



REPUBLIC OF KENYA



KENYA LAW
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**Mwau v Attorney General (Civil Appeal 276 of 2015)
[2023] KECA 518 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 518 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 276 OF 2015
K M'INOTI, KI LAIBUTA & GWN MACHARIA, JJA
MAY 12, 2023**

BETWEEN

HON JOHN HARON MWAU APPELLANT

AND

HON ATTORNEY GENERAL RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 15th January 2015 in Petition No. 541 of 2013)

The award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) is merit based and is not conferred as of right.

The appellant contended that all persons occupying the office of Judge, Member of Parliament, and Major Generals of the Armed Forces, between December 2008 and 2012, were automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Burning Spear. The Court of Appeal held that Awards and honours had to be in recognition of outstanding or distinguished services rendered to the Nation in various capacities and responsibilities. It would demean the value and prestige of an award/honor if it was given in common domain. The awards were merit based.

Reported by John Ribia

Constitutional Law – national awards and honours – powers of the President – prerogative to award persons with the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) - whether persons occupying the office of the President between December 2008 and 2012 were automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) – whether the said award/honour was awarded on merit or as of right by virtue of occupying specific offices in government - whether the President had absolute and unfettered discretion to award and honour persons with the said award/honour – whether the prerogative powers by the President to award persons with the said award/honour were derived from the Constitution or common law - article 32; section 3; Guide to Awards of Orders, Decorations and Medals, Revised Edition (October, 2004) clause 3



Constitutional Law – *fundamental rights and freedoms – freedom from discrimination – where one contended to be discriminated against for not being awarded with the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) despite serving as an assistant minister – whether the appellant was discriminated against by not being conferred of the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) despite serving as an assistant minister - article 27*

Words and Phrases – *prerogative – definition - an exclusive right, power, privilege or immunity, usually acquired by virtue of office - Black's Law Dictionary 11th Edition*

Brief facts

The suit revolved around a claim on the award of the *First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.)*. From sometime between December 2008 and 2012, the appellant served as an assistant minister. The appellant contended that by a notice in the Kenya Gazette of December 11, 2008 to 2012 the President published a list of persons upon whom award, decorations and medals had been conferred. According to the appellant, Ministers, Judges, Assistant Ministers and Members of Parliament that were not decorated with the said award/honour were discriminated against.

The appellant contended all persons occupying the office of Judge, Member of Parliament, and Major Generals of the Armed Forces, between December 2008 and 2012, were automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Burning Spear. The appellant's case at the High Court was dismissed leading to the instant appeal.

Issues

- i. Whether persons occupying the office of the President between December 2008 and 2012 were automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.)
- ii. Whether the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) was awarded on merit or as of right by virtue of occupying specific offices in government.
- iii. Whether the appellant was discriminated against by not being conferred of the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) despite serving as an Assistant Minister.
- iv. Whether the President had absolute and unfettered discretion to award and honour persons with the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.)
- v. Whether the President's prerogative powers to award persons with the First Class Honour of the Chief of the Order of the Golden Heart (C.G.H.) were derived from common law or the

Held

1. The role of the first appellate court was to re-evaluate and re-analyze the record and come up with its own conclusions. The hearing of the appeal was in the form of a retrial. However, the first appellate court had to bear in mind that it did not have the advantage of either hearing or seeing the witnesses.
2. The appellant raised 40 grounds of appeal number, most of which were repetitive. An appeal was neither strong nor weak based on the number of grounds one raised. A myriad of grounds of appeal only obfuscated and muddled the real issues for determination in the appeal. Rule 88 (1) of the required a memorandum of appeal to concisely set under distinct heads without argument or narrative the grounds of objection to the decision appealed against specifying the points alleged to have been wrongly decided and the nature of the order the which the court was proposed to make.
3. The grounds set forth in the Memorandum of Appeal were not only overwhelming in number but most of them constituted narrations, which made it difficult to demarcate the real issue requiring the attention of the court. If the court were to duplicate the grounds, they would constitute a judgment unto themselves. The rules demanded in no uncertain terms that the grounds of appeal had to be concise without narration or argument.



4. Although the respondent did not file submissions for the court's consideration, he contended that pursuant to rule 100 of the Court of Appeal Rules, entirely relied on the judgment of the High Court. Rule 100 which was not relevant to the submission. The same provides for rights of a respondent when an appeal was withdrawn. The instant appeal had not been withdrawn so as to avail the respondent the rights spelt out under the rule.
5. The respondent's counsel failed in his duty to lighten the court's burden by filing submissions which would have been a reference point in arriving at a determination. Counsel had a singular duty of assisting the court in its obligation of making a fair and informed decision. It mattered not that a case did not favour a party's position, for which a party opted not to file submissions. The import of submissions could not be overemphasized as the appeal, just as in many appeals, was to be canvassed by way of written submissions.
6. Article 132 (4)(c) of provided that the President could confer honours in the name of the people and the Republic. Article 132 generally provided for the function of the President. The operative word was 'may' which in that context, connoted a choice to act or not. It meant that the act in issue was optional. The National Committee on Honours and Awards made recommendations to the President for persons to be honoured. The honours did not accrue to an individual by virtue of holding an office, so much so that once the individual assumed that particular office, the President did not have the discretion but to confer the award or honour; and that he automatically must honour the award that allegedly accords with that office.
7. Between the year 2008 and 2013 the law that was in place and that guided the award of honours was the Guide to Awards of Orders, Decorations and Medals, Revised Edition (October, 2004). Clause 3 thereof provided that all titles or honours were awarded on merit. The award of honours at the time was given to people of proved integrity, with the award being seen as very special and a coveted distinction.
8. Awards and honours had to be in recognition of outstanding or distinguished services rendered to the Nation in various capacities and responsibilities. It would demean the value and prestige of an award/honor if it was given in common domain.
9. Not all persons who held the offices that the appellant outlined were necessarily of proved integrity or had rendered distinguished or exemplary service to the nation in their capacities so as to qualify them for automatic awards. That was why the awards accrued with coveted distinction of a career path.
10. If the suggestion made by the appellant were to apply, conferment of the awards and honours would indeed be problematic since each of the specified office holders would be entitled to awards and honours by virtue of the office. It would hardly demarcate the essence of distinguishing persons who had rendered exemplary service to the nation.
11. The court's legal jurisdiction stemmed from, and applied, common law, and hence it would be expected that the dictates in on the instant subject obtained from the common law. In England, prerogative powers remained the preserve of the Monarch since the middle ages, but were now exercised largely by Government ministers without the consent of the commons. However, the head of the Monarchy still exercised some prerogative powers known as reserve powers or the personal prerogatives. Some powers were exercised by the Monarch solely while others were exercised on the advice of ministers, advice which by convention, the Monarch was reasonably expected to follow.
12. Although Kenyan laws and statutes stemmed from common law, Kenya had since independence developed and enacted its own laws, tailor made for the Kenyan people. Section 3(1) of the at had explicitly provided the hierarchy and the manner of application of Kenyan laws. Common law could not take precedence over considering that article 2 provided for the supremacy of the Constitution.
13. remained the supreme law of Kenya which bound all people and State organs. It also governed and regulated all other laws of the land. Though common law was applicable within Kenya's jurisdiction, it did not and could not take precedence over the Constitution and other written laws.



14. Article 132(4)(c) of had made it clear that conferment of national awards was the prerogative of the President, which he exercised in accordance with and at his discretion. Hence, the President reserved the powers to determine who was entitled to be conferred with an award. Although the powers of the President under the could loosely be described as prerogative powers, they were constitutional powers which ought not to be confused with the prerogative powers of the Monarch under common law.

Appeal dismissed.

Orders

Each party was to bear its own costs.

Citations

Cases

1. Beluf Establishment v The Attorney-General (Civil Appeal 134 of 1986; [1993] KECA 32 (KLR)) — Explained
2. Selle & Another v Associated Motor Board Co Ltd ((1968) EA 123) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 132, 132(4)(c); 134(4); 162; 162(2) — Interpreted
2. Court of Appeal Rules, 2022 (cap 9 sub leg) — Rule 88 (1) — Interpreted
3. Judicature Act (cap 8) — Section 3(1) — Interpreted
4. National Honours Act, 2013 (Act No 11 of 2013) — Cited

Texts

1. Garner BA (2014), Black’s Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)

Advocates

Mr. Mwangi, K.M for Appellant

Mr. Thande for Respondent.

JUDGMENT

1. This is a first appeal in which our responsibility is well settled in law; namely, to re-evaluate and re-analyze the record and come up with our own conclusions. The hearing of the appeal is in the form of a retrial. However, the court must bear in mind that it did not have the advantage of either hearing or seeing the witnesses and must give due regard to this. In *Selle & another v Associated Motor Board Co Ltd* (1968) EA 123, this court held that:

“...this court is not bound necessarily to accept the findings of fact by the court... (as a first appeal) is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

2. The background to this appeal is that the appellant, then serving as an assistant minister in the Government of Kenya challenged what he alleged was discriminatory conferment of awards, orders, decoration and medals, by the former President of the Republic of Kenya, HE Mwai Kibaki, during Jamhuri Day celebrations of December 12, 2012. The appellant contended that by a notice in the Kenya Gazette of December 11, 2008 to 2012 the President published a list of persons upon whom award, decorations and medals had been conferred. According to the appellant, Ministers, Judges Assistant Ministers and Members of Parliament were discriminated against. He argued that the discrimination was a culmination of historical injustices and with an ancillary purpose of ameliorating



the effects of a long tradition of state's violation of human rights and fundamental freedoms, which, if continue unchecked, would permeate into the social fabric and end up becoming a cancer in the society, thus promoting ethnicity and societal conflicts.

3. To ventilate his complaint, the appellant filed a petition in the High Court dated November 30, 2013 seeking 17 different declarations/orders namely;-
 - a. A declaration as to what amounts to unfair administrative action.
 - b. A declaration as to what amounts to a discriminatory practice by a State officer, public officer or a public body.
 - c. A declaration that a person occupying the office of the President between December 2008 and 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Golden Heart (CGH)
 - d. A declaration that a person occupying the office of the Vice President, Speaker of the National Assembly, Cabinet Minister, Head of Public Service and Secretary to the Cabinet, Chief Justice between December 2008 to 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the Second Class Honour of the Elder of the Order of the Golden Heart (EGH).
 - e. A declaration that a person occupying the office of the Deputy Speaker of the National Assembly, Assistant Minister, Lieutenant General and/or Service Commander and Commissioner of Police between December 2008 and 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the Third Class Honour of the Moran of the Order of the Golden Heart (MGH).
 - f. A declaration that a person occupying the office of a judge, Member of Parliament, and Major Generals of the Armed Forces, between December 2008 and 2012, was automatically, by virtue of the office held, entitled as of right to the award and honour of the First Class Honour of the Chief of the Order of the Burning Spear (CBS)
 - g. A declaration that the decision and/or action of conferring National awards and honours, that is to say, the First Class Honour of the Chief of the Order of the Burning Spear (CBS) to only three judges while excluding all other persons holding the office of a judge between December 2008 and 2012, was discriminatory to the other judges.
 - h. A declaration that the decision and/or action of conferring National Awards and honours to only a few Cabinet Ministers, a few Assistant Ministers and a few Members of Parliament, excluding all other Assistant Ministers and/or Members of Parliament holding office between December 2008 and 2012, was discriminatory to the Assistant Ministers and Members of Parliament.
 - i. By virtue of article 162 of the *Constitution*, a Declaration that Judges of the High Court, of the Land and Environment Court and of the Industrial Court are of concurrent jurisdiction.



- j. A declaration whether, by virtue of article 162(2) of the *Constitution*, the Land and Environment Court and the Industrial Court, are High Courts in their own right.
 - k. A declaration whether persons of the same cadre entitled to certain rights and privileges can be accorded differential treatment arbitrarily.
 - l. A declaration whether persons of similar qualifications, status and/or holding equal office can be discriminated against arbitrarily.
 - m. An order that all other judges including Industrial Court and the Environmental and Land Court Judges who held office between December, 2008 and 2012 were entitled to and be conferred with the National Honour and award of the First Class Honour of the Chief of the Order of the Burning Spear (CBS) as of right forthwith.
 - n. An order that all persons who held the position of Assistant Ministers between December, 2008 and 2012, were entitled to and be conferred with the National Honour and award of the Third Class Honour of the Moran of the Order of the Golden Heart (MGH) as of right forthwith.
 - o. An order that all persons who were Members of Parliament between 2008 and 2012 are entitled to and be conferred with the National Honour and award of the First Class Honour of the Chief of the Order of the Burning Spear (CBS) as of right forthwith.
 - p. An order that all persons who were holding the office of a Chief/Principal Magistrate between December 2008 and 2012, be conferred with the National Honour and award of the Second Class Honour of the Elder of the order of the Burning Spear (EBS) as of right, forthwith.
 - q. An order that all persons who were holding the office of a Magistrate between December 2008 and 2012, be conferred with the National Honour and award of the Third Class Honour of the Moran of the order of the Burning Spear (MBS) as of right, forthwith.
 - r. An order for any other or further relief that this honourable court may deem just and appropriate in the circumstances; and
 - s. An order that the respondent bears the costs of this Petition.”
4. It was the appellant’s contention that some individual Judges, Magistrates, Assistant Ministers and Members of Parliament, including himself, who were eligible and whose rights to be conferred with medals, honours and awards had accrued, have been denied that right; and that the act of denying those individuals the said accrued rights and conversely to award the same to others in similar situations, amounted to unequal treatment, was unfair, discriminative and was done in bad faith and in violation of the *Constitution*.
5. The appellant, further contended that the Guidelines and Policy in the Guidebook 2004 for awarding honours, orders, medals and awards categorized and differentiated the eligibility for individuals to receive the said honours, orders, medals, and awards in three distinct categories, namely; those ascending to the stated office in the Guidebook; those who have performed actions or achievements in scientific fields, loyalty or heroism, sacrifice, bravery, patriotism or leadership; and foreign Heads of



States and other foreigners. He thus claimed that if those categories were strictly followed, there would be no discrimination at all. It was also his contention that certain office bearers such as the President, Deputy/Vice President, Chief Justice, Speaker of the National Assembly, Head of Public Service and Secretary to the Cabinet, Chief of General Staff, Cabinet Secretaries, the Attorney General, Deputy Speaker of the National Assembly, Assistant Ministers, Lieutenant Generals, Clerk to the National Assembly, Inspector General of the National Police Service, Members of Parliament, Judges of the High Court and Senior Deputy Commissioners of Police are eligible for the awards, honours and medals as of right.

6. The appellant averred that between 2008 and 2013, only five Judges had been awarded the First Class honour and award of the Order of the Burning Spear (CBS) and that all other Judges had been left out. He also stated that between 2008 and 2013, only one ordinary Member of Parliament, Hon Adan Keynan, was awarded the honour of the First Class Order of the Elder of the Burning Spear (EBS) while all others were left out; It was his view that the differentiation amongst Judges, Members of Parliament and Assistant Ministers was unfounded as it had no legitimate purpose other than spite and to create unequal treatment and as such, it was discriminatory, unconstitutional and amounted to an unfair administrative action. He added that there were no reasons advanced for failure to gazette all Judges with the National honours and therefore, the discrimination meted against them was unfair, unreasonable and unlawful as it was not intended to achieve any objective other than inculcating in them the feeling that some judges, are more important than others.
7. The petition was supported by the appellant's affidavit sworn on November 8, 2013. The same was a regurgitation of the contents of the petition and we do not wish to rehash it.
8. The respondent opposed the petition and filed grounds of opposition dated December 10, 2013 namely: that National honours were a prerogative of the President under the 2004 Guidelines and accordingly, this court would be overstepping its mandate if it granted the declarations sought by the petitioner; that the national honours were the sole discretion of the President under the *National Honours Act, 2013* and article 134(4) of the *Constitution*; that both the 2004 Guidelines and the *National Honours Act, 2013* established stringent and elaborate structure for the nomination of persons to be honoured and awarded, which Guidelines could not be bypassed or substituted for a judgment of the court; and that one element that runs through the Guidelines and the Act is merit and individual qualities, actions or achievements of heroism, sacrifice, bravery, patriotism or leadership for the defence, benefit or betterment of the country or a county; that the two documents do not make provision for the mass beneficiaries for the awards and honours; that the act of identifying persons from various sectors for purposes of being awarded with various national honours involves differentiating individuals based on their services, and that this does not amount to discrimination; and that the petitioner did not raise any constitutional question for the court's determination and, to that extent, the petition was an abuse of the court process.
9. The petition was heard by way of written submissions. In its judgment, the trial court (Lenaola, J, as he then was), rightly demarcated the issues for determination, to be whether the petitioner and some (unnamed) Judges, Magistrates, Assistant Ministers and Members of Parliament, among others, who were allegedly eligible to be conferred with medals, national honours and awards between 2008 and 2012 had been denied that right and whether the alleged act of denying those individuals the awards and honours amounted to unequal treatment and discrimination under the *Constitution*.
10. The court proceeded to find that there was and there is, no guarantee or automatic conferment of honours or awards to an individual, and that there is no such thing as class conferment of honours to individuals in a particular class, profession, office or department; and that conferment of honours in Kenya is not automatic or compulsory, but is at the discretion of the President, much as it is the



preserve of the Monarch in the United Kingdom, and is given to an individual as a way of recognizing that individual's performance and service to the Nation. The court arrived at the conclusion that there would be no purpose of awarding national honours if they are given without regard to merit and a set of criteria and consequently, dismissed the petition with each party ordered to bear its own costs.

11. Aggrieved, the appellant filed the instant appeal. *Vide* a memorandum of appeal dated November 16, 2015, he raised 40 grounds of appeal, which we have collapsed into 5. They are that the learned trial Judge: misconstrued the discretion of the President under the Constitution by holding that the President had absolute and unfettered discretion under article 132 of the Constitution; misconstrued and misapplied the concepts of discrimination and other concepts of differentiation when he failed to note that the petition in the High Court concerned accrued rights; failed to appreciate that certain national honours and medals are conferred as a matter of right upon ascension to specified public offices, and that merit and honor is inherent and or sacrosanct in the specified public offices and thereby obviating the need of any particular consideration thereby losing sight of the policy guidelines on award of national honours and the constitutionally entrenched purpose of awarding and conferring national awards in the name of the people of Kenya; failed to appreciate that the petition sought to address inter-class and intra- class discrimination, which is subtle and discreetly inflicted directly and indirectly, consciously and unconsciously in the course of discharge of administrative duties; and erred and violated the petitioner's right to a fair trial when he neglected to make a crucial determination in the petitioner's case and set up a dangerous precedent by institutionalizing discrimination and unfair administrative action when it erroneously conferred monarchical powers over the presidency, as the conferring authority of national honours.
12. The appeal came up for virtual hearing before us on the January 24, 2023. Learned counsel, Mr Mwangi, KM appeared for the appellant while learned counsel, Mr Thande, appeared Kuria for the respondent.
13. Mr Mwangi relied on written submissions, bundle and list of authorities and a case digest filed on March 19, 2019 which he briefly highlighted. In summary, he submitted that conferment of national honours and awards is divided into 3 different categories; that firstly, upon assumption or ascendancy to a public office, the person assuming that office acquires the dignity and honour of that office, and that the policy guidelines prescribes what honour or medal that person is entitled to be conferred with; that secondly, upon recommendation by a committee of National Honours and Awards and finally, at the discretion of the President. He submitted that conferment of national honours and awards is an executive function under article 132 of the Constitution and that, when the President is conferring national honours and awards, he is doing so in the name of the people and therefore he is not totally exercising a discretion that is dependent upon him but executing a constitutional function of his office, which is the conferment of the national honours and awards.
14. Learned counsel submitted that the National Honours Act No 11 of 2013 provides for the creation of the various committees for the purpose of setting the criteria for conferment of the national honours and awards and that the Act of Parliament is a procedural legislation through which the Minister was required to gazette regulations for its implementation. However, no such regulations have so far been issued and consequently, the Guidelines of 2002 still obtain and are the ones still in force, on the criterion for conferment of the national honours and awards.
15. It was further submitted that the persons who were entitled to national honours and awards based on the offices they assume but were never conferred before 2008 and 2012, were entitled to be conferred with those honours and awards by virtue of holding those offices and, therefore, the High Court was in error when it decreed that there is no obligation bestowed on the President to confer national honours and awards on any particular individual at any particular time, because the President exercises



a constitutional function and Kenya being a constitutional democracy, the President exercises his function in accordance with the Constitution. We were accordingly urged to allow the appeal with costs.

16. In quick rebuttal, Mr Kuria, stated that he had not filed any submissions but that under rule 100 of this court's rules, he would rely on the judgment of the High Court.
17. We have considered the record of appeal in light of our mandate, the rival submissions and principles of law relied upon by both parties. We find that only two issues fall for determination, namely: the import of the presidential prerogative under article 132 of the Constitution; and whether the appellant's and the identified officers' constitutional right was violated, or whether they were discriminated against by failure to confer them with national honours or awards.
18. Before we delve into the merit of the appeal, we find it necessary to address two observations. The first is the whooping number of grounds of appeal raised by the appellant, 40 in number, and most of which we find repetitive. The appellant needs to be cognizant of the fact that an appeal is neither strong nor weak based on the number of grounds he raises; and that a myriad of grounds of appeal only help to obfuscate and muddy the real issues for determination in the appeal. We can do no better than remind counsel who drafted them of the provisions of rule 88(1) of the Court of Appeal Rules, 2022 which requires that:
 - “(1) A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying –
 - a. the points which are alleged to have been wrongly decided; and
 - b. the nature of the order which it is proposed to ask the court to make”.
19. A glance at the grounds set forth in the Memorandum of Appeal are not only overwhelming in number but most of them constitute narrations, which makes it difficult to demarcate the real issue requiring the attention of the court. Indeed, if we were to duplicate the grounds, they would constitute a judgment unto themselves. We wish to remind the parties that the rules demand in no uncertain terms that the grounds of appeal must be concise without narration or argument.
20. The second observation relates to the submission by counsel for the respondent that, although he did not file submissions for our consideration, he would, pursuant to rule 100 of this court's rules, entirely rely on the judgment of the High Court. We have appraised ourselves of the said rule 100 which, to us, is not relevant to the submission made by counsel. The same provides for rights of a respondent when an appeal is withdrawn. For avoidance of doubt, it reads as follows:
 - “(i) If an appeal is withdrawn under rule 98 after notice of cross-appeal has been given, the respondent who gave the notice may withdraw it within fourteen days after the service on him or her of the notice of withdrawal, but if it is not so withdrawn, the cross- appeal shall proceed to hearing and these rules shall apply as if the cross-appellant were an appellant and the appellant a respondent.
 - (ii) If an appeal is withdrawn under rule 98 within fourteen days after the date when the appeal was instituted, a respondent who has lodged a notice of cross-appeal shall be entitled to give notice of appeal notwithstanding that the time specified under rule 77 has expired, if that respondent does so within fourteen



days after the date when the appellant’s notice of withdrawal was served on the respondent”.

21. In the present case, the appeal has not been withdrawn so as to avail the respondent the rights spelt out under the rule. To our minds, the respondent’s counsel failed in his duty to lighten the court’s burden by filing submissions which would have been a reference point in arriving at a determination. For his failure, he attached an excused to a rule that is of no help. It is paramount, therefore, to emphasize that counsel have a singular duty of assisting the court in its obligation of making a fair and informed decision. It matters not that a case does not favour a party’s position, for which a party opts not to file submissions. The import of submissions cannot be overemphasized as the appeal, just as in many appeals, was to be canvassed by way of written submissions.
22. On the first issue falling to be determined, we would wish to recall the provisions of article 132(4)(c) of the *Constitution*, which reads as follows:
 - (4) The President may—
 - c. confer honours in the name of the people and the Republic.” (Emphasis ours)
23. We hasten to add that, article 132 generally provides for the function of the President. Under the relevant part, the operative word is ‘may’ which to our minds in this context, connotes a choice to act or not. It means that the act in issue is optional. Counsel for the petitioner did confirm to the court that the national committee on honours and awards makes recommendations to the President for persons to be honoured. His contention was that the honours accrue to an individual by virtue of holding an office, so much so that once the individual assumes that particular office, the President does not have the discretion but to confer the award or honour; and that he automatically must honour the award that allegedly accords with that office. We do not agree with the appellant’s contention for the reasons below.
24. In view of the foregoing, it behooves us to re-examine the second issue, which is whether the basis upon which the President awarded the honours was in accordance with the law, and whether it was discriminatory against the appellant and the other cited officers. Counsel for the appellant was at pains to produce before us any specific provision in law that expressly entitled an individual to an award or honour by virtue of merely holding or assuming office. He did not succeed, and the fact is that, between the year 2008 and 2013 the law that was in place and that guided the award of honours was the *Guide to Awards of Orders, Decorations and Medals, Revised Edition* (October, 2004). Under Clause 3 on Criteria for Nominations, it provided that:

“All titles or honours are awarded on merit. Persons who are honoured by the President must therefore be men and women of proven integrity whose role in and contribution to the country and society in general have been adjudged exemplary, profound, pre-eminent and inspiring or people who have excelled in service to the society and to the country in social, political, economic or scientific spheres through displays of exceptional brilliance, courage, commitment and valour in their abilities, such that the award is seen to be a very special, coveted distinction.” (Emphasis added)
25. From the above excerpt, it is clear in no uncertain terms that, the award of honours at the time was given to people of proved integrity, with the award being seen as very special and a coveted distinction. In our view, therefore, awards and honours had and have to be in recognition of outstanding or distinguished services rendered to the Nation in various capacities and responsibilities. It would demean the value and prestige of an award/honor if it was given in common domain. We also hold the view that not all persons who hold the offices that the appellant outlines are necessarily of proved integrity or have



rendered distinguished or exemplary service to the nation in their capacities so as to qualify them for automatic awards. That is why the awards accrue with coveted distinction of a career path.

26. In our considered view, if the suggestion made by the appellant were to apply, conferment of the awards and honours would indeed be problematic since each of the specified office holders would be entitled to awards and honours by virtue of the office. It would hardly demarcate the essence of distinguishing persons who have rendered exemplary service to the nation. We are accordingly unable to agree with the appellant as neither the Constitution nor the Guidelines entitled a person to an award by virtue of the office held. To this extent, the appellant's contention that he was entitled to be conferred with an award by virtue of holding office as Member of Parliament, and on account of nothing else, does not hold.
27. Finally, we think it is paramount to address one more issue that is relevant to the matter at hand. This is, whether a prerogative power continues to operate as it did for the Monarch under the common law by virtue of the fact that it is conferred on the President by the Constitution. The issue arose from the impugned judgment where the learned Judge held that conferment of national awards is at the discretion of the President, much as it is the preserve of the Monarch in the United Kingdom, and is given to an individual as a way of recognizing that individual's performance and service to the Nation.
28. We need not emphasize that our legal jurisdiction stems from, and applies, common law, and hence it would be expected that the dictates in the Constitution on this subject obtain from the common law. The Black's Law Dictionary 11th Edition defines 'prerogative' as "an exclusive right, power, privilege or immunity, usually acquired by virtue of office." In England, prerogative powers remained the preserve of the Monarch since the Middle Ages, but are now exercised largely by Government ministers without the consent of the commons. However, the head of the Monarchy still exercises some prerogative powers known as reserve powers or the personal prerogatives. This is to say, that some powers are exercised by the Monarch solely while others are exercised on the advice of ministers, advice which by convention, the Monarch is reasonably expected to follow.
29. Although our laws and statutes stem from common law, we have since independence developed and enacted our own laws, tailor made for the Kenyan people. In that vein, the Judicature Act at section 3(1) has explicitly provided the hierarchy and the manner of application of our laws. It provides that:

Mode of exercise of jurisdiction.

1. The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—
 - a. the Constitution;
 - b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
 - c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the August 12, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its



inhabitants permit and subject to such qualifications as those circumstances may render necessary.

30. In *Beluf Establishment v Attorney-General* [1993] eKLR Gachuhi, JA. stated: -

“The law of this country was imported from England. Section 3 of the *Judicature Act* (cap 8) sets out the application of the Common Law and Statutes in force in England on August 12, 1897 as the law applicable here.

Certain statutes have been reproduced verbatim as Acts of Parliament of this country even those enacted after that date. Decisions of the English courts, past and present, have continued to be applied here as authorities. So whatever decision is being made in England will eventually become applicable here. This will continue for sometime in the future.” (Emphasis added)

32. That view is certainly debatable. Even by the terms of section 3(1) of the *Judicature Act*, the Common Law cannot take precedence over the *Constitution*. After the judgment, our Constitution was promulgated in 2010 by the Kenyan people and article 2 provides that:

2. Supremacy of this Constitution

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2)

What this provision implies is that the *Constitution* remains the supreme law of our land which binds all people and State organs. It also governs and regulates all other laws of the land. Therefore, though common law is applicable within our jurisdiction, it does not and cannot take precedence over our Constitution and other written laws. In the case at hand, article 132(4)(c) has made it clear that conferment of national awards is the prerogative of the President, which he exercises in accordance with the *Constitution* and at his discretion. Hence, he reserves the powers to determine who is entitled to be conferred with an award. Although the powers of the President under the Act may loosely be described as “prerogative powers”, they are constitutional powers which ought not to be confused with the prerogative powers of the Monarch under Common law.

31. In the end, having carefully considered the record of appeal, the written and oral submissions of the parties and statute law, we find nothing to suggest that the learned Judge dismissed the appellant’s petition based on wrong interpretation of the law and facts. Accordingly, we find that his decision was proper and sound in the circumstances. The upshot is that this appeal lacks merit and is hereby dismissed. Owing to the nature of the matter, we order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

K. M’INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL



G.W NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

