the public interest in following the legally prescribed process in this appointment?**
>
> **g) Whether the petitioner has any proprietary right to the office of the Ambassador?**

A) What is required to the interpretation of the constitution?

45. The issues raised in the petition rest on the interpretation of the provisions of Articles 132(2) (e) and 260 of the Constitution. Before doing so, it is proper to consider the principles underlying interpretation of the Constitution. Article 259(1) of the Constitution enjoins the Court to interpret the Constitution in a manner that promotes its purpose and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.

46. Further, the Constitution should be given a purposive, liberal and flexible interpretation. The Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional [2011] eKLR**, adopted the words of Mahomed J in the Namibian case of **State vs Acheson 1991(20 SA 805, 813)** where he stated that;

> "**The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ...aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion."**

47. In the case of **The Government of Republic of Namibia vs Cultura 2000, 1994 (1) SA 407 at 418**, Mahomed CJ again stated;

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation."

48. While in the case of **Njoya & 6 Others v Attorney General & another [2004] eKLR,** the Court observed that:-

"Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."

49. A Constitution is a living instrument with several provisions that should be read as an integrated whole, reading one provision alongside others so that they are seen as supporting one another and not contradicting or destroying each other **(see Tinyefuze vs. Attorney General of Uganda Constitutional Petition No 1 of 1996 [1997]3 UGCC)**. In **Re The Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012)**, the Supreme Court advocated a holistic interpretation of the Constitution stating;

"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

50. And in **Minister of Home Affairs vs. Fisher [1980] AC 319** the Privy Council stated at 329;

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the requirement that rules of interpretation may apply, to take as a point of departure for the process of interpretation, a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

The above mentioned authorities clearly set out what is required to the interpretation of the constitution.

B) Whether the appointing authority under Article 132 of the Constitution of Kenya 2010 executed their mandate within the law?

51. Article 132 of the Constitution of Kenya 2010 deals with the function of the President as regards nomination of various officers as provided under **Article 132(2) of the Constitution** as follows:-

"(2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—

(a) The Cabinet Secretaries, in accordance with Article 152;

(b) The Attorney-General, in accordance with Article 156;

(c) The Secretary to the Cabinet in accordance with Article 154;

(d) Principal Secretaries in accordance with Article 155;

(e) High commissioners, ambassadors and diplomatic and consular representatives; and

(f) In accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss."

Under the aforesaid Article the President mandate is first to nominate, and with approval of the National Assembly, appoint and may also dismiss.

52. In the affidavit of Ambassador Omolo as per annexture **(MMM-1)** it is alluded that the petitioner was/is an *"ambassador Designate"* and that her appointment was subject to successful vetting by Parliament. It should be understood that in diplomatic parlance *"ambassador-designate"* is an official who has been nominated to be an ambassador, but who has not yet taken the oath of office. It therefore follows the petitioner's alleged appointment is premature. The appointment to the position of ambassador is not a one day event, but is intricate and involves process between two sovereign states. In Kenya it is clear that the process is in the exclusive domain of the Executive Arm of Government and the Legislature; from the clear reading of Article 132 (2) of the Constitution of Kenya. That accordingly the doctrine of separation of powers and deferences obliges the court not to interfere with appointment process and decision making process.

53. From the plain reading of Article 132(2) of the Constitution of Kenya 2010, the appointment to the position of ambassador or high commissioner is a process and not an event, there stages to be covered sequentially as follows:

"i) His Excellency The President has to nominate a Kenyan under Article 132 of the Constitution;

ii) The Ministry of Foreign Affairs, the 1st Respondent herein, writes to the country where the nominee is to serve as Ambassador or High Commissioner seeking their concurrence which is given in the form of agrément that the nominee has been accepted to serve;

iii) Concurrently the Head of Public Service requests the National Assembly to vet the nominee;

iv) The National Assembly selects the date, time and place of the vetting process which is then communicated to the nominee through the Principal Secretary of the 1st Respondent and an advertisement is placed in the media for general public;

v) The National Assembly notifies the appointing authority through the Head of Public Service of its determination on the nominee;

vi) Where the nominee is successful the Head of Public Service conveys the substantive appointment that elaborates the terms of service. This letter forms the basis of concluding the contract with the nominee and

vii) This [*(vi) above*] triggers the final process including the letter of appointment, draft *Letters of Credence* credentials for signature by the appointing authority for presentation by the appointee to the Head of State of the receiving State."

54. In the instant petition, there is no dispute from the petitioner and the Respondents, that the President discharged his mandate under Article 132 of the Constitution of Kenya 2010, by having nominated the petitioner. The issue is thus, whether the President, as appointing authority executed his mandate under Article 132 of the Constitution of Kenya? In considering this point, this court is guided by the decision in **British American Tobacco Ltd vs. Cabinet Secretary for Ministry of Health & 5 others (2017)** where the Court of Appeal referred to the Indian case of **Maharashtra State Board -VS- Kurmarsheth & Others [1985] CLR 1083,** where it was stated as follows:-

"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations..."

55. In this petition there is no dispute to the fact, that the President and the National Assembly legitimately carried their role in the process of nomination and approval of the petitioner, as a Kenyan ambassador to Korea and setting out certain conditions. I find the mandate having been executed it would not be correct for the court to concern itself with the wisdom or efficacious of the Executive and legislative in the process in question herein.

56. It is clear, that under Article 132(2) of the Constitution of Kenya 2010, the President, with approval of Parliament, appoints and may dismiss, amongst others, the High commissioners, ambassadors and diplomatic and consular representatives. From the aforesaid Article there is no doubt, that it is the exclusive role of the President and Parliament to appoint and approve respectively the ambassadors. From the Article in question it is clear, that there must be concurrence between the President and the National Assembly on the qualification and suitability of the nominee before appointment. The President first and foremost nominates the individual appointee, forwards the name to the National Assembly for vetting and approval, after approval the President performs the final acts of appointment. It therefore follows should the National Assembly decline to clear the President's nominee, the process collapses. I find from the reading of the Article 132 of the constitution the petitioner cannot circumvent the parliamentary approval and the vetting contemplated under the Article by involving court's jurisdiction. In view of the findings herein, I find that the Respondents have demonstrated that the appointing authority under Article 132 of the Constitution of Kenya executed their mandate within the law.

C) Whether the issue of appointment of ambassadors is within the jurisdiction of this court and whether the orders and Declarations sought can be issued?

57. The petitioner's petition under prayer (a) seek a declaration that once the petitioner was appointed by the President and vetted by Parliament, her appointment was complete and she is entitled to posting to Korea as ambassador of Kenya. She further prays under (e) for a Judicial Review order of mandamus compelling the Respondents to have to Designate and/or post the petitioner as Kenya's ambassador to the Republic of South Korea. The appointment to the position of ambassador is a process and not an event, that requires strict observation as stipulated under Article 132(2) of the Constitution of Kenya 2010. The petitioner's prayers under (a) and (e) seems to ignore the laid down procedure for an appointment of an ambassador. The President do not appoint first but starts the process by nominating, a nominee, who should proceed to be vetted and approved by the National Assembly then follows appointment or dismissal by President. What the petitioner is seeking under prayers (a) and (e) of her petition is not only contrary to Article 132 of the Constitution of Kenya 2010 but is tantamount to circumventing a necessary constitutional safeguard in appointing an ambassador and usurping the authority of the 3rd Respondent and the Appointing authority. It is of great importance to point out that this court cannot take over the role of the 3rd Respondent as it lacks jurisdiction and even necessary tools to do vetting and further lacks the constitutional and statutory mandate to exercise such jurisdiction. I further find if this court grants such orders and declaration, as sought its action would amount to sitting in the position of the National Assembly in the vetting/approval exercise and also undertaking the final act of appointment, which by law vests with the President of the Republic of Kenya. I find this court lacks judicial power to grant the orders and I find the appropriate thing to do is to decline to exercise jurisdiction on the above-mentioned two prayers.

58. The Respondents urge the issues herein above raised by the petitioner are not justiciable as the appointment of ambassadors is a matter within the exclusive jurisdiction of legislature and the executive. It is therefore contended that this court lacks jurisdiction to grant the orders sought in the present petition on the basis that the matters raised therein are outside its jurisdiction and are justiciable. The justiciability doctrine requires that court's and tribunals, at the earliest opportunity, should consider whether a set of facts placed before them espouse proper question for determination. It requires that courts should only decide cases which invite *"real earnest and vital controversy."*

59. In the case of **Wanjiru Gikonyo & 2 others vs National Assembly of Kenya & 4 others (2016) eKLR,** Late Hon. Justice Onguto, (decided) that the justiciability dogma prohibits the court from entertaining hypothetical, political or academic interest cases. The court is therefore not expected to engage in abstract arguments. That the court is prevented from determining an issue where it is too early or simply out of apprehension. That an issue before the court must be ripe, through a factual matrix, for determination.

60. In the case of **Coalition for Reform of Democracy (CRD) and 2 others vs Republic of Kenya & another HCCCP 628 of 2004 (2015) eKLR,** the Supreme Court cited the case of **Patrick Ouma Onyango & 12 others vs AG & 2 others Misc. App. 677 of 2005** where the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. page 92 as follows:-

> **"In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself - an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors."**

61. I therefore find, that this petition is based on issues, that are purely within the jurisdiction of the Executive and the National Assembly. It concerns a process, that is incomplete and pending and lastly the controversy in my view is political. I therefore find the petition herein is non-justiciable and that it does not present a controversy requiring the intervention of this court.

62. This court has been entreated by the petitioner to overturn the decision of the National Assembly of giving a conditional approval to appointment of the petitioner. The declaration sought will be an affront to the twin doctrine of separation of powers and deference as enunciated by the Court of Appeal in **Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where the Court of Appeal made the following salient findings that:-

> **"a) The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. This applies equally to executive decisions."**
>
> **b) The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."**
>
> **c) Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches."**

63. From the above decision of the Court of Appeal this court is reminded of the need to exercise restrain over assuming/exercising its jurisdiction on these matters on account that the appointment of ambassadors is ordained by the constitution as being a matter resulting in other branches of the government and more specifically the Executive and the Legislature and not this court.

64. I find that proceeding to grant the orders and Declarations sought in this petition, whose aim is likely to condemn and veto the outcome of the vetting process of the petitioner, will be tantamount to revisiting, reconsidering, reevaluating, reassessing, monitoring and reviewing the proceedings leading to adoption of the conditional approval of the nomination of the petitioner. If this court was to do so, it would in my view be overstepping its judicial mandate and will be playing a role of an appellate forum for mandate, already executed and being a preserve of constitution and statute for other arms of government. I accordingly find that this is a suitable case where the court should involve the doctrine of separation of powers and deference and decline to grant the orders.

D) Whether an ambassador is a state officer and if not whether the issue of dual citizen still affects her?

65. The issue for consideration is whether the ambassador falls within the definition of a state office in Article 260 of the Constitution of Kenya 2010. Article 260 of the Constitution of Kenya provides the meaning of state office as follows:-

> **"State office" means any of the following offices;**
>
> **(a) President;**
>
> **(b) Deputy President;**

(c) Cabinet Secretary;

(d) Member of Parliament;

(e) Judges and Magistrates;

(f) Member of a commission to which Chapter Fifteen applies;

(g) Holder of an independent office to which Chapter Fifteen applies;

(h) Member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;

(i) Attorney-General;

(j) Director of Public Prosecutions;

(k) Secretary to the Cabinet;

(l) Principal Secretary;

(m) Chief of the Kenya Defence Forces;

(n) Commander of a service of the Kenya Defence Forces;

(o) Director-General of the National Intelligence Service;

(p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or

(q) An office established and designated as office by national legislation.

State officer means person holding a state officer"

66. Article 78 of the Constitution of Kenya bars persons who hold dual citizenship from occupying state offices or being members of defence forces of Kenya. The aim of the constitution was to avoid the potential conflict of interest that may arise which would affect the well-being of the country involving the security interest of the state.

67. It is petitioner's contention that from the list of who comprises state officers, the office of ambassador is not listed as a state office. It is further submitted **Article 260 of the Constitution of Kenya 2010** distinguishes a public office, a public officer and public service as follows:-

"Public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;

"public officer" means—

(a) Any State officer; or

(b) Any person, other than a State Officer, who holds a public office;

"Public service" means the collectivity of all individuals, other than State officers, performing a function within a State organ;"

The petitioner therefore urges the office of ambassador is not a state office and had the drafters of the constitution intended for it to be one, nothing would have been easier than to state so. It is further urged, that there is no legislation, that has been enacted by parliament stating that the office of an ambassador is a state office.

68. It should be appreciated, that though there is no specific legislation establishing the office of Ambassador as a state office, Article 80(c) of the Constitution of Kenya 2010 gives Parliament the power to enact legislation to operationalize chapter six of the constitution. Further it should be noted that the office of the ambassador is a public office, the appointing authority being the President.

69. The provisions of Article 80(c) of the Constitution of Kenya 2010 led to enactment of the Leadership and Integrity Act. **Under section 52,** it provides that it binds state officers and public officers and states:-

"52. Application of Chapter Six of the Constitution and this Act to public officers generally

1) Pursuant to Article 80 (c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers

2) For the purposes of subsection (1), the relevant public entity recognized or established pursuant to section 3 of the Public Officer Ethics Act, 2003 (No. 4 of 2003) shall enforce the provisions of this Act as if they were provided for under the Public Officer Ethics Act, 2003 (No. 4 of 2003)"

70. Section 31 of the Leadership and Integrity Act provides:-

"31. Citizenship

1) Subject to Article 78(3) of the Constitution, a State officer who acquires dual citizenship shall lose his or her position as a State officer.

2) A person who holds dual citizenship shall, upon election or appointment to a State office, not take office before officially renouncing their other citizenship in accordance with the provisions of the Kenya Citizenship and Immigration Act, 2011, (No. 12 of 2011.)"

71. Upon consideration of the foregoing provisions of the law I am satisfied that office of ambassador though not a state office, but a public office, is bound by the provision, of Section 31 of the Leadership and Integrity Act by dint of section 52 of the Leadership and Integrity Act.

72. Article 78 of the Constitution of Kenya 2010 provides as follows:-

"78. Citizenship and leadership

(1) A person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya.

(2) A State officer or a member of the defence forces shall not hold dual citizenship.

(3) Clauses (1) and (2) do not apply to—

(a) Judges and members of commissions; or

(b) Any person who has been made a citizen of another country by operation of that country's law, without ability to opt out."

73. In the case of **Bishop Donald Kisaka Mwawasi vs. Attorney General & 2 others (supra)** the Learned Judges of Appeal held as follows:-

"Similarly as the appellant is a Kenyan citizen he is by virtue of Article 78(1) eligible for election. The proscription in Article 78(2) is for a State officer holding dual citizenship. However the proscription is not absolute. It is exempted by Article 78(3) (b), if the person is made a citizen of another country by operation of that country's law without ability to opt out. That exception is significant. It implies that if the laws of that other country have no provision for renunciation of citizenship of that country, a State officer can hold dual citizenship. Article 80 authorized Parliament to enact legislation on Leadership, to among other things, provide for the application of the chapter on Leadership with necessary modifications, to public officers. In pursuance of that Article, Parliament enacted the Leadership and Integrity Act (Chapter 182) which provides in section 31 thus:

"31 (1) subject to Article 78(3) of the Constitution, a State officer who acquires dual citizenship shall lose his or her position as a State officer.

(2) a person who holds dual citizenship shall, upon election or appointment to a State office, not take office before officially renouncing their citizenship in accordance with the provisions of Kenya Citizenship and Immigration Act, 2011 (No. 12 of 2011)."

Thus Parliament interpreted Article 78(2) to mean that a dual citizen is eligible to stand for election but upon election he cannot hold office unless and until he voluntarily and officially renounces citizenship of the other country according to the law. Although the Immigration and Citizenship Act has no specific provision for renunciation of citizenship of another country by a dual citizen, section 20 which applies to voluntary renunciation of citizenship by a foreign national upon application for registration as a citizen of Kenya presumably applies to dual citizenship as the marginal note to the section implies. Such a person is required to avail to the Cabinet Secretary evidence of renunciation of citizenship of the other country."

74. From the above decision of the Court of Appeal, the 3rd Respondent reiterates that when a dual citizen is nominated to state or public office, they ought to renounce their foreign nationality to take up the position. It is further the 3rd Respondents' submission the drafters of

the constitution precluded state officers from holding dual citizenship solely because of national interest which include the country security interest; urging further parliament has by legislation of the Leadership and Integrity Act under section 52, extended the bar from holding dual citizenship to public officers. The petitioner as regards Article 78 of the Constitution urges that only state officers are not allowed to have dual citizenship under Article 78 of the Constitution and even so, that prescription is not absolute as provided under Article 78(3) of the Constitution of Kenya 2010 and relies on **Bishop Kisaka Mwawasi vs. AG & 2 others (supra).**

From the aforesaid case it is clear that, a state officer who acquires dual citizenship shall loose his or her position as a state officer. That a state officer or a member of defence forces shall not hold a dual citizenship, however clauses (1) and (2) of Article 78 of the Constitution of Kenya do not apply to Judges and members of Commission or any person who has been made a citizen of another country by operation of that country's law without ability to opt out.

75. It is urged, that the office of Ambassador is not a state office as per provision of Article 260 of the Constitution of Kenya 2010 but even if it was to be regarded as a state office, the petitioner would be protected by Article 78 of the Constitution of Kenya 2010. In the instant case, the petitioner herein was born in **USA** and only became an American citizen by virtue of the American Laws. She grew up in Kenya, attended St. Augustine Nursery School in Mombasa, Hindu Temple Preparatory School in Kitui, Central Primary School in Kitui, Kenya High School for "O" Level and Kyeni Girls for her A levels. She is a Kenyan and only claims her **USA** citizenship by operation of the law. From the reading of Article 78 (3) (b) of the Constitution of Kenya, it appears that the petitioner is protected by the said Article, from the requirement to renounce her American citizenship in order to hold a public office. The United States of America is her place of birth; her mother is an American citizen and she cannot opt out of her place of birth and opt out of her birth right.

76. The above proportions has been confirmed by the Court of Appeal in **Civil Appeal No. 280 of 2013 Bishop Donald Kisaka Mwawasi vs. Attorney General & 2 others (2014) eKLR** in which the Court of Appeal held *inter-alia* that:-

> **"The proscription in Article 78(2) [of the Constitution] is for a State officer holding dual citizenship. However the proscription is not absolute. It is exempted by Article 78(3) (b), if the person is made a citizen of another country by operation of that country's law without ability to opt out. That exception is significant. It implies that if the laws of that other country have no provision for renunciation of citizenship of that country, a State officer can hold dual citizenship".**

77. Further in the above Court of Appeal decision the court expressed itself under paragraph 71 and held:-

> **"From the above analysis, we hold that:**
>
> **1. While a citizen by birth does not lose citizenship by acquiring the citizenship of another country and while a dual citizen is by virtue of Article 12(1) entitled to rights, privileges and benefits of citizenship by rights to leadership including political participation are limited by Article 78(2).**
>
> **2. Parliament in enacting section 31 of the Leadership and Integrity Act interpreted Article 78(2) correctly. The proscription in Article 78(2) is not against a dual citizen being elected or being appointed as a State officer. The restriction is against leadership by dual citizen in the specified State offices, and it does not all apply unless and until a person is elected and/or appointed to a State office. That is a material fact which must be borne in mind.**
>
> **3. A dual citizen is eligible to seek nomination for election as a member of Parliament or member of county government and to stand as a Member of Parliament or county government in an election and also eligible to hold any State office."**

78. The issue arising is whether the petitioner has no ability under the laws of the other country to renounce citizenship of the other country. The petitioner contends that the US citizenship was acquired by birth and as such, her citizenship or the process of opting in was a consequence of circumstances out of her control. That she did not participate in the decision to be born in **US** and she cannot *"opt out"* of that decision. Indeed no one chooses the parents nor the place of birth and that is one case beyond anyone's control. It seems like Article 78(3) (b) of the constitution would only be applicable to people who opted in by applying for citizenship and renunciation would be the process of opting out.

79. From the petitioner's position and submission she implies that being an American citizenship by birth and that by law she cannot opt out of the citizenship and as such she falls under the exception proffered under Article 78(3) (b) of the Constitution of Kenya 2010 and that she is therefore eligible for appointment for the position of ambassador, under Article 78(3) (b) of the Constitution of Kenya 2010.

80. In the case of **Bishop Donald Kisaka Mwawasi vs Attorney General & 2 others (supra)** under holding No. 4 it was stated:-

> **"However, a dual citizen is disqualified upon election or appointment to a State office from assuming office before voluntarily and officially renouncing his other citizenship howsoever granted in accordance with Kenya Citizenship and Immigration Act unless as Article 78(3) provides, he has no ability under the laws of the other country to renounce citizenship of the other country."**

81. The question is whether the party has no ability under the laws of the other country to renounce citizenship of the other country. Section 349 of the Immigration and Naturalization Act **(IWA)** of the United States of America, a united states citizen can lose his or her citizenship or can be *"expatriated"* under various circumstances including:-

> **"i) Voluntary renunciation of the citizenship;**

ii) Applying for the citizenship of another country and thereafter being naturalized in that country.

iii) Serving in a foreign government office, in a position that requires the taking of an oath of allegiance."

82. The section herein above governing the right of a United States citizen to renounce abroad his/her U.S citizenship is clear thus the same should be done voluntarily and no one should be forced so to do. In the case **Afroyim v. Rusk, 387 U.S. 253 (1967)**, is a major United Sates Supreme Court case in which the Court ruled that citizens of the United States may not be deprived of their citizenship involuntarily. The U.S. government had attempted to revoke the citizenship of Beys Afroyim, a man born in Poland, because he had cast a vote in an Israeli election after becoming a naturalized **U.S.** citizen. The Supreme Court decided that Afroyim's right to retain his citizenship was guaranteed by the Citizenship Clause of the Fourteenth Amendment to the Constitution. In so doing, the Court struck down a federal law mandating loss of U.S. citizenship for voting in a foreign election—thereby overruling one of its own precedents, **Perez v Brownell (1958)**, in which it had upheld loss of citizenship under similar circumstances less than a decade earlier.

83. Further in in **Vance vs. Terrazas, 444 U.S. 252 (1980),** also a United Sates Supreme Court decision, established that a United States citizen cannot have his or her citizenship taken away unless he or she has acted with an intent to give up that citizenship. The Supreme Court overturned portions of an act of Congress which had listed various actions which had said that the performance of any of these actions could be taken as conclusive, irrefutable proof of intent to give up **U.S.** citizenship. However, the Court ruled that a person's intent to give up citizenship could be established through a standard of preponderance of *evidence (i.e. more likely than not)* rejecting an argument that intent to relinquish citizenship could only be found on the basis of clear, convincing and unequivocal evidence.

84. Also, the **U.S** Supreme Court in **Perkins v. Elg, 307 U.S. 325 (1939)** cited the case of **United States v. Wong Kim Ark, 169 U.S 649**, where it was stated that as municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality. And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law on the resumption of that citizenship by her parents does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

85. From the above-mentioned cases it is clear that the case emphasize the fact that an American citizen by birth cannot lose her citizenship by acquiring that of another country unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles. The parliament here cannot therefore force or demand that the petitioner renounces her U.S citizenship unless she voluntarily decides to do so.

86. Miguna Miguna vs. Fred Okengo Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party) [2018] eKLR the court held that "this is because citizenship by birth is a birth right and an in alienable right. This is in line with the principle that **"A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible… The role of the Court should be to expand the scope of such a provision and not to extenuate it."(Tinyefuze v Attorney General of Uganda) (**supra)"

87. I have no hesitation to state, that I agree with the sentiments of the Learned Judge, that citizenship by birth is an alienable right which cannot be taken away from anyone. Article 14 of Constitution of Kenya 2010 clearly pronounces that *"A citizen by birth does not lose citizenship by acquiring the citizenship of another country"*

E) Whether the National Assembly can grant conditional approval of a nominee?

88. The Petitioner faults the National Assembly for giving a conditional approval by claiming that the National Assembly has misapprehended the provisions of Article 78 of the Constitution as read with Article 260 of the Constitution. The Petition questions whether Article 132(2) (e) of the Constitution and the Public Appointments (Parliamentary Approval) Act give power and/or discretion to the National Assembly to grant a conditional approval. The Petitioner states, that the National Assembly only has the mandate to either approve or to reject the appointment and does not have the discretion to approve with conditions as it did in this case.

89. Article 132(2) of the Constitution of Kenya 2010 mandates the National Assembly to approve persons nominated by President for the following position;

a) The Cabinet Secretaries in accordance with Article 152;

b) The Attorney General in accordance with Article 156;

c) The Secretary to the Cabinet in accordance with Article 154;

d) Principal Secretaries in accordance with Article 155;

e) High Commissioners, ambassadors and diplomatic and consular representatives;

f) The Director of Public Prosecution;

g) The Chief Justice and the Deputy Chief Justice;

h) Members of Commissions and Independent offices;

i) The Central Bank Governors.

90. The National Assembly represents the people of the constituencies and the special interests in the National Assembly. Its roles are set out in **Article 95 of the Constitution** and include, amongst others:-

a) Deliberation on and resolution of issues of concern to the people of Kenya;

b) Exercising oversight over state organs.

91. The National Assembly exercises vetting and/or approval mandate on behalf of the people of the Republic of Kenya and pursuant to laid down constitutional and statutory principles *(Parliamentary Approval Act 2011).* They do not exercise the mandate *suo moto,* but upon receipt of a written notification from the Appointing authority, which said notification must be lodged with the office of the clerk of the National Assembly. Under **section 3 of the Public Appointment (parliamentary approvals) Act** it provides thus:-

"An appointment under the Constitution or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by Parliament in accordance with this Act."

92. From the above-mentioned section it is clear, that the National Assembly must approve the appointment of an individual where the constitution clearly requires for valid appointment to take place.

93. The public appointments *(parliament approvals)* Act under Section 6 provides for factors that the committee has to consider in a candidate during approval hearing, which factors are listed under the schedule under paragraph 11, include question of nationality. Under the schedule, paragraph 26 provides that the committee will consider:-

Potential Conflict of Interest;

"(a) Identity the family members or other persons, parties, categories of litigation or financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to rise.

(b) Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern."

Section 7 of the Public Appointment (Parliamentary Approvals) Act further provides as follows with regards to issues for consideration of nominees;

"The issues for consideration by the relevant House of Parliament in relation to any nomination shall be—

(a) The procedure used to arrive at the nominee;

(b) Any constitutional or statutory requirements relating to the office in question; and

(c) The suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the need of the body to which the nomination is being made."

94. In the instant petition, the petitioner appeared before the National Assembly Committee of Defence and Foreign Affairs where she was interviewed taking into account the above consideration. The petitioner satisfied the committee on qualification; however she indicated that she is a dual citizen of the United States of America and Kenya. This was a concern for the Committee which after hearing her submissions on the issue, deliberated and made a conditional approval that she renounces her US citizenship before appointment. The issue was deliberated upon by the National Assembly which also took issue with the conflict of interest, that the nominee would face while holding the public office of Ambassador of Kenya while at the same time being a citizen of the United States of America.

95. Section 7 of the Public Appointments *(Parliamentary Approval)* Act requires the National Assembly to take into consideration the suitability of the nominee having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made. In the circumstances, the National Assembly was not convinced that the nominee would execute her duties as ambassador without facing potential conflict of interest.

96. Section 8 of the Public Appointments *(Parliamentary Approval)* Act gives the National Assembly power/discretion to make recommendations in the Report after the approval hearings on a candidate's suitability. Section 8 provides;

"8. Period for consideration and report

(1) Unless otherwise provided in any law, a Committee shall consider a nomination and table its report in the relevant House for debate and decision within fourteen days from the date on which the notification of nomination was given in accordance with section 5.

> **(2) At the conclusion of an approval hearing, the Committee shall prepare its report on the suitability of the candidate to be appointed to the office to which the candidate has been nominated, and shall include in the report, such recommendations as the Committee may consider necessary.**

97. It should be noted that the office of the ambassador is no ordinary office, as it involves representing the international and National interest of Kenya. It is mostly likely in discharge of the duties of an ambassador; the Applicant would face serious conflict of interest in advancing the interest of Kenya as against those of the **USA,** a country where she is a citizen.

98. I find that contrary to the petitioner's contention, that it is the prerogative of the National Assembly to approve or reject the petitioner's nomination in accordance with Article 132(2) of the Constitution of Kenya 2010 and Section 3 of the Public Appointments *(Parliamentary Approval)* Act No. 33 of 2011 and standing order 216(5) (f) of the National Assembly standing orders, and this includes granting a conditional approval.

99. In the **United States**, *"advice and consent"* is a power of the United States Senate to be consulted on and approve treaties signed and appointments made by the president of the United States to public positions, including Cabinet secretaries, federal judges, United States attorneys, and ambassadors. This power is also held by several State Senates, which are **consulted on and approve** various appointments made by the state's chief executive, such as some statewide officials, state departmental heads in the governor's cabinet, and state judges *(in some states).*

100. In the **United States' Constitution, Article II, section 2, clause 2** provides as follows;

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

101. The historical reasoning on the power of advice and consent by the United States of America Senate in Article II, section 2, clause 2 of the **US** Constitution is as follows;

> **"This language was written at the Constitutional Convention as part of a delicate compromise concerning the balance of power in the federal government. Many delegates preferred to develop a strong executive control vested in the president, while others, worried about authoritarian control, preferred to strengthen the Congress. Requiring the president to gain the advice and consent of the Senate achieved both goals without hindering the business of government."**

102. In Kenya, the power to '**advice and consent**' is replicated in the Kenyan laws in Article 132(2) (e) of the Constitution as well as the Public Appointments *(Parliamentary Approval)* Act. **Section 8** of the Act gives the National Assembly the discretion to advice the President on his nominees. The National Assembly did so by making the Resolution that the nominee be appointed only after she renounces her **US** Citizenship for purposes of loyalty and to avoid conflict of interest in her duties.

103. The power to approve is similar to the power to consent and advice. The Black's Law Dictionary, 10th Edition defines *"advice and consent"* at page 65 and *"approve"* at page 123 as follows;

"**ADVICE AND CONSENT**"

> **"The right of the U.S. Senate to participate in making treaties and appointing federal officers, provided by U.S. Const. art. II, § 2. As to treaties, the Senate's advice and consent generally includes Senate involvement in the negotiation process, and the need for a two-thirds majority of the Senate for ratification. As to public officers, the Senate's advice and consent generally includes the right to vote on approval of an appointment."**

> **"APPROVE"**

"*To give formal sanction to; to confirm authoritatively. Parliamentary law. To adopt*".

> **"CONSENT"**

> **"Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the profession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another. It supposes a physical power to act, a moral power of acting and a serious, determined and free use of these powers."**

104. The power to approve involves consent of the National Assembly. In this case, the National Assembly in its wisdom gave consent to the appointment of the Petitioner, albeit on conditions which the National Assembly thought would be beneficial for the entire country.

It is of great important once to note, that an ambassador/High Commissioner should only owe allegiance to the sending state and only represent the interest of the sending state. Kenya is a party to Vienna Convention on Diplomatic Relation, Article 3 provides that;

"1. The functions of a diplomatic mission consist, inter alia, in:

(a) Representing the sending State in the receiving State;

(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission"

105. I find, that the role of a diplomat is to represent the interest of the sending state including National security and any individual who owes allegiance to another state, unless he has been made a citizen of another country by operation of that country's law without ability to opt out under provisions of Article 78(3) (b) of the Constitution of Kenya 2010, ought not be an ambassador unless he/she renounces the citizenship of the foreign state. This is because the risk of a dual citizenship may jeopardize the national interest of the Republic of Kenya against the interest of the foreign state. In view of the aforesaid and the findings herein above I am satisfied that the 3rd Respondent has demonstrated that in the process of vetting and approval of the petitioner herein the same was conducted fairly and was fair and within the law.

F) What is the public interest in following the legally prescribed process in this appointment?

106. In granting orders and declaration sought in any petition the court is required to carefully examine the nature of the challenge vis-à-vis the wider public interest. In the case of **Kenya Power and Lighting Company Ltd vs NMG Company Ltd (2010) eKLR** the Court of Appeal stated that:-

"We think that in a case like this, we must consider the likely effect of the orders sought by the applicant. We should take into account the special nature of the set-up of the Second respondent. It is common ground that it is the sole supplier of electricity in the country and that has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached nevertheless the court has a reciprocal duty to ensure that it does not hamstring such bodies like the Second respondent from performing their lawful duty or duties as bestowed upon them by the relevant law."

107. I am of view, that the principle which command general acceptance is, that there are circumstances in which public interest must be raised over and above the interest of a private individual; to the safety of general public. The private/individual interest of the petitioner herein, stated to be a violation of her rights, should be considered in right of protecting the public from private interest. The court has ultimate power in the interest of justice to safeguard the interest of public, where there is reasonable grounds to protect and preserve the interest of the public. The individual interest of a party are narrow and subservient to the wider public interest of protecting the constitutional mandate of the Executive and the National Assembly under Article 132 of the constitution, which mandate I have found to have properly been executed.

G) Whether the petitioner has any proprietary right to the office of the Ambassador?

108. It is petitioner's contention that she is being denied an opportunity to work for the Republic of Kenya by the pending her posting as an Ambassador. It is 3rd Respondents submissions that there is no propriety right in public office. In the case of **Philip K. Tunoi & another vs. Judicial Service Commission and another (2016) eKLR,** the Court of Appeal held that there was no proprietary rights in public office. The court relied on the **USA** case, in **Mial v. Ellington, 134, N.C. 131 (1903),** where the Supreme Court of North Carolina held that a public office is not property and that an officeholder has no vested property interest therein, and also in **Gorman vs City of New York (280 App. Div. 39 (NY. App. Div. 1952)** where the Supreme Court of New York Appellate Division held that merely because a member's benefits in a pension scheme may not be constitutionally impaired does not create a constitutional right to stay in public employment.

109. In view of the aforementioned authorities I find the petitioner is not being denied an opportunity to work for Republic of Kenya by pending posting, as the process has not been completed and the Appointing Authority is yet to appoint her as is awaiting the approval from the National Assembly and further there is no propriety rights in public office as public office is not a property in which an office holder has a vested property interest.

110. I have considered all issues raised in this petition and facts of this petition and I find that the public interest strongly militates against the exercise of this court's determination of the issues raised in the petition as the current process of approval, return of the approval to the Appointing authority and appointment is not complete and thus the process should be allowed to be completed. In this petition under Article 132(2) of the constitution, the President nominated the petitioner, and is awaiting the approval of the National Assembly, is yet to appoint the petitioner as an ambassador. The National Assembly approved the petitioner's nomination with a condition that she cedes her **US** citizenship. The petitioner did not await President's appointment or dismissal but proceeded to file the present petition. I find as the President of the Republic of Kenya is yet to make the appointment formally on the advice of the National Assembly, the petition is not ripe

for determination. The petition in my view is premature.

111. In the circumstances I have no alternative other than dismissing the petition as being premature so as to allow the process of approval and appointment to be completed.

112. Having considered the nature of the petition and the interest at stake I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 14th day of November, 2019.

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J .A. MAKAU

JUDGE