National Assembly of Kenya v Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KECA 548 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 166 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JUNE 10, 2022

BETWEEN

NATIONAL ASSEMBLY OF KENYA ..... APPELLANT

AND

TUKERO OLE KINA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(This was appeal against the judgment of the High Court of Kenya at Malindi (R. Nyakundi J.) dated 23rd September, 2019 inMalindi Constitutional Petition No. 6 of 2018)

High Court declares section 66(1) of the Marriage Act of 2014 unconstitutional for its disproportionate effect in cases where a divorce in a civil law marriage could be necessary and justified before the three-year limitation.

The appeal revolved around the constitutionality of section 66 (1) of the Act which provided that a party to a civil marriage could not petition the court for the separation of the parties or for the dissolution of the marriage unless three years had elapsed since the celebration of the marriage. The instant court overruled the decision by the High Court declaring section 66(1) as discriminatory but declared the section unconstitutional for its disproportionate effect in cases where a divorce in a civil law marriage could be necessary and justified before the three-year limitation.

Reported by John Ribia

Statutes *– interpretation of statutes – interpretation of section 66(1) of the Marriage Act – where section 66(1) limited parties to a civil marriage to a three year waiting period before any of them could petition for separation or dissolution of the marriage - whether the differential treatment of parties to a civil marriage under section 66(1) was discriminatory – Constitution of Kenya, 2010, articles 27, 28 and 48; Marriage Act, 2014, section 66(1).*

Constitutional Law *– doctrine of separation of powers – rationale – powers of the Judiciary vis-à-vis powers of the Legislature - where a legislative provision was alleged to have infringed on constitutional rights – where a petitioner challenged the provision without first petitioning Parliament to amend or repeal the law - what was*

the role of the High Court in interpreting a legislative provision alleged to have infringed on constitutional rights and whether it amounted to usurpation of Parliament's legislative mandate - whether a court that determined the constitutionality of a provision of law where the petitioner had not exercised the remedy of petitioning Parliament to amend or repeal the impugned section of law was a violation of the doctrine of separation of powers – Constitution of Kenya, 2010, articles 119 and 165(3)(b) and (d)(i).

***Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - petition challenging the breach of fundamental rights and freedoms – doctrine of ripeness – doctrine of exhaustion of remedies - petition challenging the constitutionality of a provision of law – where the petitioner had not petitioned Parliament to amend or repeal the impugned provision of law - whether a party that challenged the constitutionality of a provision of law in the High Court without petitioning Parliament to amend or repeal the impugned section of law was a violation of the doctrine of ripeness and exhaustion of remedies – Constitution of Kenya, 2010, articles 22, 23, 119 and 165(3)(b) and (d)(i).*

***Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to equality and freedom from discrimination – doctrine of ripeness – whether a petition that claimed violation against the freedom from discrimination was ripe for determination where the petitioner did not show how he or any other person was discriminated against but highlighted the discriminatory nature of a law and how it may lead to discrimination - Constitution of Kenya, 2010, articles 22, 23, 27, 119 and 165(3)(b) and (d)(i).*

***Constitutional Law** – fundamental rights and freedoms –right to equality and freedom from discrimination – determination of discrimination - guiding principles - what were the factors to be considered in determining whether discrimination was unfair - Constitution of Kenya, 2010, article 27.*

Brief facts

At the High Court, the petitioner (1st respondent in the instant appeal) successfully obtained a declaration that section 66(1) of the Marriage Act, 2014 (the Act) was unconstitutional, null and void for running afoul of among other attendant rights and freedoms such as article 27 of the Constitution of Kenya, 2010 (the Constitution) on the right to equality and freedom from discrimination. Section 66 (1) of the Act provided that a party to a civil marriage could not petition the court for the separation of the parties or for the dissolution of the marriage unless three years had elapsed since the celebration of the marriage.

Aggrieved the appellant filed the instant appeal on grounds that the High Court lacked jurisdiction to determine the petition as the 1st respondent had not exhausted all remedies, in particular the remedy of petitioning Parliament to amend or repeal the law. The appellant also contended that various regimes of marriages under the Act had measures in place to limit the remedy of separation or dissolution of marriage. As such, the provisions of section 66(1) of the Act were not discriminatory.

Issues

i. Whether a party that challenged the constitutionality of a provision of law in the High Court without petitioning Parliament to amend or repeal the impugned section of law was a violation of the doctrine of ripeness and exhaustion of remedies and a violation of the doctrine of separation of powers.
ii. Whether a petition that claimed violation of the freedom against discrimination was ripe for determination where the petitioner did not show how he or any other person was discriminated against but highlighted the discriminatory nature of a law and how it could lead to discrimination.
iii. Whether the differential treatment of parties to a civil marriage under section 66(1) of the Marriage Act, which limited parties to a civil marriage to a three year waiting period before any of them could petition for separation or dissolution of marriage, was discriminatory.
iv. What were the guiding principles in determining whether there was discrimination?
v. Whether the differential treatment of parties to a civil marriage under section 66(1) of the Marriage Act, which limited parties to a civil marriage to a three year waiting period before any of them could petition for separation or dissolution of marriage met the standards set to limit a fundamental right or freedom under arti cle 24 of the Constitution.

vi. Whether there were any circumstances in which the presumption of constitutionality of statutes could be rebutted?

vii. What was the role of the High Court in interpreting a legislative provision alleged to have infringed on constitutional rights and whether it amounted to usurpation of Parliament's legislative mandate?

Relevant provisions of the Law

Marriage Act, No. 4 of 2014

Section 66 - Right to petition for separation or divorce

(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage

Held

1. There was a broad approach to standing in the enforcement of the Bill of Rights under article 22 of the Constitution. A petitioner needed to demonstrate either an actual infringement of a right, or the threat of infringement of a right. A petitioner could bring an action in his or her own interest, on behalf of another person who was not able to act in their own name, on behalf of other persons in the same situation, or in the public interest.
2. Section 66(1) of the Marriage Act was operational and the 1st respondent had lay a basis not only of actual but also threatened violation, and the question of the constitutionality of the section was neither premature nor abstract, and presented an existing legal problem that was affecting or likely to affect a substantial section of members of the public. The petition was justiciable and the 1st respondent had *locus* to present the issue in the public interest, and the High Court did not err in finding as much.
3. The application of the principle of constitutional avoidance only applied when courts did not need to make a decision on a constitutional issue, by either anticipating a question of constitutional law in advance or formulating a rule of constitutional law broader than was required by the precise facts to which it was to be applied. That was not the position in the instant appeal, as there was an existing and precise constitutional question that had been raised.
4. Where an alternative remedy would entail delay or uncertainty in providing a remedy, then such an alternative remedy was not available or effective and the doctrine of exhaustion did not apply. When the constitutionality of a statute was legitimately challenged, the only available remedy was to urge the court to nullify the offending provisions. It would not be just or reasonable to expect members of the public to be exposed to a likely or potentially unconstitutional law, as they resort to the alternative remedy proposed by the National Assembly of petitioning and waiting for Parliament to amend the law.
5. In deference to the doctrine of separation of powers, courts should not unduly interfere with Parliament's lawful exercise of its constitutional functions. However, any legislation, actions and decisions made by Parliament outside the confines of the Constitution and the law would attract the courts' jurisdiction as provided for under the Constitution. The doctrine of Parliamentary supremacy as applied in other jurisdictions had been watered down in Kenya by the supremacy of the Constitution as provided for in article 1 of the Constitution.
6. It was within the jurisdiction of the High Court under article 165(3)(b) and (d) of the Constitution to determine any questions raised as regards the infringement of the Bill of Rights, the interpretation and constitutionality of laws, and the constitutionality of decisions and actions of Parliament. The presumption of constitutionality was a legal principle that was used by courts during statutory interpretation, and not a principle that excluded the jurisdiction of courts. When interpreting statutes, courts started with the premise that statutes enacted by the Legislature were constitutional, unless and until it was established they violated specific provision of the Constitution.

7. The presumption of constitutionality was not absolute, and would not be upheld when there was a violation of the Constitution by Parliament when enacting a statute, or by the provisions of a statute. The High Court did not err in assuming jurisdiction.
8. The Constitution ought to be contextual and read as an integrated whole, while taking into account the purposes of the provisions. The instant petition arose from a possible tension and conflict between different constitutional values and guarantees arising from the diverse provisions of the Marriage Act on divorce proceedings. Tensions would exist and arise where there was an intersection between the different co-existing regulatory regimes of the family by the State (being the civil law regime) and by religious and personal laws evidenced in the Marriage Act.
9. The State had both positive and negative obligations in the observance and promotion of rights to family life. The interpretation of whether a provision of the law was discriminatory in that respect was dependent on the context of the provision and its purpose, and that the court should engage in a balancing exercise where there were competing rights in issue. Discrimination could be direct or indirect. Direct discrimination arose from the unfavourable treatment of a person arising from some characteristic possessed by that person, and the protected characteristics such as race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Indirect discrimination arose where an apparently neutral practice had a disproportionate impact on a protected group.
10. The interpretation of the value and ideal of equality in the context of the various marriage laws was permitted by the Constitution. The parties to the different marriage systems were not similarly situated to require uniformity in treatment. They had dissimilar situations in terms of religion, belief and conscience which led them to contract different types of marriag e. The court could not adopt an interpretation of equality that required all the parties to the different marriage systems to be simply treated alike, and must of necessity interpret equality in the context of the constitutionally permitted social, religious and personal differences that influenced the choice of the different marriage systems.
11. The finding by the trial court that termed the three-year limitation a public policy consideration and questioned why no 3-year limit was imposed on the other four regimes of marriage by holding that the imposition of the three-year limitation was erroneous, given that the different regimes of marriages were based on disparate social, religious and philosophical considerations.
12. The right to equality did not prevent the State from providing differential treatment to certain groups or individuals for a variety of constitutional and legitimate reasons, and it was not every differentiation that amounted to unequal treatment and was discriminatory. For example, article 27(4) of the Constitution which stated that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' Courts, to persons who professed the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance. That provision underscored the necessity of differential treatment to accommodate personal and religious choices. When there was such different treatment, one had to examine the social, economic, political or other conditions of the relevant individuals to determine whether the State's commitment to equality was being upheld.
13. There were three tests that required to be met by legitimate differentiation that were derived from article 24 of the Constitution. The rationality test, under which there had to be a legitimate purpose for the differentiation, and reasonable connection between the differentiation and its purpose. If the answer to the rationality test was affirmative, then one moved to the proportionality test, which was implied by the provisions of paragraphs (a) to (e) of article 24(1). Under the second test, the question asked was whether the differentiation was proportional, namely whether it was to the extent necessary. The third test was whether the differentiation was necessary in an open and democratic society. If the answer to any of those tests was negative, then it meant that the differentiation was discriminatory, or a limitation of a right or freedom was not constitutional.

14. Before the Marriage Act, there were different laws governing marriage and divorce, and the objective of the Marriage Act was to merge them together in one law rather than to achieve uniformity among the different laws. While there was an element of harmonisation of certain elements of marriage laws and in particular by the introduction in Part II of the Marriage Act, 2014 of provisions which applied to all marriages, the different marriage laws continued to retain their different nature and character.
15. Civil marriages were regulated by the State, which set the terms and conditions, and were not regulated by religion or personal belief. Article 45 of the Constitution required the State to take positive steps to recognize and protect the family unit, and to enact laws that recognized marriages concluded under any tradition, or system of religious, personal or family law with that objective in mind, and which were consistent with the Constitution. The obligations involved the adoption of measures designed to secure family life even in the sphere of the private relations of individuals.
16. The policy considerations put forth by the National Assembly were supported by the constitutional provisions on protection of the family unit. The restraint with respect to divorce was not only provided for civil marriages alone, but also in the other marriages under the Marriage Act. Under sections 64 and 68 of the Act in Christian and customary marriages respectively, the process of mediation and reconciliation were encouraged in addressing matrimonial disputes before parties resolved to divorce. Christian traditions and teachings, which applied to Christian marriages and divorces, allowed for divorce but did not encourage it, and marriage was considered a sacrament with parties considered as having made a covenant in the presence of God to stay together for life.
17. The court took judicial notice of the fact that the Catholic Church did not recognise divorce, and a marriage could only end when one partner died, or if there were grounds for an annulment if the marriage had not been consummated or it could be proved that the marriage should never have taken place.
18. Under the customary practices and laws of most Kenyan communities, divorce was effected by the wife returning or being sent back to her family and the return of the dowry paid. There were however some communities which did not recognise divorce, especially where dowry had been paid and there were children from a marriage, such as the Kuria, Maasai, Nandi and Kipsigis communities. In Islamic marriages, section 71 of the Marriage Act of 2014 provided that dissolution of the marriages was undertaken according to Islamic law, under which divorce while allowed, was discouraged and was a last option. There were also processes of reconciliation provided for during the various stages of divorce under Islamic law.
19. The family was the basic social unit and was constituted in various ways. The main purpose of family law was to regulate the rights and duties of members of a family, including managing the disputes that could arise within the family and consequences of termination of the family.
20. There was a legitimate reason and purpose for the provisions of section 66(1) of the Marriage Act, arising out of the State's positive constitutional obligation to protect the family unit and to recognize the various forms of marriages and divorces under different traditions, religious and personal laws. The provisions of section 66(1) were neither differential nor discriminatory, given that the other systems of marriage laws also provided various limitations on the right to petition for divorce. The High Court therefore erred in its findings in that regard.
21. While under section 66(1) of the Marriage Act divorce was an extraordinary remedy, the intention of the constitutional purpose was not to perpetrate a marriage that was no longer beneficial or in the parties' interests, and the Legislature should in that regard strike a fair balance between the public and private interests involved in a civil law marriage.
22. Notwithstanding the legitimate constitutional purpose for the time limitations in divorce proceedings arising from civil marriages, as an exception to the general rule, divorce should be allowed for situations which were unavoidable and unendurable for reasons of exceptional hardship or depravity, irrespective of the duration of the marriage for, and to protect the rights of the parties involved.

23. After the High Court decision was rendered, the Marriage (Matrimonial Proceedings Rules) 2020 (Rules) were enacted pursuant to section 95 of the Marriage Act and provided for the procedure for instituting and responding to matrimonial proceedings. Regulation 4(1) of the Rules allowed a party in a civil marriage to apply for leave to file the petition for divorce before lapse of three years. Apart from the provision not having been in existence at the time of the impugned decision, the provision was not backed by, and contradicted the provision in the Marriage Act, and essentially in effect created an exception to section 66(1) of the Marriage Act. Two basic rules that applied in that regard were that delegated legislation needed to be in accordance with, and within the scope of powers of the parent Act, and the amendment of a provision of an Act was a legislative act, that required to be undertaken by Parliament.
24. There were legitimate values provided in the Constitution at stake, including those of diversity, inclusiveness and protection of marginalised groups, which underscored the existence of plural family law systems and marriage laws. The differential provisions in the laws served to facilitate and enable the exercise and achievement of the right and freedom of conscience and belief. Differential provisions in the Marriage Act were justifiable in an open and democratic society based on human dignity, equality and freedom, so long as they meet the rationality and proportionality tests.
25. The limitation in section 66(1) of the Marriage Act, 2014 fell short of the proportionality test. While section 66(1) was not discriminatory, it was unconstitutional for reason of, and to the extent of its disproportionate effect in cases where a divorce in a civil law marriage may be necessary and justified before the three-year limitation. The court however suspended the effect of the instant declaration of unconstitutionality for a period of three years from the date of the judgment, to enable Parliament make the necessary amendments to the Marriage Act. That was in light of the recognition that while regulation 4 of the Marriage (Matrimonial Proceedings Rules) 2020 may in the meantime provide interim relief, the provision required to be anchored in the statute.

Appeal partly allowed.

Orders

No order as to costs.

Citations

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Kenya

1. *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (Amici Curiae)* Petition E016 of 2021; [2022] KESC 8 (KLR) - (Explained)
2. *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others* Petition 206 of 2019; [2020] eKLR - (Explained)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] eKLR - (Consolidated) - (Explained)
4. *County Government of Nyeri & another v Cecilia Wangechi Ndungu* Civil Appeal 2 of 2015; [2015] eKLR - (Explained)
5. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal No 238 of 2017; [2018] eKLR - (Explained)
6. *Federation of Women Lawyers Kenya (FIDA K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] eKLR - (Explained)
7. *In the Matter of Kenya National Commission on Human Rights* [2014] 2 KLR 356 - (Explained)
8. *In the Matter of the Speaker of the Senate & another* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Explained)
9. *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* Civil Appeal 219 of 2013; [2014] eKLR - (Followed)

10. *KAS v MMK* Divorce Case 10 of 2016; [2016] eKLR - (Explained)
11. *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013] 3 KLR 515 - (Explained)
12. *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Appeal 92 of 2015; [2017] eKLR - (Explained)
13. *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* Civil Appeal 11of 2018; [2018] eKLR - (Explained)
14. *Pharmacy and Poisons Board v George Wang'anga & 5 others* [2020] eKLR Civil Appeal 79 of 2018; [2020] eKLR - (Explained)
15. *Republic v Speaker of the National Assembly & 4 others ex- parte Edward R O Ouko* Miscellaneous Application 108 of 2017; [2017] eKLR - (Explained)
16. *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* Civil Appeal 172 of 2014; [2017] eKLR - (Explained)
17. *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others* Civil Appeal E084 of 2021; [2021] KECA 282 (KLR) (Civ) - (Explained)
18. *Waihiga, David Mwaure v Public Service Commission & 4 others* Petition 291 of 2015; [2017] eKLR - (Explained)

Tanzania

Selle & another v Associated Motor Boat Company Ltd & others [1968] 1 EA 123 - (Explained)

South Africa

1. *Christian Education South Africa v Minister of Education* [2000] ZACC II; 2004(4) SA 757 (CC) - (Explained)
2. *Harksen v Lane NO and others* [1997] ZACC 12 - (Explained)
3. *Zantsi v Council of State Ciskei* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) - (Explained)

United Kingdom

Scotch Whisky Association and others v the Lord Advocates and another [2017] UKSC 7 - (Explained)

India

1. *Kamra v New India Assurance* 1992 AIR 1072 - (Explained)
2. *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* [1987] 1 SCC 424; 1987 AIR 1023; 1987 SCR (2) 1 - (Explained)

Canada

R vs Videoflicks [1984] 48 OR (2d) 395 - (Explained)

Regional Court

Babiarz v Poland [2017] ECHR 13 - (Explained)

Texts

1. Cotran, E., (Ed) (1968), *Restatement of African Law: The Law of Marriage and Divorce: Kenya* London: Sweet & Maxwell Vol 1
2. Currie, I., De Waal J., (Eds) (2005), *The Bill of Rights Handbook* Johannesburg: Juta Law 5th Edn p 78
3. Debbie, O., (2006), *Time Restriction on Divorce in Singapore* National University of Singapore Press
4. Lowe, NV., Douglas, G., (Eds) (2005), *Bromley's Family Law* Oxford: Oxford University Press 9th Edn pp 1-2

Statutes

Kenya

1. Computer Misuse and Cybercrimes Act, 2018 (Act No 5 of 2018) section 22 - (Interpreted)
2. Constitution of Kenya articles 1(1); 3(3); 10; 20(1),(2); 21(1); 23(1); 27(1)(4); 28; 30; 36; 37;45(3)(4); 48; 50(1); 94; 95(2); 109; 115; 119; 165(3)(5); 186(4) - (Interpreted)

3. Marriage (Matrimonial Proceedings) Rules, 2020 (cap 150 Sub Leg) rule 4(1) - (Interpreted)
4. Marriage Act (cap 150) sections 6, 64, 66(1); 68; 71; 95; part II - (Interpreted)

Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950 articles 8, 12

Advocates

None mentioned

JUDGMENT

1. The 1st respondent herein, Mr Tukero Ole Kina, is an Advocate of the High Court of Kenya. Mr Ole Kina filed a petition in the High Court of Kenya at Malindi dated on June 12, 2018, seeking a declaration that section 66 (1) of the *Marriage Act, 2014* is unconstitutional null and void, for contravening various articles of the *Constitution*. The said petition was brought in the public interest against the Attorney General and the National Assembly of Kenya.

2. The *Marriage Act of 2014* in this respect regulates various forms of marriages being Christian, Civil, Customary, Hindu and Islamic marriages, and also provides for the manner and procedures for resolution of matrimonial disputes, including dissolution of marriages. The main ground for the petition is that section 66(1) of the *Marriage Act of 2014* discriminates against parties in Civil marriages, by providing that a party may not petition the court for separation or dissolution of the marriage unless three years have elapsed since the celebration of the marriage, and does not provide for such a bar with regards to petitions to dissolve a Christian, Customary, Hindu or Islamic marriage.

3. It was Mr Ole Kina's contention that the section thereby contravenes article 27(4) of the *Constitution* which forbids discrimination on any ground; article 2(4) as it is thereby inconsistent with the *Constitution*; article 3(3) which mandates the 2nd respondent and appellant to uphold and defend the *Constitution*; article 20 (1) and (2) and article 21(1) for violating the enjoyment of rights and fundamental freedoms in the Bill of Rights and the obligation to respect the said rights and freedoms respectively; article 28 for failing to respect and protection of human dignity; article 30 for failing to ensure that parties are not held to slavery or servitude; article 36 as it fails to ensure the parties right to freedom of association; article 48 which guarantees equal opportunity to access justice; and article 50(1) on the right to a fair hearing by interfering with judicial authority.

4. The 2nd respondent, the honourable Attorney General, contested the petition on the grounds that it offended the doctrine of presumption of constitutionality of an Act of Parliament, and that Mr Ole Kina had not discharged the burden of proving the invalidity of the impugned legislation, which is meant to give effect to articles 36 and 45 of the *Constitution* among others. Further, that the provisions of the *Marriage Act, 2014* were wide in scope and application, and should be interpreted liberally and purposively in accordance with the letter and the spirit of the Act. Additionally, that the question of which system of marriage was suitable, constitutional, valid or desirable was not for the court to decide, but for the people exercising their freedom of choice and direct sovereignty under article 1 of the Constitution. Therefore, that the public interest and policy considerations, as well as the plain and purposive reading of the Constitution weighed heavily against the petition.

5. The appellant, the National Assembly, in an affidavit sworn by its Clerk, Mr Michael Sialai, averred that Mr Ole Kina's petition contravened article 1 (1), 94, 95 and 109 of the Constitution which mandates Parliament to enact, amend or repeal any laws through Bills passed and assented to by the President, and sought to restrict Parliament's mandate under article 95 and 186(4) of the Constitution. Mr Sialai detailed the legislative history of the impugned Act, which was introduced, considered and enacted by

the National Assembly as the Marriage (Amendment) Bill of 2013, and forwarded to the President for assent, in accordance with article 115 of the *Constitution*. Further, that it was subsequently assented to on April 19, 2014 and commenced on May 20, 2014, after public participation. Therefore, that the Marriage Act of 2014 was passed in accordance with the Constitution and the National Assembly's standing orders, and there was no infringement of the Constitution as alleged. It was contended in this respect that the National Assembly deliberates on and resolves issues of concern to the people under article 95(2) of the Constitution, while Parliament can legislate on any matter under article 186(4).

6. It was further urged that Mr Ole Kina had not demonstrated how he had been discriminated against by the enactment of the impugned legislation, since the equality guaranteed under article 45(3) of the *Constitution* is granted to the parties to a marriage, and article 45(4) recognizes different types of marriages and permits Parliament to enact legislation on marriage that takes into account varying traditions, systems and religions. That the *Marriage Act* accordingly gives citizens the freedom to choose the regime they want to be married under based on their religion and beliefs pursuant to the Constitution. Lastly, the National Assembly also contended that the petition contravened the presumption of constitutionality of legislation enacted by Parliament, was a threat to the doctrine of separation of powers as it encroached on Parliament's legislative mandate and ought not to be entertained by the High Court.

7. After hearing the parties, the High Court (Nyakundi J.) held that it was constitutionally mandated under article 23(1) of the *Constitution* to hear and determine applications for redress of a denial, violation or threat to a right or fundamental freedom in accordance with article 165. Further, that if the impugned section of the *Marriage Act* was in violation of the *Constitution*, then the presumption of its constitutionality will have sufficiently been rebutted. The High Court was of the opinion that the duty to scrutinize allegations of rights infringement was not an usurpation of the mandate of parliament, and where the purpose or the effect of an impugned provision goes against the grain of the Constitution, or where there is no discernible link between the legislation and the purpose, then the court could not shirk its constitutional fiat to call the offending provision into question.

8. It was the finding of the High Court that section 66(1) of the *Marriage Act* of 2014 denies parties desirous of dissolving their union under the umbrella of a civil marriage the opportunity to do so unless and until a three-year period has lapsed, and was therefore *prima facie* discriminatory and a violation to the right on equality in terms of article 27 of the *Constitution*. In addition, that by imposing the three-year limitation, the impugned section had the effect of forcefully keeping parties in a situation they no longer wished to be part and was an affront to a person's human dignity preserved by article 28. Having debunked the notion that the 3-year limitation was a valid public policy consideration, the High Court also found that the right of affected parties to access justice guaranteed under article 48 is infringed upon.

9. After concluding that the petitioner has amply rebutted the presumption of constitutionality of section 66(1) the *Marriage Act, 2014* the High Court proceeded to hold as follows:

> " 124...Before making the final declarations however, I find it necessary to speak on the issue of public participation. This necessity has arisen from the realization that, having scanned the length and breadth of the Hansard Reports and the material presented by the respondents' in opposition of the petition, there is no evidence of a discussion on the effect of section 66(1) and neither is there any on (*sic*) efforts to seek out stakeholders views and comments from the public at large who were affected by the imposition of the three year limit".

The High Court accordingly held that given the impact of section 66(1) on the public, it was prudent for the National Assembly to actively engage the public and had such an exercise been undertaken, the "likelihood of the impugned provision being retained would have been minimal".

10. The National Assembly, being aggrieved with the decision of the High Court, lodged the present appeal by way of a Memorandum of Appeal dated December 17, 2019, which sets out 19 grounds of appeal challenging the findings made by the High Court along four broad limbs. Firstly, on the policy considerations that informed the provisions of section 66(1) of the *Marriage Act*; secondly, the discriminatory nature of the section; thirdly, the presumption of constitutionality of an Act of Parliament; and lastly Parliament's constitutional role and powers under article 45(4) of the *Constitution* to enact legislation that recognizes marriages concluded under any tradition, or system of religious, personal or family law.

11. The Attorney General similarly challenged the High Court's decision in a Notice of Cross Appeal lodged on February 5, 2020 on eight grounds, that impugned the finding of the High Court that section 66 (1) of the *Marriage Act* of 2014 was in contravention of the Constitution, and alleged that the findings were not supported by various sections of the *Marriage Act*.

12. We heard the appeal on December 6, 2021, and learned counsel Mr S Mwendwa urged the appeal on behalf of the National Assembly, and relied on submissions dated November 2, 2021. Mr Ole Kina, learned counsel, appeared in person, and referred the court to his written submissions dated December 3, 2021. The Attorney General's Office, even though served with the hearing notice, was not represented, and neither were any submissions filed on its behalf.

13. As this is a first appeal from the decision of the High Court, we reiterate our role as expressed in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123:

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court 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 it 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

14. In the case of *Speaker of the National Assembly of the Republic of Kenya & another vs Senate of the Republic of Kenya & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282, this court observed that the principles in the Selle case (*supra*) apply equally to constitutional appeals, and this court is not in any way precluded from applying principles of constitutional interpretation and adjudication where necessary.

15. We need to point out at the outset in this respect that non-observance of the legislative procedures by the National Assembly in the enactment of the *Marriage Act of 2014*, including public participation, was not pleaded in the petition before the High Court, and this fact was acknowledged by Mr Ole Kina in his submissions. It is a settled position that parties are bound by their pleadings and any case constructed outside the pleadings cannot be the subject of a court's determination, as held by this court in *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR, Therefore, the findings made on public participation by the High Court in the

impugned judgment were in error, and the issue of whether there was public participation cannot also be the subject of determination in this appeal, as it was never pleaded.

16. In addition, the main issue pleaded by Mr Ole Kina was the unconstitutionality of section 66(1) of the *Marriage Act of 2014*, and it is also notable in this regard that the differential nature of divorce proceedings arising from civil marriages provided in the said section was not contested. Consequently, the two issues arising in this appeal are firstly, whether the High Court's jurisdiction was ousted by the presumption of constitutionality of the *Marriage Act* and doctrine of separation of powers, and secondly, whether the differential treatment of parties to a civil marriage in divorce proceedings under section 66(1) of the *Marriage Act, 2014* is discriminatory.

17. We shall not spend much time on the first issue of the jurisdiction of the High Court, as it is a well-trodden and settled issue. Counsel for the National Assembly in this regard urged the issue of jurisdiction along two limbs. The first was that of justiciability of Mr Ole Kina's claim, and reference was made to article 165(5) of the *Constitution* for the assertion that the High Court's jurisdiction is limited to constitutional issues and not theoretical issues. It was the counsel's argument that neither Mr Ole Kina nor the trial Judge established the discrimination set out in article 27(4) of the *Constitution*. The second limb was that of the ripeness of the claim, and the counsel submitted that Mr Ole Kina had the option under articles 37 and 119 of the *Constitution* to petition Parliament to amend or repeal the impugned section if there were basis for the same. Therefore, that the court ought to have exercised restraint under the doctrine of exhaustion of remedies, as there was an alternative method to dispute resolution established by legislation. Reliance was placed on the decisions by this court in *National Assembly of Kenya v The Institute for Social Accountability and others* (Civil Appeal No 92 of 2015) and *Pharmacy and Poisons Board v George Wang'anga & 5 others* [2020] eKLR that courts should not engage in a theoretical exercise or step into the shoes of Parliament to correct a perceived mistake.

18. Mr Ole Kina on his part submitted that the cases relied on by the National Assembly were distinguishable from the facts of the present appeal, and that his case raised a justiciable issue of validity of an Act of Parliament. Learned counsel cited article 22 of the *Constitution* for the position that a petition could be brought to court where there was an allegation that a right or fundamental freedom in the Bill of Rights that had been denied, violated or infringed or was threatened with infringement, and that there was no requirement for a party to seek an alternative remedy. He contended that the petition did not call for the court to legislate, rather to void a provision of the *Marriage Act* once the court found it unconstitutional. Additionally, that article 22(2) of the *Constitution* opened up the litigation space and locus standi in this regard to any one acting in public interest. Lastly, that article 165 and article 23 of the *Constitution* give the High Court unlimited original jurisdiction to determine a claim alleging violation or threat of right or fundamental freedom in the Bill of rights and to interpret the Constitution and the validity of any law.

19. We will commence with a consideration of the first limb of the jurisdictional challenge by the National Assembly, as to whether there was a justiciable constitutional issue that was ripe for determination before the High Court. The argument in this regard was that Mr Ole Kina had not shown how he or any other person was discriminated against. In the decision by the Supreme Court in *Attorney-General & 2 others v Ndii & 79 others ; Prof Rosalind Dixon & 7 others (Amici Curiae)* [2022] KESC 8 (KLR), Koome CJ explained that the doctrine of ripeness discouraged a court from deciding an issue too early, and required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. Further, that approach shielded a court from dealing with hypothetical issues that had not crystalized. Lenaola SCJ in the same decision likewise held that justiciability was the quality or state of being appropriate or suitable for adjudication by a

court, and that for a matter to be justiciable, it had to be ripe in the sense that the facts had developed sufficiently to permit an intelligent and useful decision to be made.

20. With regard to human rights litigation, there is now a very broad approach to standing in the enforcement of the Bill of Rights under article 22 of the *Constitution*. Two aspects of standing are pertinent in this appeal. First, a petitioner such as Mr Ole Kina, needs to demonstrate either an actual infringement of a right, or the threat of infringement of a right. Second, a petitioner can bring an action in his or her own interest, on behalf of another person who is not able to act in their own name, on behalf of other persons in the same situation, or in the public interest.

21. It is also not in dispute that Parliament has already enacted the *Marriage Act of 2014*, and section 66(1) thereof is operational, with persons contracting marriages and undertaking divorce proceedings thereunder. Therefore, Mr Ole Kina did lay a basis not only of actual but also threatened violation, and the question of the constitutionality of the said section is neither premature nor abstract, and presents an existing legal problem that is affecting or likely to affect a substantial section of members of the public. We therefore find that the issue presented by Mr. Ole Kina was clearly justiciable and he had locus to present the issue in the public interest, and the High Court did not err in finding as much.

22. It is also notable that the application of the principle of constitutional avoidance only applies when courts do not need to make a decision on a constitutional issue, by either "anticipating a question of constitutional law in advance or formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied", as held by Chaskalson P in *Zantsi vs Council of State Ciskei* (1995) (4) SA 15 (CC) . This is not the position in the present appeal, as there is an existing and precise constitutional question that has been raised by Mr. Ole Kina.

23. On exhaustion of other legal relief or other constitutional remedies, where an alternative remedy would entail delay or uncertainty in providing a remedy, then such an alternative remedy is not available or effective and the doctrine of exhaustion does not apply. In addition, when the constitutionality of a statute is legitimately challenged, the only available remedy is to urge the court to nullify the offending provisions. As explained in *The Bill of Rights Handbook* by Iain Currie & Johan de Waal (5th Edition) at page 78:

> Where the violation of the *Constitution* is clear and directly relevant to the matter and there is no apparent alternative form of ordinary relief, it is not necessary to waste time and effort by seeking a non- constitutional way of resolving a dispute. This will often be the case when the constitutionality of a statutory provision is placed in dispute because, apart from a reading down, there are no other remedies available to a litigant affected by the provision. On the other hand the principle of avoiding constitutional issues is particularly relevant when the interest of an applicant in the resolution of a constitutional issue is not clear and where the issue is not ripe for decision or when it has become academic or moot"

24. It would consequently not be just or reasonable to expect members of the public to be exposed to a likely or potentially unconstitutional law, as they resort to the alternative remedy proposed by the National Assembly of petitioning and waiting for Parliament to amend the law.

25. The second limb of the National Assembly's arguments on jurisdiction was on the court interference with the constitutional mandate of Parliament. It is now settled that in deference to the doctrine of separation of powers, courts should not unduly interfere with Parliament's lawful exercise of its constitutional functions. However, and this position notwithstanding, any legislation, actions and decisions made by Parliament outside the confines of the Constitution and the law will attract the courts' jurisdiction as provided for under the Constitution. It is notable in this regard that the doctrine

of Parliamentary supremacy as applied in other jurisdictions has been watered down in Kenya by the supremacy of the Constitution, which is clearly provided for in article 1 of the *Constitution*.

26. The Supreme Court of Kenya in *In the Matter of the Speaker of the Senate & another* [2013] eKLR, held that article 93(2) the *Constitution* provides that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution, and observed that the institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another. The Supreme Court then proceeded to hold as follows as regards when courts will properly intervene:

> "(62) However, where a question arises as to the interpretation of the Constitution, this court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the court to make a determination by way of an Advisory Opinion, it would be remiss of the court to look the other way. Understood in this context therefore, by rendering this Opinion, the court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."

27. Likewise, in *Republic v Speaker of the National Assembly & 4 others Ex- parte Edward RO Ouko* [2017] eKLR, the Supreme Court held that:

> "Parliament in Kenya cannot enjoy privilege, immunities and powers which are inconsistent with the fundamental rights guaranteed in [the Constitution]. Thus, whereas parliamentary privilege is recognized, it does not extend to violation of the Constitution hence Parliament cannot flout the Constitution and the law and then plead immunity; where a claim to parliamentary privilege violates constitutional provisions, the court's jurisdiction would not be defeated by the claim to privilege; that the concept of statutory finality does not detract from or abrogate the court's jurisdiction in so far as the complaints made are based on violation of constitutional mandates or non-compliance with rules of natural justice; that whereas the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected, the courts can however interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution."

28. It is indeed within the jurisdiction of the High Court under article 165(3) (b) and (d) of the *Constitution* to determine any questions raised as regards the infringement of the Bill of Rights, the interpretation and constitutionality of laws, and the constitutionality of decisions and actions of Parliament. In this respect it is also notable that the presumption of constitutionality is a legal principle that is used by courts during statutory interpretation, and not a principle that excludes the jurisdiction of courts. Under this principle, when interpreting statutes, courts start with the premise that statutes enacted by the legislature are constitutional, unless and until it is established they violate specific provision of the Constitution.

The principle was explained by the Supreme Court of India in *L Kamra v New India Assurance* (1992) AIR 1072 by Justice K Ramaswamy as follows:

> "The court ought not to interpret the statutory provisions, unless compelled by their language, in such a manner as would involve its unconstitutionality, since the legislature or the rule making authority is presumed to enact a law which does not contravene or violate the constitutional provisions. Therefore, there is a presumption in favour of constitutionality of a legislation or statutory rule unless ex facie it violates the fundamental rights guaranteed under part III of the Constitution."

29. The presumption of constitutionality is therefore not absolute, and will not be upheld when there is a violation of the Constitution by Parliament when enacting a statute, or by the provisions of a statute. The High Court therefore did not err in assuming jurisdiction when the question of the constitutionality of section 66(1) of the *Marriage Act of 2014* as enacted by Parliament was raised by Mr Ole Kina.

30. Lastly, the High Court also correctly identified and detailed the principles that would guide in its interpretation of the Constitution, which are set out in article 259 of the *Constitution* namely, to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law, human rights and fundamental freedoms in the Bill of Rights; and that contributes to good governance. The elucidation of the purposive and holistic interpretation of the Constitution has been the subject of this court's decision in Speaker of the *National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282, and the Supreme Court's decisions in *Re the Matter of Kenya National Commission on Human Rights* [2014] eKLR,, and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, [2015] eKLR. It was emphasized therein that the provisions of the Constitution must be contextual and read as an integrated whole, while taking into account the purposes of the provisions.

31. The second issue in this appeal concerns the application of these principles in interpreting the constitutional effects of the differential nature of section 66 (1) of the *Marriage Act of 2014*, which we shall now address. Counsel for National Assembly in this regard placed reliance on the case of *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* [1987] 1 SCC 424 that the interpretation should take into account the text and context of the impugned provision, and faulted the trial Judge for finding that section 66 (1) of the *Marriage Act of 2014* was discriminatory and failing to recognize the discretion the parties had to contract any type of marriage under any legal regime, since the Act did not force anyone to enter into any type of marriage.

32. On the findings that there was violation of article 27(1) of the *Constitution* on the right to equal protection and benefit of the law, counsel referred the court to the decision in the case of *Harksen v Lane No and others* [1997] ZACC 12 for the test in determining unfair discrimination, and the decisions in *Federation of Women Lawyers, Kenya (FIDA) & 5 others v Attorney General & another*

[2011] e KLR and *David Mwaura Waihiga v the Public Service Commission and 4 others* Petition No 291 of 2015, for the position that differentiation in treatment does not automatically amount to discrimination.

33. Counsel urged that the provision for three years subsistence of a civil marriage before divorce proceedings can be commenced was rational, because the grounds for divorce provided under section 66(2) of the *Marriage Act* of 2014 needed time to be cogently proved and a finding made that a marriage had irretrievably broken down, as noted in the case of *KAS v MMK* [2016] eKLR. In addition, that the time limitation is reasonable and justifiable within the context of article 24 of the *Constitution* which provides for limitation of rights and freedoms in the Constitution. Reference was in this regard made to the decision in *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Party)* [2020] eKLR wherein the court declared section 22 of the Computer Misuse and Cybercrimes Act a justifiable limitation on the right to freedom of expression.

34. The counsel further cited the policy consideration for the provision in section 66 (1) of the *Marriage Act* of 2014, namely, to preserve the value of the marriage institution and provide "a stabilizing effect on marriage", and relied on an article on "*Time Restriction on Divorce in Singapore*," published by the National University of Singapore in the Singapore Journal of Legal Studies, and the United Kingdom's Law Commission's Report on Law Reforms of the Divorce Law for this position. It is however notable that copies of these documents were not availed to the court nor part of the record of appeal.

35. The decision of this court in County Government of *Nyeri v Cecilia Wangechi Ndungu* [2015] eKLR was also cited for the position that the cardinal rule in the construction of a statute is the intention of the legislature, and reference was made to the Hansard Report and the Departmental Committees on Justice and Legal Affair's Report on the Marriage Bill, 2013, for the submission that the purpose and intent of the impugned provision rests on strong policy considerations including the need to ensure that marriage is not a trial and error game and that divorce of a civil marriage is only occasioned when it is necessary and after a period of three (3) years.

36. Further, that the time limitations for instituting divorce proceedings in a civil marriage is a policy decision best handled by the Executive and enacted by the legislature as exemplified by the decisions in *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013] eKLR and *Scotch Whisky Association and others v the Lord Advocates and another* (2017) UKSC 76 . Courts should therefore not intervene, and the decision in *Pevans East Africa Limited and another vs Chairman, Betting Control and Licensing Board & 7 others*, Civil Appeal No 11 of 2018 was cited for the submission that the trial Judge substituted his decision for that of the National Assembly without justification as the impugned provision is not in contravention of *the Constitution*, the law or manifestly irrational.

37. Lastly, the counsel for the appellant submitted that the impugned provision does not impede access to justice and was not in contravention of article 48 of the *Constitution* because the time limit is justified by policy considerations. Further, parties are free to choose any type of marriage, and every marriage had different rules governing it and distinct legal consequences.

38. Mr Ole Kina on his part noted that no policy considerations of the impugned section were indicated in the official parliamentary report on the debate and consideration of the Marriage Bill, and he posed the question on how the latitude given to the other forms of marriages to divorce soon after contracting of a marriage would achieve the stabilization goal in marriages. Further, that if there was a valid policy consideration to be achieved by the imposition of a waiting period, then the same ought to have been employed uniformly. For the same reason, that there is no justification for the limitation of the right

to access justice at the earliest possible moment where the need arises, and to the extent that the right has to be postponed for a period of 3 years while equally situated persons married under other regimes of marriages do not have to wait, the impugned section is unconstitutional null and void, as rightly found by the trial Judge.

39. On the construction of the statute, Mr Ole Kina distinguished the cases of *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 Others* (*supra*), *Scotch Whisky Association and others v the Lord Advocates and another* (*supra*) and *Pevans East Africa Limited and another v Chairman, Betting Control and Licensing Board & 7 others* (*supra*) on the facts.

40. It is evident that this appeal arises from a possible tension and conflict between different constitutional values and guarantees arising from the diverse provisions of the *Marriage Act* on divorce proceedings. It is notable in this respect that the Constitution protects and guarantee both the right to equality including in marriage, as well as the right to diversity of family laws. Article 10 provides for the national values of equality and non- discrimination side by side with the values of inclusiveness and protection of the marginalised. Article 27(1) provides that every person is equal before the law and has the right to equal benefit and protection of the law and article 45(3) specifically provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage. In this regard, the Constitution specifically recognises and protects the family as the natural and fundamental unit of society and basis for social order under article 45(1).

41. On the other hand, article 32 guarantees the right to freedom of conscience, religion, thought, belief and opinion, and of persons either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance. Furthermore, article 45(4) of the *Constitution* specifically empowers Parliament to enact legislation that recognises marriages under any tradition, or system of religious, personal and family law which are consistent with the Constitution. Lastly, under article 25, these rights may be limited or restricted in accordance with the law and in so far as this is necessary in a democratic society in pursuit of a legitimate aim.

42. Therefore, it is inevitable that tensions will exist and arise where there is an intersection between the different co-existing regulatory regimes of the family by the state (being the civil law regime) and by religious and personal laws evidenced in the *Marriage Act*. We are guided by comparative jurisprudence in this regard, and decision by the European Court of Human Rights in the case of *Babiarz v Poland* (Application No 1955/10) is illustrative of these tensions and the considerations that should be brought to bear.

43. In that case, the applicant's complaint to the European Court of Human Rights was the alleged breach of his rights guaranteed by articles 8 and 12 of the *EU Convention for the Protection of Human Rights and Fundamental Freedoms*, based on the national courts' refusal to grant him a divorce, and thereby preventing him from marrying the woman with whom he had been living. Article 8 and 12 of the said Convention provides for the right to a family and to marry respectively. The European Court of Human Rights in relation to breach of article 8 held as follows:

> " In so far as the applicant relies on article 8 of the Convention, the court reiterates that while the essential object of article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Mikulić v Croatia*, No 53176/99, § 57, ECHR 2002-I). However, the boundaries between the State's positive and negative obligations under

this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests (see *SH and oersth v Austria* [GC], No 57813/00, § 87, ECHR 2011-V)..."

44. On article 12, the court held that the exercise of the right to marry gives rise to social, personal and legal consequences and is subject to the law of the Contracting States, but the limitations thereby introduced must not restrict or reduce the right to marry in such a way or to such an extent that the very essence of the right to marry is impaired. In the court's view, there had been no violation of the applicant's right to marry and that in the circumstances of the case, the positive obligations arising under article 8 of the Convention did not impose on the authorities a duty to accept the applicant's petition for divorce.

45. We are persuaded by the approach taken by the court in the said decision, that the State has both positive and negative obligations in the observance and promotion of rights to family life, that the interpretation of whether a provision of the law is discriminatory in this respect is dependent on the context of the provision and its purpose, and that the court should engage in a balancing exercise where there are competing rights in issue. In this respect, we are also alive to the nature of discrimination, which can be direct or indirect. Direct discrimination arises from the unfavourable treatment of a person arising from some characteristic possessed by that person, and the protected characteristics include those listed in article 27, namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Indirect discrimination arises where an apparently neutral practice has a disproportionate impact on a protected group.

46. The different classifications of discrimination were elucidated by this court (Waki, Makhandia & Murgor JJA) in the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR, wherein it was explained as follows:

> " *Black's Law Dictionary*, Ninth Edition defines "discrimination" as, "Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured." And direct and indirect discrimination was distinguished in the case of *Nyarangi & others v Attorney General* [2008] KLR 688 when it was stated that;
>
> "Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs v Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found "to disqualify negros at a substantially higher rate than white applicants".
>
> With regard to differential or unequal treatment it was observed in the case of *Kedar Nath v State of WB* (1953) SCR 835 (843) that;
>
> "Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

47. In the present appeal the allegation by Mr Ole Kina is in our view one of direct discrimination by the State, being that parties, who, arising either from their belief, religion, conscience or culture have contracted a civil marriage are discriminated against by the time limitation in divorce proceedings imposed by section 66(1) of the *Marriage Act* as compared with parties in other forms of marriages. It is necessary at the outset to clarify that the issue raised by Mr. Ole Kina is not one of equality between the parties in a civil marriage, but of equality as between a civil marriage and the other marriage and divorce systems provided under the *Marriage Act*.

48. The basic question that needs to be answered therefore, is whether the differential nature of section 66(1) of the *Marriage Act* is indeed discriminatory in light of the provisions of the Constitution, and in particular the tests set out in article 24 of the *Constitution*. Our starting point is the interpretation of the value and ideal of equality in the context of the various marriage laws permitted by the Constitution. Firstly, it is notable that the parties to the different marriage systems are not similarly situated to require uniformity in treatment, as urged by Mr Ole Kina. They have dissimilar situations in terms of religion, belief and conscience which leads them to contract different types of marriage. In the circumstances, we cannot adopt an interpretation of equality that requires all the parties to the different marriage systems to be simply treated alike, and must of necessity interpret equality in the context of the constitutionally permitted social, religious and personal differences that influence the choice of the different marriage systems.

49. This position was appreciated by a three-Judge bench of the High Court (Mwera, Warsame and Mwilu JJ, (as they then were)) in *Federation Of Women Lawyers Fida Kenya & 5 others v Attorney General & Anor* [2011] eKLR as follows:

> "In our view, mere differentiation or unequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

50. To this extent, the finding by the trial Judge that "If the imposition of the three year limitation was indeed a public policy consideration, all the parliamentary draughtsmen had to do was to express the said intention uniformly across all the regimes of marriage contemplated under the Act. After all, it is provided in section 3 (3) of the *Marriage Act, 2014* that all marriages have the same legal status. Why was no such limit imposed on the four other regimes of marriage envisioned under the Act?.." was in our view erroneous, given that the different regimes of marriages are based on disparate social, religious and philosophical considerations.

51. It therefore follows that the right to equality does not prevent the State from providing differential treatment to certain groups or individuals for a variety of constitutional and legitimate reasons, and it is not every differentiation that amounts to unequal treatment and is discriminatory. An example that is relevant to the circumstances of this appeal is the provisions of article 27(4) of the *Constitution* which states that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance. This provision underscores the necessity of differential treatment to accommodate personal and religious choices. When there is such

different treatment, one must examine the social, economic, political or other conditions of the relevant individuals to determine whether the State's commitment to equality is being upheld.

52. In *Mohammed Abduba Dida v Debate Media Limited & another* [*supra*] this court observed as follows in this regard:

> " From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of the Constitution should be determined by applying a three stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the Constitution. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of the Constitution."

53. In this respect, the criteria that is applied to separate legitimate differentiation from constitutionally impermissible differentiation is provided in the limitation provisions of article 24 as follows:

> " 24.
>
> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including––
>
> (a) the nature of the right or fundamental freedom;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

54. There are three tests that require to be met by legitimate differentiation that are derived from the provisions of article 24. Firstly, the rationality test, under which there must be a legitimate purpose for the differentiation, and reasonable connection between the differentiation and its purpose. If the answer to this test is affirmative, then one moves to the second test, namely, the proportionality test, which is implied by the provisions of paragraphs (a) to (e) of article 24(1). Under the second test, the

question asked is whether the differentiation is proportional, namely is it to the extent necessary. In *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017] eKLR this court noted that:

> " Even after establishing the existence of a law limiting any specific right and accepting that it is reasonable and justified the means chosen to achieve the objective must pass a proportionality test by considering;
>
> (a) the nature of the right or fundamental freedom:
>
> (b) the importance of the purpose of the limitation:
>
> (c) the nature and extent of the limitation;
>
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

55. It was held in this respect in *Harksen vs Lane NO* (*supra*) that the analysis to be undertaken in this respect involves "a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality". The third and final test if whether the differentiation is necessary in an open and democratic society. If the answer to any of these tests is negative, then it means that the differentiation is discriminatory, or a limitation of a right or freedom is not constitutional

56. Applying the rationality test, we note that the appellant proferred various policy considerations for section 66(1) of the *Marriage Act* of 2014, on which the High Court's position was as follows:

> " 118. The policy argument fronted by the respondents' as a basis for the differential treatment of persons desirous of dissolving a marriage falls short in my view. A cursory observation of the underpinnings of this argument reveals that the same was wholly based on the position in England as presented in the paper titled 'The Law Commission working paper No. 76: Time restriction on presentation of divorce and nullity petitions'. Further reliance was placed on the position in Singapore as discussed in the paper by Debbie S L. Ong titled, 'The Restriction on divorce in Singapore'. However, scarce effort was expended by the Respondents' to prove that in passing the impugned provision, the drafters of the Act paid any mind to public policy. Furthermore, if we were to take this line of reasoning as the gospel, what informed the decision to pick three years and not two or four" What reasoning was used to arrive at the conclusion that the three-year period was sufficient enough to make a fledgling marital union stable" None of the foregoing questions were answered to my satisfaction or at all by the respondents'".

57. We have already noted that the documents referred to were indeed not provided by the appellant, and not referred to during the Parliamentary debate on the Marriage Bill. Our view is that the starting point of an interpretation of the purpose of the section is the text of the *Marriage Act* and its plain meaning by applying the usual and ordinary meanings of the words used, to discover its original intent. This

court in its analysis of determining the intention of a statute, in the case of County Government of *Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR pronounced itself as follows in this regard:

> " Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

58. If after examining the language of the statute, the purpose still remains unclear, we will then attempt to ascertain the intent of the legislature by looking at legislative history and other related sources.

59. The objective of the *Marriage Act* is in this regard stated as "An Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purposes" It is evident from the said long title that there were different laws governing marriage and divorce, and the objective was to merge them together in one law rather than to achieve uniformity among the different laws. The Memorandum of Reasons and Objects of the Marriage Bill 2013 which was published in Kenya Gazette Supplement No 97 (National Assembly Bills No 13), in this respect explained as follows:

> " This Bill which has been submitted to the committee by the Attorney General seeks to consolidate the various existing marriage laws applicable in Kenya into one Act of Parliament. The Bill proposes to repeal seven pieces of legislation namely. The Marriage Act (cap 150), The African Christian Marriage and Divorce Act (cap 151), The Matrimonial Causes Act (cap 152), The Subordinate Courts (Separation and Maintenance) Act (cap 153), The Mohammedan Marriage and Divorce Registration Act (cap 155), The Mohammedan Marriage, Divorce and Succession Act (cap 156), the Hindu Marriage and Divorce Act(cap 157,. The amendment and consolidation of the marriage laws is important in order to minimise the complexity, unpredictability and inefficiency occasioned by the current multiplicity of laws on the subject."

60. Therefore, while there was an element of harmonisation of certain elements of marriage laws and in particular by the introduction in Part II of the *Marriage Act of 2014* of provisions which applies to all marriages, the different marriage laws still continued to retain their different nature and character. Section 6 of the *Marriage Act of 2014* specifically provides as follows:

> 1. "A marriage may be registered under this Act if it is celebrated
>
> (a) in accordance with the rites of a christian denomination;
>
> (b) as a civil marriage;
>
> (c) in accordance with the customary rites relating to any of the communities in Kenya;
>
> (d) in accordance with the Hindu rites and ceremonies; and
>
> (e) in accordance with Islamic law
>
> 2. A Christian, Hindu or civil marriage is monogamous.

3. A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. “

61. In addition, civil marriages are regulated by the State, which sets the terms and conditions thereof, and are not regulated by religion or personal belief. In this respect, Mr Ole Kina is therefore alleging that the State has infringed the rights to equality of parties in civil law marriages, and the State’s obligation’s with respect to marriages if any, is thus a relevant context and purpose to take into account. Article 45 of the *Constitution* in this respect requires the State to take positive steps to recognize and protect the family unit, and to enact laws that recognize marriages concluded under any tradition, or system of religious, personal or family law with this objective in mind, and which are consistent with the Constitution. These obligations may involve the adoption of measures designed to secure family life even in the sphere of the private relations of individuals as noted by the European Court of Human Rights in *Babiarz v Poland* (*supra*).

62. The policy considerations put forth by the National Assembly are therefore supported by the Constitutional provisions on protection of the family unit, and it is notable in this respect that the restraint with respect to divorce is not only provided for civil marriages alone, but also in the other marriages under the *Marriage Act*. Under sections 64 and 68 of the Act in Christian and customary marriages respectively, process of mediation and reconciliation are encouraged in addressing matrimonial disputes before parties resolve to divorce. Christian traditions and teachings, which apply to Christian marriages and divorces, likewise allow for divorce but do not encourage it, and marriage is considered a sacrament with parties therein considered as having made a covenant in the presence of God to stay together for life.

63. Therefore, the Bible in the book of Matthew chapter 5 in verses 31-32 states that ‘anyone who divorces his wife must give her a certificate of divorce.’ But I tell you that anyone who divorces his wife, except for sexual immorality, makes her the victim of adultery, and anyone who marries a divorced woman commits adultery”. We also take judicial notice of the fact that the Catholic Church does not recognise divorce, and a marriage can only end when one partner dies, or if there are grounds for an annulment if the marriage has not been consummated or it can be proved that the marriage should never have taken place.

64. Under the customary practices and laws of most Kenyan communities, divorce was effected by the wife returning or being sent back to her family and the return of the dowry paid. There are however some communities which did not recognise divorce, especially where dowry had been paid and there were children from a marriage, such as the Kuria, Maasai, Nandi and Kipsigis communities – see in this respect Eugene Cotran’s *Restatement of African Law: Kenya* - Volume 1 on The Law of Marriage and Divorce.

65. As regards divorce in Islamic marriages, section 71 of the *Marriage Act of 2014* provides that dissolution of the said marriages is undertaken according to Islamic law, under which divorce while allowed, is discouraged and is a last option. In the Hadith (a collection of traditions containing sayings of the prophet Muhammad) by Abdullah ibn Umar it is reported in Book 6, Number 2173 that the Prophet Muhammad said that, “Of all the lawful acts the most detestable to Allah is divorce”. There are also processes of reconciliation provided for during the various stages of divorce under Islamic law.

66. Comparatively, the specific purposes of a civil law on divorce is alluded to by Nigel Lowe and Gillian Douglas in their text on *Bromley’s Family Law*, Ninth Edition at pages 1 to 2, wherein they recognise that the family is the basic social unit and is constituted in various ways. According to the legal scholars, the main purpose of family law is to regulate the rights and duties of members of a family, including

managing the disputes that may arise within the family and consequences of termination of the family. The objectives of a divorce law were also identified by the United Kingdom's Law Reform Commission in its Report on Family Law: The Ground For Divorce (Law Com No 192) as follows:

(i) It should try to support those marriages which are capable of being saved.

(ii) It should enable those which cannot be saved to be dissolved with the minimum of avoidable distress, bitterness and hostility.

(iii) It should encourage, so far as possible, the amicable resolution of practical issues relating to the couple's home, finances and children and the proper discharge of their responsibilities to one another and to their children.

(iv) It should seek to minimise the harm that the children of the family may suffer, both at the time and in the future, and to promote so far as possible the continued sharing of parental responsibility for them.

67. It is notable that in its proposals on reforms in divorce law, the UK Law Commission recommended that the irretrievable breakdown of the marriage remains the sole ground for divorce; and that such breakdown should be established by the expiry of a minimum period of one year, for consideration of the practical consequences which would result from a divorce and reflection upon whether the breakdown in the marital relationship is irreparable.

68. The above constitutional, legal and comparative analysis in our view supports an inevitable finding that there is a legitimate reason and purpose for the provisions of section 66(1), arising out of the State's positive constitutional obligation to protect the family unit and to recognize the various forms of marriages and divorces under different traditions, religious and personal laws. It is also our view that the provisions of section 66(1) of the *Marriage Act* are neither differential nor discriminatory, given that the other systems of marriage laws also provide various limitations on the right to petition for divorce. The High Court therefore erred in its findings in this regard.

69. The pertinent question in our view is whether the limitation in section 66(1) of the *Marriage Act* meets the proportionality test, and in particular, whether there is disproportionate harm done by the section as against the benefits that it seeks to achieve in terms of protection of the family unit. While under section 66(1) of the *Marriage Act* divorce is an extraordinary remedy, it is our view that the intention of the Constitutional purpose was not to perpetrate a marriage that is no longer beneficial or in the parties' interests, and the legislature should in this regard strike a fair balance between the public and private interests involved in a civil law marriage.

70. As noted by the United Kingdom's Law Reform Commission in its Report on Family Law: The Ground For Divorce at paragraph 3.4:

> " The aim of supporting those marriages which can be saved can be distinguished from the aim of upholding the institution of marriage itself. For some of our respondents, as for our predecessors, it was important that divorce law should send the right messages, to the married and the marrying, about the seriousness and permanence of the commitment involved. We agree. Despite a rapid recent growth in cohabitation outside marriage, marriage remains an extremely popular institution. Couples see it as offering, not only an "important signifier" of their commitment to one another, but also a home of their own, financial and emotional security, and an "accepted context" for having children.' Marriage involves mutual legal obligations of support and sharing which other relationships do not. The law should certainly do its utmost to recognise and enforce these. It must also be realistic

and practical. If people who are unhappily married are denied a means of reordering their lives in a sensible fashion, many of them will simply walk away. Others may be deterred from marrying in the first place, but will live together instead. Support for the institution of marriage cannot be achieved by turning it into an institution which no-one any longer wishes to enter. But the recognition that a marriage has broken down does not mean that the obligations resulting from it should be ignored."

71. It is our view that notwithstanding the legitimate constitutional purpose for the time limitations in divorce proceedings arising from civil marriages, as an exception to the general rule, divorce should be allowed for situations which are unavoidable and unendurable for reasons of exceptional hardship or depravity, irrespective of the duration of the marriage for, and to protect the rights of the parties involved. It is notable in this respect that section 6 of the repealed Matrimonial Causes Act, which contained similar provisions to section 66(1) of the *Marriage Act of 2014*, provided as follows:

(1) No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage: Provided that a judge of the court may, upon application being made to him in accordance with rules made under this Act, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree nisi, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the Judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage.

72. We take judicial notice of the fact that after the High Court decision was rendered, the *Marriage (Matrimonial Proceedings Rules) 2020* were enacted on July 8, 2020 pursuant to section 95 of the *Marriage Act* and provide for the procedure for instituting and responding to matrimonial proceedings. Regulation 4(1) of the Rules now allow a party in a civil marriage to apply

for leave to file the petition for divorce before lapse of three years. As follows:

"(1) An application for leave to present a petition for separation of the parties or for the dissolution of a marriage contracted under Part IV of the Act before three years have elapsed since the celebration of the marriage shall be made by originating summons in Form MA15 set out in the First Schedule.

73. Quite apart from this provision not having been in existence at the time of the impugned decision, it is our view that the provision is not backed by, and contradicts the provision in the *Marriage Act*, and essentially in effect creates an exception to section 66(1) of the *Marriage Act*. Two basic rules that apply in this regard are that delegated legislation needs to be in accordance with, and within the scope of

powers of the parent Act, and the amendment of a provision of an Act is a legislative act, that requires to be undertaken by Parliament.

74. Before we conclude, we will for purposes of record, briefly address the last test on the importance of the differential provisions in the *Marriage Act* in an open and democratic society. As indicated earlier, there are legitimate values provided in *the Constitution* at stake, including those of diversity, inclusiveness and protection of marginalised groups, which underscores the existence of plural family law systems and marriage laws. In addition, the differential provisions in these laws serve to facilitate and enable the exercise and achievement of the right and freedom of conscience and belief.

75. Various comparative decisions have emphasized the need, in an open and pluralistic society, to accommodate religious and other differences different from the dominant views, conduct or practice of the majority, and the principle of reasonable accommodation was also confirmed and upheld by this Court in *Seventh Day Adventist Church (East Africa) Limited vs Minister for Education & 3 others* (supra). (Also see the decision by the Canadian Court of Appeal in *R vs Videoflicks* [1984] 48 OR (2d) 395 and the South African decision in *Christian Education South Africa vs Minister of Education* [2000] ZACC II; 2004(4) SA 757 (CC)). We likewise underscore that differential provisions in the *Marriage Act* are justifiable in an open and democratic society based on human dignity, equality and freedom, so long as they meet the rationality and proportionality tests.

76. In the present appeal, however, we have found that the limitation in section 66(1) of the *Marriage Act* of 2014 falls short of the proportionality test. We are nevertheless cognisant of the constitutional purpose of the section, and therefore reach the conclusion that while section 66(1) of the *Marriage Act* of 2014 is not discriminatory, it is unconstitutional for reason of, and to the extent of its disproportionate effect in cases where a divorce in a civil law marriage may be necessary and justified before the three-year limitation. We however suspend the effect of this declaration of unconstitutionality for a period of three years from the date of this judgment, to enable Parliament make the necessary amendments to the *Marriage Act* of 2014. This is in light of the recognition that while regulation 4 of the *Marriage (Matrimonial Proceedings Rules) 2020* may in the meantime provide interim relief, the said provision requires to be anchored in the statute.

77. There shall be no order as to the costs of the appeal.

78. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10 TH DAY OF JUNE, 2022

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

*I certify that this is a true copy of the original***

Signed

DEPUTY REGISTRAR