

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E213 OF 2023
BETWEEN

EDWARD KAROPH WABWOTO & 21

OTHERS..... PETITIONERS

VERSUS

ATTORNEY GENERAL.....

RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 21st June 2023 is supported by affidavits of even date sworn by the Petitioners.
2. This Petition assails the dilatory and reluctant manner the President of the Republic of Kenya failed to act on the recommendation of the Judicial Service Commission regarding the appointment of the Petitioners as Judges of the Environment and Land Court and, the Employment and Labour Relations Court thereby violating the Petitioners constitutional rights and legitimate expectation.

3. The Petitioners thus seek the following reliefs against the Respondent:

- a) ***A declaration that for the period running from 13/08/2019 to 3/6/2021, the President of the Republic of Kenya violated Articles 2, 3, 10, 27, 28, 47, and 166(1)(b) of the Constitution in failing, refusing and neglecting to appoint the Petitioners as Judges of the Environment and Land Court and the Employment and Labour Relations Court for 22 months after they were recommended for such appointment by the Judicial Service Commission.***
- b) ***A declaration that the State, through the refusal, failure or neglect by the President of the Republic Kenya to appoint the Petitioners as Judges after they were recommended for appointment by the Judicial Service Commission for the period running from 13/08/2019 to 3/6/2021 violated their fundamental rights and freedoms namely, the right to equal benefit of the law and the full and equal enjoyment of rights as guaranteed by Article 27(1)&(2) of the Constitution, the right to inherent dignity and the right to have that dignity respected and protected as guaranteed by Article 28 of the Constitution, and the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by Article 47(1) of the Constitution as well as the right to written reasons for administrative action that is likely to adversely affect the rights or fundamental freedoms as guaranteed by Article 47(2) of the Constitution.***

- c) A declaration that the State through the actions of the President of casting aspersions, without particulars, that the reason why he could not appoint the Petitioners was because they were not fit to hold public office violated the rights of the Petitioners to have their dignity respected and protected in terms of Article 28 of the Constitution.**
- d) An order for compensation by way of general damages against the Respondent for the violation of Petitioners' rights and constitutional protections specified in prayers (A), (B) and (C) above.**
- e) An order of compensation by way of exemplary damages against the Respondent for abuse of state power resulting in the violation of Petitioners' rights and constitutional protections specified in prayers (A), (B) and (C) above.**
- f) An order of compensation by way of special damages as specified in the individual affidavits of the Petitioners accompanying this petition.**
- g) An order directed at the Respondent to issue a public apology to the Petitioners in such form and manner as shall be specified by the order of this Court for the humiliation, uncertainty and inconvenience caused by the violations of their rights and constitutional protections specified in prayers A, B and C above.**
- h) Costs of the Petition.**

- i) Interest of (D), (E) and (F) above at court's rate from the date of Judgment till payment in full .***

Petitioners' Case

4. The Petitioners state that on 13th August 2019, the Judicial Service Commission (JSC) in line with Article 166(1)(b) of the Constitution, Section 30 of the Judicial Service Act and the First Schedule to the Judicial Service Act, recommended the appointment of the Petitioners as Judges of the Environment and Land Court and the Employment and Labour Relations Court to the President.
5. The Petitioners state that the President in light of Article 166(1)(b) of the Constitution and preceding binding interpretations by the Courts in the matter, had an obligation to appoint the Petitioners in accordance with JSC's recommendation. They as such had a legitimate expectation owing to this provision, that they would be appointed as Judges.
6. The Petitioners contend that in spite of JSC's recommendation which was anchored on the Constitution and the relevant provisions of the Statutory law, the President failed, refused and neglected to appoint them for a period of 22 months until 3rd June 2021. They claim that the President's refusal had no justification whatsoever and

neither was the reason for this failure formally communicated.

7. The Petitioners state that the President's refusal to appoint them triggered the filing of constitutional Petition -**Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR**, which was filed in public interest by the Petitioner therein. They state that the Court in its Judgment dated 6th February 2020 held that:

“We find that the President has no mandate to review, reconsider or decline to appoint persons recommended by the 1st Interested Party as judges. We also find that the delay by the President in appointing the persons recommended, is unreasonable and unconstitutional... We therefore allow it and make the following orders, which we consider appropriate:

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

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

A declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective courts

is a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution.”

8. The Petitioners are aggrieved that notwithstanding the above judgment; the President was unyielding. They allege that instead, the President, citing some undisclosed intelligence reports, went ahead to make public remarks which portrayed Petitioners as persons of questionable character that were not fit to hold office as Judges, hence injuring their reputation.
9. The Petitioners contend that the President of failing to appoint them exercised his power in a manner that contravenes Article 2(2) of the Constitution and also, Article 3 and 10. Equally that he denied them the right to equal benefit of the law and enjoyment of their rights under Article 27 of the Constitution. In addition, the act of vilifying them in public on unsubstantiated allegations violated their rights under Article 28 and 47 of the Constitution.
10. The Petitioners contend that the public humiliation and the long period of uncertainty as a result of the President’s conduct caused them loss and damage.
11. The Petitioners aver that they used to work for their respective organizations where they resigned following the JSC recommendation of their appointment as Judges of ELC and ELRC, only to endure 21 months of uncertainty and

hardship due to President's delay and reluctance to make the appointment.

12. The Petitioners have thus, in their individual affidavits, urged that they be compensated by being placed at the remuneration level they would have been had they been appointed as required by the Constitution.

Respondents' Case

13. In opposition to the Petition, the Respondent filed a Notice of Preliminary Objection dated 26th January 2024 on the basis that:

- i. *The Petition is fatally defective in that it offends the express provision of Section 7 of the Civil Procedure Act based on the doctrine of res judicata since the issues raised in the Petition were directly and substantially in issue in **Constitutional Petitions No.369 of 2019; Adrian Kamotho Njenga -versus - Attorney General and Others ,Nairobi High Court Constitutional Petition No. 206 of 2020, Katiba Institute - versus - The President of the Republic of Kenya 2 others as well as Nairobi High Court Constitutional Petition No.E196 of 2022 Benjamin Gikenyi -Versus - the Chief Justice of the Republic of Kenya ,Judicial Service Commission &13 others (Interested Parties).***
- ii. *The Petition is fatally defective and an abuse of the Court process and runs afoul of the doctrine of sub judice provided for under Section 6 of the Civil Procedure Act in that the matters being canvassed in this Petition are pending determination in the*

*Court of Appeal in **Nairobi Civil Appeal Number E088 of 2022; Attorney General -versus - Katiba Institute & 6 others** where an order of stay of execution of the judgement in **Nairobi High Court Constitutional Petition No. 206 of 2020, Katiba Institute- versus - the President of The Republic of Kenya 2 others** has been issued pending the determination of the appeal vide **Court of Appeal Civil Application No E365 of 2021.***

- iii. *The Petition as framed does not raise any constitutional issues for determination and if at all any claim exists; it arises as a matter of an alternative determination of allegations of a breach of contract of employment between the Petitioners and the Judicial Service Commission.*

Petitioners' Submissions

14. Ongoya and Wambola Advocates filed submissions dated 30th October 2024 on behalf of the Petitioners. On a preliminary note, Counsel underscored that the Respondent had not filed a Replying Affidavit in response to the Petition and thus submitted that the facts as pleaded remained undisputed.
15. On the assertion that the Petition is res judicata, Counsel relied in the principles set out in **Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy [2017] KECA 477 (KLR)** by the Court of Appeal as follows:

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

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

16. Counsel submitted that the Respondent’s claim was unfounded as the issues in this Petition were not in issue in the previous petitions and have not been litigated before. In summary, Counsel submitted that *the Petitioners issues touch on the loss of remuneration and violation of their constitutional right to dignity owing to the President’s action of casting aspersions* without particulars.

17. In addition, the Petitioners herein were not parties in the said suits. Equally, Counsel highlighted that this Petition was filed in a different context, being that, the cited suits were filed prior to the Petitioners appointment, while the instant suit is after their appointment hence the remedies are also distinct.

18. On sub judice, Counsel in like fashion denied this claim stating that the issues and parties in this suit are not similar to those **Civil Appeal Number E088 of 2022**. Reliance was placed in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR)** where the Supreme Court observed as follows:

“Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.”

19. On the third objection, Counsel submitted that this Court has jurisdiction to entertain this matter as it raises constitutional issues being, the State’s failure through the President, to act as required by the Constitution and not against the Judiciary as the employer as alleged by the Respondent. Counsel emphasized therefore that this matter is not based on an employer -employee relationship as alleged.
20. To buttress this point reliance was placed in **Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** where it was held that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law

can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

21. Comparable reliance was placed **in the Matter of the Interim Independent Electoral Commission (Applicant) [2011] eKLR and Milimani HCCHRPET E311/2023- Honourable Justice Aggrey Muchelule & 5 others v the Honourable Attorney General and Judicial Service Commission.**
22. Turning to the Petition, Counsel submitted that the Respondent had not controverted the deponed facts and the Preliminary Objection is unmeritorious, thus are liable for the violations committed against the Petitioners. Reliance was placed in **Justice Aggrey Muchelule & 5 others** (supra) where it was held that:

“Having considered the pleadings and arguments by parties, the decisions relied on, the constitution and the law, I come to the following conclusions;

First, the President violated the constitution and the petitioners’ rights and fundamental freedoms. The 1st to 4th petitioners were serving Judges. They were recommended for appointment to the Court of Appeal but were not appointed. They were kept waiting for three years. The 5th and 6th petitioners were judicial officer and Registrar of the High Court, respectively. They were recommended for appointment to the ELC, but were not appointed for three years, a violation of their legitimate expectation. The petitioners were humiliated, ridiculed and held in contempt following

unsubstantiated claims and innuendoes that they were not fit for appointment, despite rigorous interview processes they had gone through.

Second; the petitioners were discriminated against and suffered differential treatment in violation of Article 27 of the Constitution when their colleagues were appointed leaving them without any explanation. This caused the petitioners anxiety, mental and physical anguish. They were considered pariah in the eyes of reasonable members of society which diminished their dignity. Third; the petitioners' right to fair administrative action was violated contrary to Article 47 as no written reasons were given why they could not be appointed. The petitioners not only lost yearly increment but also pecking order in their respective courts..."

23. Counsel further submitted that the Petitioners are entitled to general, aggravated and special damages. On general damages, Counsel submitted that this Court should award Ksh.15,000,000.00 to each Petitioner. Reliance was equally placed in **Justice Aggrey Muchelule & 5 others** (supra) where it was noted as follows:

"86. When considering the level of damages to award, the position adumbrated by Patterson JA in Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported) is helpful. He stated: Where an award of monetary compensation is appropriate, the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to

reality nor does it mean that it should be trivialized...In Peter M. Kariuki v Attorney General [2014] eKLR, the Court of Appeal awarded Kshs. 15,000,000 general damages for violation of constitutional rights. 88. Taking these awards into account, the nature of violations by the holder of the highest office in the land and considering the level of inflation, an award of Kshs. 15,000,000 general damages for each petitioner, is fair and reasonable..."

24. On exemplary and punitive damages, Counsel submitted that abuse of power by the President in failing to appoint the Petitioners entitles them to this award to the tune of Ksh.5,000,000. Parallel dependence was placed in **Justice Aggrey Muchelule & 5 others** (supra) where it was held that:

"There can be no greater public interest than defending the constitution and upholding the rule of law and human rights, as founding values in Article 10 of the constitution. The President's constitutional transgression has to be frowned upon and discouraged. The AG must also be called out for failing to uphold Article 156(6) of the constitution. The only way to do so, is to award exemplary damages. Taking into account what the petitioners went through during the three years' wait; the discrimination they endured when their colleagues were appointed; the lost pecking order and salary increase, I consider an award of Kshs. 5,000,000 exemplary damages for each petitioner reasonable in the circumstances of this case..."

25. On special damages, Counsel submitted that the Court should award the Petitioners special damages as follows and as supported by the averments in their affidavits:

- a) 2nd Petitioner Ksh.65,000,000.
- b) 3rd Petitioner Ksh.50,000,000.
- c) 4th Petitioner Ksh.16,524,684.
- d) 5th Petitioner Ksh.50,000,000.
- e) 9th Petitioner Ksh. 16,524,684.
- f) 11th Petitioner Ksh.20,000,000.
- g) 12th Petitioner Ksh. 50,000,000.
- h) 13th Petitioner Ksh. 75,000,000.
- i) 16th Petitioner Ksh 50,000,000.
- j) 17th Petitioner Ksh.100,000,000.
- k) 20th Petitioner Ksh. 50,000,000.

Respondent's Submissions

26. The Respondent neither filed submissions to the Petition nor to its Notice of Preliminary Objection. I found none in the Court file and in Court Online platform (CTS).

Analysis and Determination

27. It is my considered view that the issues that arise for determination in this matter are:

- i. Whether this Petition is barred by the doctrine of Res judicata and sub judice.***
- ii. Whether the Petition raises constitutional questions.***

iii. Whether the Respondent violated the Petitioner's rights under Articles 27, 28, and 47 of the Constitution.

iv. Whether the Petitioners are entitled to the relief sought.

Whether the instant Petition is barred by the doctrine of Res judicata and sub judice.

28. In the Respondent Preliminary objection, it contended that the instant matter is incompetent on the basis that it offends the principle of *res judicata* and *res-sub judice*. Nevertheless, the Respondent did not file submissions in support of this contention. That notwithstanding, a jurisdictional issue is a grave matter, which when raised, obligates the Court even on its own motion, to inquire into it and determine if it is competent to adjudicate the matter. This explains why even when parties are in agreement about a Court's jurisdiction, the Court can *suo motu* decide otherwise for not even the consent of the parties can confer a Court with jurisdiction.

29. The Supreme Court in **Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR)** addressing itself question of jurisdiction rendered itself as follows:

“68.A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as

conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

30. The Respondent set out its Preliminary Objection based on three major grounds as follows:

- 1) *That the Constitutional Petition is fatally defective in that it offends the express provisions of Section 7 of the Civil Procedure Act based on the doctrine of res judicata since the issues in the Constitutional Petition were directly and substantially in issue in Constitutional Petitions No. 369 of 2019 -Adrian Kamotho Njenga vs Attorney*

General and others; Nairobi High Court Constitutional Petition No. 206 of 2020 -Katiba Institute vs The President of the Republic of Kenya & 2 Others as well as Benjamin Gikenyi vs the Chief Justice of the Republic of Kenya, Judicial Service Commission & 13 others (Interested Parties).

- 2) *The Constitutional Petition is fatally defective and an abuse of the Court process and runs afoul the doctrine of sub judice provided for under Section 6 of the Civil Procedure Act in that the matters being canvassed in this Petition are pending determination in the Court of Appeal in Nairobi Civil Appeal Number E088 of 2022; Attorney General vs Katiba Institute and 6 Others (where order of stay of execution of the judgment in Nairobi High Court Constitutional Petition No. 206 of 2020 -Katiba Institute vs the President of the Republic of Kenya & 2 Others has been issued pending the determination of the appeal vide Court of Appeal Civil Application No. E365 of 2021).*
- 3) *That the Petition as framed does not raise any constitutional issues for determination and if all any claim exists, it arises as a matter of an alternative determination of allegations of breach of contract of employment between the Petitioner and the Judicial Service Commission.*

31. *Res Judicata* is a jurisdictional issue because, when established, the Court is completely barred from re-litigating the merits of the matter which has been previously concluded. Regarding *res-sub judice*, it is also a jurisdictional bar in the sense that the Court is barred from hearing an analogous matter at the same time as with another that is

proceeding in another competent court to avert possible conflicting decisions that may bring about embarrassment in the administration of justice generally.

Section 6 of the Civil Procedure Act sets out the principle of *sub judice* states:

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

32. Regarding the principle of *res judicata*, this is codified under **Section 7 of the Civil Procedure Act** Cap 21 as follows:

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

33. The Respondents main contention is that the constitutional issues raised by this Petition were decided on merits in cases cited in the Respondents' Notice of Preliminary Objection and/or are pending determination before the Court of Appeal, and being *judgments in rem*, the same issues cannot be relitigated as they are *res judicata*. Further, that they cannot be litigated simultaneously with ongoing appeals

before the Court of Appeal as this will be in breach of the doctrine of *sub judice*. Elaborating on the implication of rem judgments, the Court of Appeal in **Ngutari & 5 others v Okello. & 5 others [2025] KECA 505 (KLR)** stated as follows:

“16. In matters of constitutional interpretation, the proceedings more often than not take the in rem form. In rem proceedings give rise to in rem judgements which is a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation). Such a judgement is said to be conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless whether or not they are parties to any legal proceedings are bound by a judgment in rem and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the Court has by its judgment declared or made it to be. On the other hand, in personam judgement determines the rights of the parties to an action and those who are privy to them in regard to the subject matter in dispute. See Halsbury Laws of England, 4th edition Volume 16 paragraph 1525 and Hoffmann and Zeffertt: “The South African Law of Evidence” 4th edition, at 339- 340 and Lazarus-Barlow v Regent Estates Co Ltd

[1949] 2 KB 465 at 475, [1949] 2 All ER 118 at 122.

17. Therefore, where a court is asked to hand down an in rem judgement, care must be taken so that those who are not before the court are not unduly prejudiced by the same when their position is not the same as those of the parties before the court.”

34. The principle of res judicata was illuminated by the Supreme Court in **Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others [2016] KESC 6 (KLR)** as follows:

“[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

35. Public interest matters are not immune from the principle of *res judicata* and *sub judice*. If it is shown that an issue has been tried on merits in in a cause of action that was filed in public interest and resolved, the same cannot be retried in another public interest matter by a different party. Further, for a matter that raises similar issue of public interest, different parties will not be allowed to institute contemporaneous proceedings on the same issue in different courts. In ***Okiya Omutatah Vs Communication Authority***

of Kenya (2015) eKLR, the Court asserted this position by holding thus:

“34. Further to the above, explanation (6) of the Civil Procedure Act makes it clear that Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating....”

35. In the previous suit Petition No. 447 of 2016 an order of declaration was issued in relation to the subject matter which was a declaration against seizure and destruction of gaming slot machines. A declaration by its nature is an order in rem. Even persons who were not parties in that suit could avail themselves the benefit of a declaratory relief. The instant petition is brought in public interest and relates to the same subject matter as the former petition. This is therefore a perfect res-judicata barred case.”

36. Having elaborated on the principles, the Court must therefore proceed and determine if this matter is barred by principle of *sub judice* or *res judicata*.

37. I have very carefully perused the three cases that the Respondent relied on in its assertion that the instant Petition is both res-judicata and sub judice being: *Constitutional Petitions No.369 of 2019; Adrian Kamotho Njenga -versus -*

Attorney General and Others ,Nairobi High Court Constitutional Petition No. 206 of 2020; Katiba Institute - versus - The President of the Republic of Kenya 2 others as well as Nairobi High Court Constitutional Petition No.E196 of 2022 Benjamin Gikenyi -Versus - the Chief Justice of the Republic of Kenya ,Judicial Service Commission &13 others (Interested Parties).

38. In a nutshell, the three Petitions in my humble view focused on the constitutional interplay between the broad constitutionally mandated obligations of the President vis-à-vis the principle of the separation of powers and judicial independence in light of the sustained refusal by the President to appoint nominees that the JSC had recommended for the appointment as Judges. That is basically the running theme in the previous decisions cited by the Respondent. Indeed, the remedies secured in those decisions reflect that trend, they were general declaratory reliefs directed at the President's inaction with emphasis on his constitutional obligations. For instance; in Adrian Kamotho case, the Court declared the President was bound by the JSC recommendation, in the Katiba Institute case, the Court found that the President had acted arbitrarily and unconstitutionally when he appointed 34 and left out 6 others without giving written reasons as breach of Article 47 on the fair administrative action.

39. On the contrary, the instant Petition is more individualized where each of the Judge nominees affected by the President's delayed unconstitutional actions of failing to appoint them, articulates the specific right in Bill of Rights that were violated as a result of the President's unconstitutional decision of putting in abeyance their appointment for 21 months without giving any reasons whatsoever following the recommendation of the JSC. The Petition is thus distinct from the previous ones in this material respect and it is the finding of this Court that it is neither *res judicata* nor *sub judice* as this issue was not tried in the previous Petition and neither has it been demonstrated that it is an issue in the pending appeals.
40. In my humble view, the instant Petition ventilates individual rights of those affected hence is a fresh and independent cause of action from the previous public interest cases. In fact, a decision emanating from the instant Petition will be a judgment in *personam*.

Whether the Petition raises constitutional questions.

41. Regarding what constitutes a constitutional question, this was judicially considered by the Court in **Abdulkarim v Arrow Motors (EA) Limited & another [2017] KEHC 9674 (KLR)** which held as follows:

“37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values...

40. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak* notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and

structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

41. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing - the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

42. Correspondingly, in **Munene vs Director of Public Prosecutions & 3 others [2023] KEHC 25900 (KLR)** the Court, after citing various authorities on the matter stated:

“38. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the rest of the Constitution. In any case, the issue in dispute must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.

39. The words of Learned Judge Langa, J in Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC) captured the essence of a constitutional issue. The Judge had the following to say: -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values..."

43. The Petitioners specifically pleaded violation of Article 27 of the Constitution by being denied equal benefit of the law by the President, without reason, by failing to appoint them after they were recommended for appointment by JSC.
44. The Petitioners further alleged that their right to dignity under Article 28 was violated when aspersions were cast on them by the appointing authority without substantiation.
45. That further, their right to fair administrative action under Article 47 was violated as the they were put in a prolonged state of uncertainty without being provided with any written reasons for the action. This put a strain on them as they were in perpetual state of dilemma that made it impossible to make important career decisions such as those in private practice continuing representing clients, or those in academia continuing to take teaching assignments or taking up research assignments and so on.

46. Under Article 22 (1) of the Constitution, every person has a right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The Petitioners have precisely articulated Articles of the Constitution that were implicated in asserting that their fundamental rights were violated, the nature or the manner of the violation for which they want the Court to examine and provide a remedy.
47. Right to human dignity, the right to equal protection and benefit of the law and the right to fair administrative action that the Petitioners allege were infringed following the Presidents unconstitutional actions that are complained of in this Petition are inherently justiciable constitutional controversies as these rights are guaranteed by the Constitution in the in Article 28, 27 and 47 under the Bill of Rights and are enforceable by invoking the constitutional jurisdiction of this Court under Article 165 (3) (b) and Article 23 of the Constitution. They are thus not mere contractual or ordinary employment disputes as suggested by the Respondent in its Notice of Preliminary Objection.

Whether the Respondent violated the Petitioner's rights under Articles 27, 28, 47 and of the Constitution.

48. As already pointed out, a constitutional petition must properly plead the specific violations of the Constitution that were violated together with particulars that demonstrate how the violation happened. This test was affirmed by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** as follows:

“[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

49. In **Japheth Ododa Origa v Vice Chancellor University of Nairobi, Academic Registrar, University of Nairobi & B.M Waweru [2018] KEHC 4861 (KLR)** the Court underscored the fundamental reason behind this prerequisite by stating as follows:

“15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement...”

50. Presentation of a properly pleaded Constitutional Petition that identifies the specific provisions of the constitution that have been violated and discloses how the violation occurred and the relief sought is not the end. The Petitioner must proceed and substantiate the allegations made by adducing credible and admissible evidence that proves the allegations of violation on a balance of probabilities.

51. This principle was affirmed in the persuasive authority of **Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR)** as follows:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[38] :-

“The court’s decision in every case will depend on whether the party concerned has

satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

52. The question thus becomes, have the Petitioners proved the allegations of violations of rights specified in the Petition?
53. To start with, this Honourable Court must acknowledge the fact that the Respondents did not file any replying affidavit controverting the facts that the Petitioners deponed in their affidavit. That said, the Court must examine the evidence presented by the Petitioners in support of the specific claims of violation.
54. One of the rights and fundamental freedoms that the Petitioners claimed was violated was Article 27 of the Constitution by stating that the delayed appointment denied them the right to equal benefit of the law. Article 27 is on the equality and freedom from discrimination. Article 27 (1)

provides that every person is equal before the law and has the right to equal protection of the law. Article 27 (2) provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms while Article 27 (4) provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

55. To succeed in proving discrimination or unequal treatment before the law, it was incumbent upon the Petitioners to demonstrate by way of evidence that any of the prohibited grounds was applied to treat them less favourably from the class or group of people of similar class or group without any reasonable or justifiable reasons. This burden was not discharged unlike in the case of **Justice Aggrey Muchelule & 5 others v AG** (supra) where 6 of the nominees out of six were left out from a list of 41 in which 34 others were appointed. This was thus no differentiating factor in the instant Petition. I therefore find that the claim of discrimination or unequal treatment before the law, though pleaded was unsubstantiated by evidence.

56. The Petitioners pleaded that their human dignity under Article 28 of the Constitution was punctured by utterances by the Respondent portraying them as unethical and

unsuitable for the appointment as Judges. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected.

57. The supporting affidavit of **Hon. Justice Lilian Gathoni Kimani**, sworn on 21st June, 2023 stands out for illustrating with sufficient clarity, the indignity, humiliation and disgrace that the nominees were subjected to following the unsubstantiated utterances against them by the President. This is articulated in paragraphs 13, 14, 15 and 16 of the affidavit as follows:

*'13. That a suit filed by a public-spirited Kenyan in the case of **Adrian Kamotho Njenga v Attorney General, Judicial Service Commission & 2 Others** which was widely published in the media, was what gave a hint as to what the reasons purportedly given for failure to appoint Judges. Judgment in the said case was delivered on 6th February 2020 indicates that the President of the Republic of Kenya was said to have received adverse reports in respect of some of the persons recommended for appointment as Judges after names were published in the media. It was stated that **"It would be irresponsible and contrary to his oath of office to appoint Judges or any other public or state officer to office, where serious questions have been raised about their integrity."***

'14. That the statements were widely circulated in broadcast, print and social media yet no specific

integrity issues or transgressions were attributed to any specific nominee Judge and in the end the general accusations and allegations were attributed to all of us.'

*'15. That the public, clients, colleagues, friends and family who were at first supportive of the appointment questioned our integrity and fitness for office, initially not so loudly but with time openly. Indeed, as an example, some friends took to calling us in jest, but which was a reflection of the general belief, as **"Ali Baba and the forty thieves."***

'16. That eventually due to financial constraints caused by prolonged delay, I resumed private practice but there was little motivation, stigma had already set in and trust was low.'

58. The Respondent did not respond to this assertion of fact that they made these sweeping allegations against the Petitioners.

59. The President's unproven factual assertions taken alongside his prolonged refusal to appoint them as Judges gravely damaged their self-worth and professional standing as they were portrayed as unethical and thus unworthy of becoming Judges. The unwarranted stigmatization by the Respondent exposed them to public ridicule, with phrases being coined such as the one described by Justice Lilian Gathoni referring to the whole cohort of 41 nominees as **'Ali Baba and the forty thieves.'** This punctured their human dignity and lowered their professional integrity and cost them public

trust yet the Respondent never bothered to provide tangible proof of those wild allegations then or, even before this court during the hearing of this Petition. The finding of this Court is that violation of Article 28 has been proved on a balance of probabilities.

60. The other right the Petitioners alleged was violated is the right to fair administrative action under Article 47 of the Constitution. Article 47 (1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 47 (2) states that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.
61. The uncontroverted fact is that the Respondents were kept in a state of limbo for 21 months without any written reason whatsoever as to why the Respondent had neglected to act on the recommendation of the JSC to appoint them as Judges. Evidence was given in the Petitioners affidavits in support of the Petition that this caused them endless anxiety and uncertainty of not knowing what next. For instance, those who had been practicing advocates did not know whether as Judges designate, they were to continue representing clients or not. The same affected those who had come from other sectors including academia who did not

know whether to continue taking students for supervision, others did not know if they could take up promotion opportunities in their then places of work. All these anxieties could have been assuaged had the Respondent provided written reasons for the inaction as supplying reasons could have given any person who was aggrieved the opportunity to have the decision tested for conformity with the constitutional standards of reasonableness and proportionality by way of judicial review. As was held in **Law Society of Kenya Vs. Attorney General & Another; Mohamed Abdulahi Warsame & Another (Interested Parties) 2019 eKLR:**

“This country has a unique constitution that requires justification of every governmental or public action, taken or not taken. On that note, therefore, actions of any state officer or public officer in our Republic, including that of the President, must meet the Constitutional test of justification as an incidence of rule of law and founding value in our constitution... consistent with the above view, are words by Lord Bingham to the effect that ‘rule of law’ requires that ‘Ministers and public officers at all levels exercise the powers conferred on them in good faith, fairly, for purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably”

62. A period of 21 months in which the Petitioners were subjected to perpetual state of uncertainty after successfully completing the Judges’ interviews was unreasonable, unjustifiable and disproportionate and contrary to respect of

human dignity and fairness. This Court is satisfied that, given the Respondent did not dispute the factual account given by the Petitioners, this violation of their right to fair administrative action under Article 47 has been established on a balance of probabilities.

Whether the Petitioners are entitled to the relief sought.

63. In the instant Petition, the Petitioners have sought various reliefs. Over and above the declaratory remedies, they also seek compensation in various forms namely: *An order for compensation by way of general damages against the Respondent for the violation of Petitioners' rights and constitutional protections specified in prayers (A), (B) and (C) above; An order of compensation by way of exemplary damages against the Respondent for abuse of state power resulting in the violation of Petitioners' rights and constitutional protections specified in prayers (A), (B) and (C) above; An order of compensation by way of special damages as specified in the individual affidavits of the Petitioners accompanying this petition.*

64. Article 23 (3) of the Constitution specifies the reliefs that this Honourable Court may grant in Constitutional Petitions. The Court however is given the liberty to consider an appropriate relief. The phrase ***“in any proceedings brought under Article 22, may grant appropriate relief, including”*** shows that the list is not exhaustive.
65. In **L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) [2022] KEHC 17132 (KLR)** the Court affirmed this approach by holding thus:

“244. As is the case in constitutional petitions, there are arrays of available remedies. what a court endeavours to do upon confirming of any infringement is to grant an appropriate remedy. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief...”

66. Further in the South African case of **Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17;** the Court explained:

“[45] The determination of appropriate relief...calls for the balancing of the various interests that might be

affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case...”

67. The Supreme Court in **Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others (SC) Petition No.13 (E015) of 2022** guided as follows:

“.... [92] This Court in the case of Gitobu Imanyara & 2 Others v. Attorney General, SC Petition No. 15 of 2017, described Article 23 as “the launching pad of any analysis on remedies for Constitutional violations”. This statement has repeatedly been made in other decisions like Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.”

68. The Superior Court proceeded to note as follows:

“[94] To answer directly the question posed by this issue, under common law principles, it is

settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

[95] In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

69. In a nutshell, the understanding of this Court from the reading of the above Supreme Court authority and other decisions cited is that, unlike in the law of torts where damages are awarded based on the principle of restoring the victim to the position he would have been prior to the injury or loss occurring, that is not the principal focus of the constitutional reliefs, including compensation when awarded. The main objective of the constitutional remedy is not punishing the violator perse, rather it is vindicatory in nature, in that it signifies public affirmation of the constitutional right and emphasizes that it is a threat to the social order and to forestall those kinds of breaches from gaining traction.
70. The approach taken by the Petitioners of seeking exemplary damages is not vindicatory, rather, it leans more towards the punitive path synonymous with assessment of damages in tortious claims. I have no problem with special damages if

they can be proved because they represent actual loss arising from a particular violation.

71. In deciding what would be the extent of compensation, this Court would focus on assessing what is appropriate and just in the circumstances of the case and no more. The Court of Appeal decision in **Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others [2021] KECA 328 (KLR)** aptly captures the vindicatory approach that characterizes assessment of compensatory awards in constitutional reliefs. It explained:

“15.The relevant principles applicable to award of damages for constitutional violations under the Constitution were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this

compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.”

72. The principles governing special damages are well established. They must be specifically pleaded and proved. In **Njagi & another v Ndunge & 2 others [2023] KEHC 17327 (KLR)** it was held that:

“Special Damages

52. In regard to special damages the law is quite clear on the same. Special Damages must be both pleaded and proved, before they can be

awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V Singh, Civil Appeal No 42 Of 1983 [1985] KLR 716, at P 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag JA - held:*

'Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.'

53. Each respondent specifically pleaded for Kshs 3550/= as special damages and strictly proved the same by adducing medical reports and Motor Vehicle Search Certificates receipts amounting to the said sum. They thus successfully proved the claim herein."

73. Similarly, in **Owino v Ramji [2024] KEHC 16956 (KLR)** the Court observed as follows:

"With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates.

18. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177* stated that:

"... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular

facts set out in the pleadings. They must be specifically pleaded.”

19. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the Trial Court failed to award special damages that were pleaded and proved.

20. In Joseph Kipkorir Rono v Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...”

74. I have carefully perused the various affidavits in support for the Petitioners. I do not find any proof of special/actual loss pleaded and specifically proved. The claim for special damages is unsubstantiated and must therefore fail.

75. In the overall analysis, this Court thus grants the following reliefs:

- i. A declaration is hereby issued that the State/Respondent, through the refusal, failure or neglect by the President of the**

Republic Kenya to appoint the Petitioners as Judges following their recommendation for appointment by the Judicial Service Commission between 13/08/2019 to 3/6/2021 violated Petitioners' right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by Article 47(1) of the Constitution as well as the right to written reasons for administrative action that is likely to adversely affect the rights or fundamental freedoms as guaranteed by Article 47(2) of the Constitution.

- ii. A declaration is hereby issued that the State/Respondent through the actions of the President of casting of unsubstantiated aspersions, that the Petitioners were unfit to hold public office thereby justifying the refusal or failure to appoint them as Judges violated the Petitioners' right to have their dignity respected and protected under Article 28 of the Constitution.**
- iii. To vindicate the Petitioners' constitutional right to inherent human dignity under Article 28 and the right to fair administrative action under Article 47 compensation is hereby awarded of Kenya shillings two Million Five Hundred Thousand Shillings (Kshs.2,500,000/-) to each Petitioner.**
- iv. Costs of the Petition.**

Dated, signed and delivered virtually at Nairobi this 19th day of February, 2026.

.....

L N MUGAMBI

JUDGE

ORIGINAL