



Law Society of Kenya v Attorney General & 2 others; East Africa Law Society & another (Interested Parties) (Petition E233 of 2024) [2025] KEHC 641 (KLR) (Constitutional and Human Rights) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E233 OF 2024
EC MWITA, J
JANUARY 31, 2025**

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF EAST AFRICAN
COMMUNITY, ARID AND SEMI-ARID LANDS AND REGIONAL
DEVELOPMENT 2ND RESPONDENT**

MOKUA ZABLON MURUKA 3RD RESPONDENT

AND

EAST AFRICA LAW SOCIETY INTERESTED PARTY

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

Kenya’s nominee for appointment to the East African Court of Justice must fulfil the requirements for appointment as a judge in Kenya.

The petition challenged the nomination of the 3rd respondent for appointment as Kenya’s nominee for the position of judge of the East African Court of Justice (EACJ). The court highlighted the requirements for a person to qualify to be appointed as a judge of the EACJ. The court held that the EACJ could not determine whether the 3rd respondent qualified to hold the office of judge in Kenya under the Constitution of Kenya. The court further held that only the Judicial Service Commission had constitutional mandate and legal mechanism for determining whether a person met the qualifications for appointment as a judge in Kenya and, therefore, could be nominated for appointment to the EACJ.

Reported by Kakai Toili



International Law – East African Community – East African Court of Justice (EACJ) - what were the requirements for a person to qualify to be appointed as a judge of the EACJ - Treaty for the Establishment of the East African Community, article 24(1).

International Law – East African Community – East African Court of Justice (EACJ) – jurisdiction of the EACJ- whether the EACJ had the jurisdiction to determine whether a Kenya’s nominee to the EACJ was qualified to hold the office of judge in Kenya – Constitution of Kenya, article 165(3)(d).

Constitutional Law – constitutional commissions – Judicial Service Commission (JSC) - what was the role of the Judicial Service Commission in the appointment of judges to the East African Court of Justice – Constitution of Kenya, article 172(1)(a); Judicial Service Act (cap 8A), section 30 and the First Schedule.

Brief facts

On April 18, 2024, the Cabinet Secretary, Ministry of East African Community, Arid and Semi-Arid Lands and Regional Development (the 2nd respondent) issued a letter forwarding the name of the 3rd respondent to the Secretary General of the East African Community for transmission to the Summit of the Community for appointment as Kenya’s nominee for the position of judge of the East African Court of Justice (EACJ), First Instance Division. Aggrieved, the Law Society of Kenya (the petitioner), filed the instant petition challenging the 3rd respondent’s nomination.

The petitioner asserted that the 3rd respondent’s nomination contravened the Constitution of Kenya. The petitioner claimed that the 3rd respondent did not meet the qualifications to be nominated as a judge of a superior court in Kenya and, therefore, as a judge of the EAC Justice, First Instance Division. The petitioner argued that the 2nd interested party, the Judicial Service Commission (the JSC) was not involved and did not recommend the 3rd respondents name for nomination as a judge. The petitioner asserted that the court had jurisdiction to interrogate the constitutional validity of that nomination. The petitioner sought for among other orders; a declaration that the action of the 2nd respondent of nominating the 3rd respondent as a judge of the EACJ’s First Instance Division was invalid, null and void.

Issues

- i. What were the requirements for a person to qualify to be appointed as a judge of the East Africa Court of Justice?
- ii. Whether the East African Court of Justice had the jurisdiction to determine whether a Kenya’s nominee to the EACJ was qualified to hold the office of judge in Kenya.
- iii. What was the role of the Judicial Service Commission in the appointment of judges to the East African Court of Justice?

Held

1. Jurisdiction was the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction was a threshold and fundamental question that the court had to determine first. If the court found that it had no jurisdiction to hear the matter, that was the end. Article 165(3)(d) of the Constitution conferred on the court jurisdiction to hear any question respecting its interpretation, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of the Constitution.
2. From a textual reading of article 24(1) of the Treaty for the Establishment of the East African Community was clear in two respects.
 1. It identified qualifications for persons to be recommended for appointment, namely, proven integrity, impartiality and independence, or jurists of recognised competence.
 2. Those to be nominated for appointment must also fulfil the conditions required for appointment to high judicial positions in their own (partner) states. The person so nominated



must, as a matter of law, fulfil conditions for appointment to the position of judge in the Partner State, in the circumstances of the case, the Republic of Kenya.

3. The person nominated by the Republic of Kenya for appointment to the EACJ had to be of proven integrity, impartiality and independence, or a jurist of recognised competence in Kenya. The person must also fulfil the requirements for appointment as a judge in Kenya. The requirements for appointment of judges in Kenya were provided for in the Constitution of Kenya and the Judicial Service Act. Moreover, the Constitution of Kenya and the Judicial Service Act provided for the procedure for identifying and nominating persons for appointment as judges.
4. Article 24(1) of the Treaty for the Establishment of the East African Community essentially left the issue of whether the person qualified for nomination, to the partner state and her institutions. The Constitution of Kenya provided for qualifications for appointment to the position of judge.
5. Article 165(3)(d) of the Constitution conferred on the court jurisdiction to hear any question respecting interpretation of the Constitution. In that respect, the EACJ could not determine whether the 3rd respondent qualified to hold the office of judge in Kenya under the Constitution of Kenya.
6. The Treaty for the Establishment of the East African Community merely identified qualifications and left determination whether a person fulfilled qualification to hold a high judicial office in the partner state to the partner state and her institutions. In that respect, the court was called upon to apply the provisions of the Treaty as it interpreted the Constitution and domestic laws of the Republic of Kenya in determining the issue before it. The court had jurisdiction to hear and determine the petition.
7. Qualifications for appointment to hold the position of judge in Kenya were provided for in article 166(2) of the Constitution. Article 166(5) of the Constitution provided that each judge of the High Court shall be appointed from among persons who had; at least ten years' experience as a superior court judge or professionally qualified magistrate; or at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.
8. Under article 172(1)(a) of the Constitution as read with section 30 of the Judicial Service Act and the First Schedule to the Act, the JSC had the mandate in Kenya to recommend to the President persons for appointment as judges. The JSC discharged that mandate under both the Constitution and the Judicial Service Act. The Judicial Service Act, (section 30 and the First Schedule to the Act), provided for the procedure for declaring vacancies, calling for, receiving and reviewing applications to ascertain qualifications of the applicants. It also called for and received reports from stakeholders, including, the petitioner, as the umbrella body responsible for the conduct and discipline of advocates in Kenya. The JSC then conducted interviews to determine suitable persons to recommend for appointment as judges.
9. The JSC was responsible for determining whether a person fulfilled qualifications for appointment to the high judicial position in Kenya. The Constitution required that appointments to public positions be done in an open and transparent manner and there be public participation. The Judicial Service Act had incorporated those requirements when determining suitability of a person to hold the high judicial position of a judge in Kenya.
10. The JSC was not involved in determining whether the 3rd respondent was of proven integrity, impartiality and competence, or a jurist of recognised competence in Kenya. It was not clear, who determined whether he fulfilled the requirements for appointment as a judge in Kenya given that the Constitution provided for other requirements, such as high moral character and distinguished academic, which were not in the Treaty for the Establishment of the East African Community, before nominating and recommending him for appointed as a judge of the EACJ.
11. In so far as the Republic of Kenya was concerned, only the JSC had constitutional mandate and legal mechanism for determining whether a person met the qualifications for appointment as a judge in Kenya and, therefore, could be nominated for appointment to the EACJ. The executive office of the



- President did not have constitutional and legal mandate to determine whether a person fulfilled the requirements for appointment to the position of judge in Kenya and what he/she must also possess to qualify for nomination and recommendation for appointment to the EACJ. Fulfilment of the requirements and suitability for appointment as a judge in Kenya and nomination for appointment to the EACJ was not about the outward view of the person. It required a lot more, including the input of the JSC which must also seek information about the person from other agencies, such as the petitioner and members of the public in compliance with articles 10(2) and 232 of the Constitution of Kenya.
12. The principles of transparency, accountability, equal opportunities and gender equality in article 6(d) of the Treaty for the Establishment of the East African Community could only be complied with before nomination of a person by the partner state and which the respondents did not seem to have complied with in the instant case.
 13. The Constitution and the Judicial Service Act provided for qualifications and the procedure for determining suitability of persons for appointment as judges. If the Constitution and the Judicial Service Act were insufficient for purposes of determining qualifications and suitability of persons to be nominated by the Republic of Kenya for appointment as judges to the EACJ, the Partner State, Kenya, would have enacted a law and procedure for doing so, just as it did with regard to elections of persons to the East African Legislative Assembly. The only reason why that was not done must have been because Kenya had an elaborate procedure for determining qualifications, suitability and recommendation of persons for appointment as judges.
 14. The petitioner argued that it had received complaints on the 3rd respondent's professional standing thus, impugning his integrity, an issue that had not been resolved by the time of hearing the petition. That was one of the issues the JSC considered in determining one's suitability to hold a high judicial office. There was also contestation on whether the 3rd respondent was jurist of recognised competence, an issue that could only be determined by the JSC after conducting, due diligence and interviews. In the circumstances, the 3rd respondent's nomination and subsequent recommendation for appointment as judge of the EACJ, First Instance Division, violated the Constitution and the laws of the Republic of Kenya, a partner state.
 15. The court had jurisdiction to hear and determine the petition. The petition challenged the nomination of the 3rd respondent without the input of the JSC which had constitutional and legal mandate to determine suitability of persons for appointment as judges and recommending them to the President as required by the Constitution of Kenya and the Judicial Service Act.
 16. The nomination and subsequent recommendation of the 3rd respondent for appointment as judge of the EACJ, First Instance Division, violated articles 166(1)(b) and 172(1)(a) of the Constitution since his suitability was not determined by the JSC and was not subjected to public participation, including the petitioner, the body responsible for the conduct and discipline of advocates in Kenya. The nomination also violated the principles of transparency and accountability in article 10(2) of the Constitution. Only the JSC had the constitutional mandate to determine whether a person was of proven integrity, impartiality and independence, or was a jurist of recognised competence and fulfilled the requirements for appointment to the high judicial office in Kenya for him/her to be nominated and recommended for appointment to the EACJ.

Petition allowed.

Orders

- i. *A declaration was issued that the manner in which the 3rd respondent was nominated for appointment as a judge of the First Instance Division of the EACJ lacked transparency and accountability thus, violated articles 10(2)(a) and (c) and 232 (1) (e) and (f) of the Constitution of Kenya.*
- ii. *A declaration was issued that the manner in which the 3rd respondent was nominated for appointment as a judge of the First Instance Division of the EACJ denied other eligible Kenyans an opportunity to apply*



for the position of judge of the EACJ in violation of article 27(1) and (3) read with article 232(1)(g) of the Constitution of the Republic.

- iii. *A declaration was issued that the nomination of the 3rd respondent as a judge of the EACJ, First Instance Division violated articles 166(2) and (5) of the Constitution of Kenya.*
- iv. *A declaration was issued that the nomination of the 3rd respondent as a judge of the EACJ, First Instance Division without the input of the JSC violated article 172(1)(a) of the Constitution of Kenya, and was null and void.*
- v. *An order of certiorari was issued quashing the letter dated April 18, 2024 by the Cabinet Secretary, Ministry of East Africa Community, Arid and Semi-Arid Lands and Regional Development forwarding the name of the 3rd respondent to the Secretary General, East African Community for appointment as a judge of the EACJ, First Instance Division.*
- vi. *Each party shall bear its own costs.*

Citations

Cases

1. Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru (Civil Application 22 ‘A’ of 2016; [2016] KEHC 3129 (KLR)) — Mentioned
2. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Mentioned
3. Anyang’ Nyong’o & 10 others v Attorney General & others (Constitutional Petition 49 of 2007; [2007] KEHC 3279 (KLR)) — Mentioned
4. Attorney General & another v Andrew Mwaura Githinji & another (Civil Appeal 21 of 2015; [2016] KECA 817 (KLR)) — Mentioned
5. Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022; [2024] KESC 21 (KLR)) — Mentioned
6. Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023; [2024] KEHC 336 (KLR)) — Followed
7. Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others (Application 50 of 2014; [2015] KESC 23 (KLR)) — Followed
8. Commission for the Implementation of the Constitution v Attorney General & Speaker of the National Assembly (Petition 145 of 2011; [2013] KEHC 6309 (KLR)) — Followed
9. Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014; [2015] KESC 2 (KLR)) — Mentioned
10. In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] KESC 3 (KLR)) — Mentioned
11. Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others (Petition 13A, 14 & 15 of 2013 (Consolidated); [2014] KESC 9 (KLR)) — Mentioned
12. Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) (Petition 206 of 2020; [2021] KEHC 442 (KLR)) — Mentioned
13. Lady Justice Kalpana H. Rawal, Philip K. Tunoi & David A. Onyancha v Judicial Service Commission, Secretary, Judicial Service Commission, Judiciary, Okiya Omtata Okoiti, International Commission of Jurists, Kituo Cha Sheria & Law Society of Kenya (Civil Application 11 & 12 of 2016 & Ad Litem 1 of 2012 (Consolidated); [2016] KESC 3 (KLR)) — Followed
14. Law Society of Kenya v Attorney General & 2 others ([2016] eKLR) — Mentioned
15. Law Society of Kenya v Attorney General & another (Petition 132 of 2020; [2020] KEHC 9867 (KLR)) — Followed
16. Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) (Constitutional Petition 203 of 2020; [2021] KEHC 454 (KLR)) — Mentioned
17. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] KESC 8 (KLR)) — Mentioned



18. Mate & another v Wambora & another (Petition 32 of 2014; [2017] KESC 1 (KLR)) — Followed
19. Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Followed
20. Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR)) — Followed
21. Republic v National employment authority & 3 others Ex-parte Middle East Consultancy Services Limited (Judicial Review Application 171 of 2018; [2018] KEHC 9449 (KLR)) — Mentioned
22. Robert N. Gakuru & Others v Governor Kiambu County & 3 others (Petition 532 of 2014; [2014] KEHC 7516 (KLR)) — Followed
23. Tax Justice Network -Africa v Cabinet Secretary for National Treasury & 2 others (Petition 494 of 2014; [2019] KEHC 9486 (KLR)) — Mentioned
24. Doctors for Life International v Speaker of the National Assembly and Others ([2006] ZACC 11) — Mentioned
25. Kaunda & Others v President of the Republic of South Africa ((CCT 23/04); [2004] ZACC 5) — Mentioned
26. Attorney General of Republic of Uganda v Kyahurwenda (Case Stated 1 of 2014; [2015] EACJ 58) — Explained
27. East Africa Law Society v Attorney General of the United Republic of Tanzania and Another (Appeal 2 of 2021) [2022] EACJ 30) — Explained
28. East African Centre for Trade Policy and Law v Secretary General of the East African Community (Reference 9 of 2012; [2013] RC 1 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 2(6); 10(2); 27(1)(3); 165(3); 166; 166(2)(5); 171;172(1)(2); 232(1); 249 — Interpreted
2. East African Legislative Assembly Act , 2011 — Cited
3. Judicial Service Act (cap 8A) — section 13(1) (d); 13(2)(3); 30; Schedule 1 — Interpreted
4. The East African Legislative Assembly Elections Rules, 2017 (Legal Notice No 58) — Cited
5. Treaty for the Establishment of the East African Community — article 6, 9, 11, 23, 24(1); 27(1); 33(2); 34 — Interpreted

Texts

1. Parrish, Austen L (2011), Rehabilitating Territoriality in Human Rights

Advocates

None mentioned

JUDGMENT

Introduction

1. On April 18, 2024, the Cabinet Secretary, Ministry of East African Community, Arid and Semi-Arid Lands and Regional Development issued a letter forwarding the name of Mr Mokua Zablon Muruka (Mr Muruka) to The Secretary General of the East African Community for transmission to the Summit of the Community for appointment as Kenya’s nominee for the position of Judge of the East African Court of Justice, First Instance Division.
2. Following Mr Muruka’s nomination, the Law Society of Kenya, (the petitioner), filed this petition challenging Mr Muruka’s nomination. The petitioner sued the Attorney General, the Cabinet Secretary, Ministry of East African Community, Arid and Semi-Arid Lands and Regional Development and Mr Muruka as the 1st, 2nd and 3rd respondents respectively. The East African Law



Society and the Judicial Service Commission were joined into these proceedings as the 1st and 2nd interested parties respectively, (herein interested parties).

The petitioners' case

3. The petitioner asserted that Mr Muruka's nomination contravened the constitution of the Republic Kenya for various reasons. First; that Mr Muruka does not meet the qualifications to be nominated as a Judge of a superior court in Kenya and, therefore, as a Judge of the East African Court of Justice, First Instance Division. Second, the petitioner argued that the 2nd interested party, the Judicial Service Commission (the JSC) was not involved and did not recommend Mr. Muruka's name for nomination as a Judge.
4. The petitioner asserted that in nominating Mr Muruka, the 1st and 2nd respondents violated the constitution and the law of Kenya and that this court has jurisdiction to interrogate the constitutional validity of that nomination. The petitioner relied on the decision in East Africa Law Society v Attorney General of the United Republic of Tanzania and Another (Appeal 2 of 2021) [2022] EACJ 30 for the position that nomination of Judges to the East African Court of Justice as envisioned by article 24 of the East African Community Treaty, (the Treaty) is a matter for the Partner States' sovereignty to be subjected to their domestic processes.
5. The petitioner argued that since the nomination violated the constitution of the Republic of Kenya, this court has jurisdiction under article 165(3) to interrogate the constitutionality and legality of that nomination.
6. It was the petitioner's other argument, that Mr Muruka does not possess the competence required by article 24(1) of the Treaty to be nominated for the position of Judge of the East African Court of Justice. According to the petitioner, Mr Muruka has not practised law for 27 years; does not possess requisite experience in superior courts within the Republic of Kenya; has not practised or handled any matter relating to international law; East African Community law, or related area of practice.
7. According to the petitioner, Mr Muruka only holds a master of theology and a doctorate in theology degrees and not in law. Mr Muruka has also not served as a law lecturer in any university in Kenya. The petitioner took the position that by dint of article 24(1) of the Treaty, Mr Muruka is required to fulfil conditions for nomination to the office of judge in the Republic of Kenya and the JSC is responsible for conducting interviews and nominating persons to be appointed as judges in Kenya by virtue of article 172(1)(a) and (2) of the constitution. The petitioner stated that it had also received complaints on Mr Muruka's character and competence which were yet to be resolved.
8. The petitioner argued, therefore, that the 2nd respondent has no legal mandate under the Treaty, the constitution or any other laws of the Republic of Kenya to nominate a judge to the East African Court of Justice. The petitioner further argued that this petition does not raise any issue regarding the infringement of the Treaty to warrant filing a reference at the East African Court of Justice. The petition only questions infringement of the constitution of the Republic of Kenya in nominating Mr. Muruka which is subject to the constitution and internal laws of the Republic of Kenya.
9. The petitioner relied on the decision of the East African Court of Justice, Appellate Division in Attorney General of Republic of Uganda v Kyaburwenda (Case Stated 1 of 2014) [2015] EACJ 58 (Para 54), that it would be absurd if domestic courts were to be excluded from the application of the Treaty should occasions arise before them.
10. The petitioner asserted that article 166 of the constitution is applicable to Mr Muruka's nomination in so far as he is required to be qualified for nomination to the office of judge in the Republic of



Kenya. It is for that reason that his qualifications and competence be scrutinized by the JSC through a transparent and competitive process. Reliance was placed on the decision in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR.

11. The petitioner posited that the JSC has a role to play in the selection and nomination of judges to the East African Court of Justice and lack of its involvement makes Mr. Muruka's nomination unconstitutional. The petitioner relied on article 24(1) of the *Treaty* and the decisions in *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested parties)* [2021] KEHC 442 (KLR) and *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR to support its position.
12. In light of the jurisprudence from the East African Court of Justice, the petitioner argued, Mr Muruka's nomination by the Republic of Kenya is a matter subject to the *constitution* of the Republic Kenya and which this court has jurisdiction to interrogate as to its compliance with the *constitution* and the laws of Kenya.
13. The petitioner maintained that the nomination was done in secrecy; denied its other qualified and deserving members an opportunity to participate in the nomination exercise to be conducted by the JSC. The petitioner relied on the decisions in Justice *Kalpana H. Rawal & 2 others v Judicial Service Commission & 2 others* [2016] eKLR; *Commission for the Implementation of the constitution v Attorney General & Another* [2013] eKLR and *Law Society of Kenya vs Attorney General & 2 others* [2016] eKLR to support its arguments.
14. According to the petitioner, past nominations of Judges to the East African Court of Justice saw the JSC send a list of nominated candidates to the executive for submission to the Summit for appointment. The petitioner relied on articles 2(6) and 165(3)(d) of the *constitution*; article 24(1) of the *Treaty* and the decisions in *Attorney General (On Behalf of the National Government) v Karua (supra)*; *East Africa Law Society v Attorney General of the United Republic of Tanzania and Another (supra)* and *Attorney General of the Republic of Uganda v Kyaburwenda (supra)*, for the argument that this court has jurisdiction to hear and determine this petition.
15. On Mr. Muruka's preliminary objection, the petitioner took the position that the objection has no merit because it does not meet the threshold for a preliminary objection. Reliance was placed on the decisions in *Aviation & Allied Workers Union v Kenya Airways Limited & 3 others* [2015] eKLR; *Attorney General & another v Andrew Mwaura Githinji & another* [2016] eKLR and *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.
16. Overall, the petitioner asserted that under article 24(1) of the *Treaty*, Mr Muruka does not meet the qualifications for nomination as a superior court judge in Kenya and, therefore, as a Judge of the East African Court of Justice, First Instance Division.
17. Based on the above arguments, the petitioner sought the following declarations and orders:
 - a. A declaration be and is hereby issued that the manner in which the 3rd respondent was nominated by the 2nd respondent for appointment as a Judge of the First Instance Division of the East African Court of Justice lacked the requisite transparency and accountability and the same violated articles 10(2)(a)& (c) and 232(1)(e) & (f) of the *constitution* of Kenya, 2010.
 - b. A declaration be and is hereby issued that the manner in which the 3rd respondent was nominated by the 2nd respondent as a Judge of the First Instance Division of the East African Court of Justice denied other eligible Kenyan's any realistic opportunity to apply for the



opportunity in violation of article 27(1) & (3) as well as article 232(1)(g) of the constitution of Kenya, 2010.

- c. A declaration be and is hereby issued that the actions of the 2nd respondent of nominating the 3rd respondent as a Judge of the East African Court of Justice's First instance Division violates article 166(2) and (5) of the constitution of Kenya 2010.
- d. A declaration be and is hereby issued that the actions of the 2nd respondent of nominating the 3rd respondent as a judge of the East African Court of Justice's First Instance Division without the input of the Judicial Service Commission violates article 172(1) (a) as read with article 10(2) (a) and (c) of the constitution of Kenya 2010.
- e. A declaration be and is hereby issued that the actions of the 2nd respondent of nominating the 3rd respondent as a Judge of the East African Court of Justice's First Instance Division is invalid, null and void.
- f. An order directing the 1st and 2nd respondents to undertake a fresh process of nomination of a Judge to the First Instance Division of the East African Court of Justice in strict compliance with the provisions of the constitution of Kenya, 2010, in particular articles 10(2)(a) & (c), 232(1)(e) & (f), 166(2) & (5), 172(1) (a), 27(1) & (3) as well as article 232 (1) (g).
- g. Costs of the suit be borne by the respondents.
- h. Any other relief that the court shall deem just and fit to grant.

Respondents' case

18. The 1st and 2nd respondents opposed the petition through a replying affidavit sworn on June 6, 2024 by the Cabinet Secretary, Ministry of East African Community, Arid and Semi-Arid Lands and Regional Development, the 2nd respondent. According to the 1st and 2nd respondents, the role of the Ministry was only to transmit the name of the person recommended by the Republic of Kenya to the EAC Secretariat as required by the Treaty for appointment by the Summit in accordance with article 24 of the Treaty.
19. The 1st and 2nd respondents contended that on October 9, 2023, the Hon Mr justice Charles Nyachae gave notice of resignation as a Judge of the East African Court of Justice, First Instance Division to the Chair of the Summit. The State Department for EAC received a letter from the EAC Secretariat communicating the resignation of Mr Justice Nyachae who had been nominated by the Republic of Kenya to the East African Court of Justice, First Instance Division. The vacancy was communicated to the President.
20. On 11th April 2024, the 2nd respondent's ministry received a letter from the Executive Office of the President nominating Mr Muruka for appointment by the Summit to replace Mr. Justice Nyachae. The nomination was communicated to the EAC Secretariat through the letter dated April 18, 2024.
21. The 1st and 2nd respondents argued that by virtue of article 24(1) of the Treaty, Mr Muruka's nomination is subject to consideration and appointment by the Summit. His competency is to be assessed by the Summit and not by this court. The 1st and 2nd respondents maintained that Mr Muruka meets the requirements in article 166 (2), (3), (4) and (5) of the constitution of the Republic of Kenya and his curriculum vitae demonstrates that he qualifies for appointment as a Judge.
22. It is the 1st and 2nd respondents' position, that the Treaty, Protocol or legal procedures of the Community do not direct the manner of nominating Judges to the East African Court of Justice by



Partner States. There is no existing Community legislation or regulation that outlines the procedure to be followed by Partner States in making the nominations. For that reason, they argued, since appointment of a Judge to the East African Court of Justice follows the recommendation of a Partner State to the Summit, the procedure for identifying a Judge is to be determined by each Partner State through its national laws, policy or adopted national framework which may guide the procedure to be adopted by the Partner State.

23. The 1st and 2nd respondents asserted that Mr Muruka's nomination by the Republic of Kenya was made under the provisions of the [constitution](#) of the Republic of Kenya and article 24(1) of [the Treaty](#). The 1st and 2nd respondents maintained that the dispute regarding Mr Muruka's nomination should have been raised through a petition to the summit. The issue of his suitability relates to the interpretation and application of article 24(1) of the [Treaty](#) and should have been filed before the East African Court of Justice pursuant to article 27(1) of the [Treaty](#).
24. In that respect, the 1st and 2nd respondents argued, this court has no jurisdiction to hear and determine this petition because the nomination and appointment of judges to the East African Court of Justice is governed by article 24 of the [Treaty](#). They relied on the decisions in [Justus Kariuki Mate & another v Martin Nyaga Wambora & another](#) [2017] eKLR and [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) [2013] eKLR to urge this court not to interfere with the nomination.
25. In the 1st and 2nd respondents' view, since the appointment of the nominee of the Republic of Kenya by the Summit is still pending, the dispute has not crystallised capable of resolution by this court. They relied on the decision in [Republic v National employment authority & 3 others ex-parte Middle East Consultancy Services Limited](#) [2018] eKLR.
26. The 1st and 2nd respondents asserted that if on Mr Muruka's appointment a question arises regarding the integrity of his appointment, the dispute can only be determined by the East African Court of Justice under articles 9, 23 and 27(1), 33(2), 34 of the [Treaty](#). They relied on [Anyang' Nyong'o & 10 others v Attorney General & others](#) (2008) 3 KLR (EP) 398 and [Attorney General \(On Behalf of the National Government\) v Karua](#) [2024] KESC 21 (KLR).
27. The 1st and 2nd respondents further argued that under article 165(6) of the [constitution](#), this court has no supervisory jurisdiction to question processes before the Summit as an organ of the East African Community. They maintained that issues in the Bill of Rights do not arise because the [constitution](#) is territorially bound. They cited the decisions in [Kaunda & others v President of the Republic of South Africa](#) (CCT 23/04) [2004] ZACC 5; [Samuel Kamau Macharia v Kenya Commercial Bank and others](#) [2012] eKLR and the article by Parrish, Austen L. "[Rehabilitating Territoriality in Human Rights](#)" (2011)
28. The 1st and 2nd respondents again relied on [East African Centre for trade Policy and Law v Secretary General of the East African Community](#) [2013] eKLR, to argue that while article 24(1) of the [Treaty](#) seeks to ensure that a highly qualified person in terms of academics and legal experience and of high level of integrity is appointed as a judge of the East African Court of Justice, the ordinary meaning of the text in article 24 only sets qualification parameters. The article does not dictate that the person must be a serving judge or determined to have qualified to be judge by the competent authority in the Partner State. The summit as the appointing authority, has the mandate to make reference to the qualifications necessary to be a judge in a Partner State, and assess whether the person recommended by the Partner State meets those qualifications.
29. The 1st and 2nd respondents maintained that Mr Muruka meets the qualifications for appointment as a judge of a superior court as required by article 166(2), (3), (4) and (5) of the [constitution](#). They took the view, that since the appointment of a Judge to the East African Court of Justice flows from the



recommendation of a Partner State to the Summit, the procedure of identifying the Judge is left to the Partner State' national laws, policy or adopted national framework which may guide the procedure the Partner State is to follow. They urged the court to dismiss the petition with costs.

3rd respondent's case

30. Mr Muruka opposed the petition through a preliminary objection, response to petition and replying affidavits sworn on May 20, 2024 and June 10, 2024. In the preliminary objection, he argued that by virtue of articles 24, 27 and 30 of the Treaty, this court has no substantive and or territorial jurisdiction to hear and determine the petition. He also argued that the petition has not been pleaded with precision or specificity. It also and offends the doctrine of constitutional avoidance.
31. Mr. Muruka relied on, among others, the decisions in *Owners of the Motor Vessel "Lillian S" v Caltex (Kenya) Limited* [1989] eKLR; *Anarita Karimi v Republic* [1979] eKLR; *Abraham Lenauyia Lenkeu v Charles Katekeyo Nkeru* [2016] eKLR on jurisdiction.
32. In the replying affidavits, Mr Muruka stated that his nomination was done in compliance with the provisions of the Treaty because the *constitution* of Kenya has no provision dealing with nomination and appointment of judges to the East African Court of Justice, or any other international courts established by treaties ratified by Kenya. According to Mr Muruka, the Republic of Kenya forwarded his name to the Secretary General of the Community for onward transmission to the Summit through the 2nd respondent exercising her role under article 8(3) of the Treaty, and in her capacity as a member of the council under articles 9 and 13 of the Treaty.
33. Regarding the petition, he took the position, that the petition was not drafted with precision and specificity; does not specify which provision of the *constitution* of the republic of Kenya dealing with nomination and appointment of Judges to the East African Court of Justice had been violated and the manner of violation. Mr Muruka maintained that under articles 27 and 30 of the *Treaty*, the petition can only be determined at the East African Court of Justice. He further argued that appointment of Judges of the East African Court of Justice is a preserve of the Summit under articles 11 and 24 of the *Treaty* and not a function of the JSC.
34. Mr Muruka went on to argue, that article 166 of the *constitution* is limited to the procedure for appointment of judges of the Supreme Court, Court of Appeal and High Court. He maintained that he qualifies for appointment having practised law for 27 years up to the highest court in Kenya; he was a lecturer and previously worked as a member of the county assembly where he applied his training, experience and skills as an advocate.
35. According to Mr Muruka, the Republic of Kenya has throughout the years and even after the promulgation of the *2010 Constitution*, nominated persons for appointment as judges of the East African Court of Justice using the same process which has never been challenged. The petitioner is estopped from challenging his nomination.
36. Mr Muruka asserted that under article 27 of the *Treaty*, the East African Court of Justice is the only court that can interpret the provisions of the Treaty on the issue of his nomination and appointment. This court has no jurisdiction to determine this issue. He urged this court to observe the doctrine of avoidance; down its tools and strike out the petition.
37. Mr Muruka relied on the Supreme Court decision in *Attorney General (On Behalf of the National Government) v Karua* [2024] KESC 21 (KLR) for the position that the decision dealt with issues of whether the Supreme Court decisions are subject to review by the East African Court of Justice, but



not the procedure of nominating persons for appointment as judges of the East African Court of Justice.

38. Mr Muruka again pointed out that the decision in *East Africa Law Society v Attorney General of the United Republic of Tanzania and Another* (Appeal 2 of 2021) [2022] EACJ 30 dealt with an issue similar to his nomination thus, this petition should have been filed at the at the East African Court of Justice.

1st interested party's case

39. The 1st interested party filed a replying affidavit sworn on 16th May 24 by David Sigano in support of the petition. The 1st interested party stated that the decision to nominate Mr Muruka was conveyed through the letter dated April 18, 2024 from the 2nd respondent to the Secretary General of the Community for onward submission to the Summit. The act of Mr Muruka's nomination was complete thus, this court has jurisdiction to determine the petition.
40. The 1st interested party relied on article 165(3)(d) of the *constitution* of the Republic of Kenya and the decisions in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR; *East Africa Law Society v Attorney General of the United Republic of Tanzania and Another* (Appeal 2 of 2021) [2022] EACJ 30; *Aukot & 2 others v National Security Council & 5 others*; *Law Society of Kenya (Interested Party)* (Petition E389 of 2023) [2024] KEHC 336 (KLR); *Law Society of Kenya (Interested Party)* [2024] KEHC 336 (KLR) and *Tax Justice Network -Africa v Cabinet Secretary for National Treasury & 2 others* [2019] eKLR, to support the argument that this court has jurisdiction to hear and determine this petition.
41. The 1st interested party further argued that there was no public participation leading to Mr Muruka's nomination as required by the *constitution* of the Republic of Kenya. The manner and process leading to his nomination offended the principles of transparency, accountability and judicial independence. The nomination was supposed to be in accordance with the *constitution* of the Republic of Kenya and laws. The 1st interested party maintained that Mr Muruka's nomination contravened articles 10 and 232 of the *constitution* of the Republic of Kenya. Reliance was placed on *Robert N Gakuru & others v The Governor Kiambu County & 3 others* [2014] eKLR; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 and *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR, on public participation.
42. On Mr Muruka's suitability for nomination, the 1st interested party argued he does not meet the constitutional requirements in the Republic of Kenya. According to the 1st interested party, article 24(1) of the *Treaty* sets qualifications for appointment of Judges to the East African Court of Justice. However, Mr. Muruka must meet qualifications for appointment to the office of judge in the Republic of Kenya as specified under article 166 of the *constitution* of Kenya.
43. The 1st interested party argued that it is the JSC's mandate to assess whether Mr Muruka or any other candidate meets the qualifications for a judicial appointment in Kenya as required by article 166(1)(b) of the *constitution*. The President who sits in the Summit should nominate Judges to the East African Court of Justice based on the evaluation and recommendation by the JSC.
44. The 1st interested party maintained that the JSC enjoys a normative constitutional role as a chapter 15 commission in accordance with article 249 of the *constitution*. The 1st interested party relied on the decisions in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR; *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* [2014] eKLR and *Law Society*



of Kenya v Attorney General & 3 others [2020] eKLR, on role of the JSC in the appointment of judges. It urged that the petition be allowed as prayed.

2nd interested party's case

45. The 2nd interested party, (The JSC), filed grounds in support of the petition. The JSC contended that it was not involved and did not recommend Mr Muruka's name for nomination as Judge as envisaged by articles 166 (1) (b) and 172(1)(a) of the *constitution*. The JSC took the position that it is the only constitutional body mandated to assess one's suitability and eligibility for nomination as a Judge. This is buttressed by the fact that appointment of Judges to the East African Court of Justice is guided by article 24(1) of the *Treaty* and one must meet qualifications for appointment to the office of Judge within the Republic of Kenya as required by articles 166 and 172(1)(a) of the *constitution*.
46. The JSC asserted that the 2nd respondent has no constitutional mandate or authority to recommend a person for appointment as a judge and that Mr. Muruka's nomination also offended articles 10, and 232 of the *constitution* of the Republic of Kenya; that Mr. Muruka's nomination flouted article 172(1)(a) of the *constitution* and threatens to undermine the constitutional principle of Judicial Independence. Reliance was placed on articles 171, 172(1)(a) and 249(1) & (2) of the *constitution*, section 13(1) (d), 13(2) & (3) of the *Judicial Service Act*, and the decisions in *Law Society of Kenya v Office of the Attorney General & anor; Judicial Service Commission (Interested Party)* [2021] eKLR and *In the matter of Interim Independent Electoral Commissions* [2011] eKLR.
47. The nomination further violated articles 10 and 232 of the *constitution* for disregarding the constitutional requirements of public participation, transparency, accountability, good governance, democracy and the rule of law. The JSC relied on decision in *Judges and Magistrates Vetting Board & 2 others v The Centre for Human Rights and Democracy & 11 others* [2014] eKLR, that it is responsible for recommending all persons for appointment as judges and the 2nd respondent had no constitutional mandate to nominate a person for appointment as a judge.

Determination

48. Having considered the petition, responses and arguments by parties, I have distilled two issues for determination, namely; whether this court has jurisdiction and whether Mr Muruka's nomination violated the *constitution* and the laws of the Republic of Kenya.

Jurisdiction

49. The respondents took a common stand that this court has no jurisdiction to determine the issue of Mr Moruka's nomination for appointment as a judge of the East African Court of Justice. According to the respondents, the issue of nomination and appointment can only be determined by the East African Court of Justice under article 27 of the *Treaty*.
50. The petitioner and the interested parties held the opposite view, arguing that nomination of persons for appointment by the Summit to the East African Court of Justice is to be determined under domestic laws of the Partner States. In that respect, the applicable law being the *constitution* and laws of the Republic of Kenya, this court has jurisdiction as the issue relates to interpretation of the *constitution* and the laws of the Republic of Kenya.
51. Jurisdiction is the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction is a threshold and fundamental question that the court has to determine first. If the court finds that it has no jurisdiction to hear the matter, that is the end. The court should not



- take any further step, but down its tools. (See *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* (*supra*)).
52. In *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court stated:
- (68) A court’s jurisdiction flows from either the *constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...without jurisdiction, the court cannot entertain any proceedings...Where the *constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.
53. *In re the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to the decision in *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* (*supra*), the Supreme Court again stated:
- [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *constitution*.
54. Article 165(3)(d) of the *constitution* confers on this court jurisdiction to hear any question respecting its interpretation, including the determination of—(ii) “the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”
55. Mr Muruka is a Kenyan nominated for appointment as a Judge of the East African Court of Justice, First Instance Division. The issue here is which law is applicable and, therefore, which court has jurisdiction to determine the issue of his qualification and nomination for appointment to the East African Court of Justice. To determine this issue, we have to make reference to article 24(1) of the *Treaty*.
56. Article 24(1) of the *Treaty* provides as follows:
- Judges of the court shall be appointed by the Summit from among persons recommended by Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence in their respective Partner States. (underlining provided)
57. A textual reading of article 24(1) is clear in two respects. It identifies qualifications for persons to be recommended for appointment, namely, proven integrity, impartiality and independence, or jurists of recognised competence. Those to be nominated for appointment must also fulfil the conditions required for appointment to high judicial positions in their own (Partner) States. The key point here is that whether one is of proven integrity, impartiality and independence, he or she must also meet qualifications for appointment to a high judicial office in the Partner State concerned, or must be a jurist of recognised competence in the Partner State. The person so nominated must, as a matter of law, fulfil conditions for appointment to the position of judge in the Partner State, in this case, the Republic of Kenya.



58. The person nominated by the Republic of Kenya for appointment to the East African Court of Justice has to be of proven integrity, impartiality and independence, or a jurist of recognised competence in Kenya. The person must also fulfil the requirements for appointment as a judge in Kenya. The requirements for appointment of judges in Kenya are provided for in the [constitution](#) of the Republic of Kenya and the [Judicial Service Act, 2011](#). Moreover, the [constitution](#) of the Republic of Kenya and the [Judicial Service Act](#) provide for the procedure for identifying and nominating persons for appointment as judges.
59. That article 24(1) of the Treaty requires that the person nominated for appointment to the East African Court of Justice should fulfil the requirements for appointment to such high judicial office in the Partner States, essentially leaves the issue of whether the person qualifies for nomination, to the Partner State and her institutions. the [constitution](#) of the Republic of Kenya provides for qualifications for appointment to the position of judge. In that respect, whether Mr. Muruka fulfils qualifications for nomination for appointment to the East African Court of Justice, requires investigation whether he fulfils the requirements provided by the [constitution](#) of the Republic of Kenya for appointment to the position of judge in Kenya, which calls for interpretation of the [constitution](#) of Kenya.
60. In [East Africa Law Society v Attorney General of the United Republic of Tanzania and another](#) (Appeal 2 of 2021) [2022] EACJ 30, the East African Law Society (appellant) challenged nomination of a judge by United Republic of Tanzania to the Appellate Division of the East African Court of Justice on, among other grounds, that the nomination violated article 6(d) of the [Treaty](#) in that it was not done transparently and there was no stakeholders' engagement/participation. The court of First Instance Division dismissed the challenge. On appeal, the Appellate Division Court upheld the decision of the First Instance Division, observing, that according to the Treaty, a person is eligible for nomination and appointment as a Judge to the court if he or she is of proven integrity, impartiality and independence.
61. The court pointed out that once the nominee has satisfied the Treaty requirements of "proven integrity, impartiality and independence", the nominee is further required to fulfil the conditions required in the nominating Partner State for holding high judicial office. In the alternative, he or she has to be a jurist of recognised competence, in their respective Partner States. The court emphasised that a nominee must be qualified to hold a high judicial office in the nominating Partner State, or be a jurist of recognized competence in the nominating Partner State in which case the nominee will have satisfied the qualifications set out in the Treaty.
62. What is clear from that decision, is that the court emphasised what article 24(1) of the [Treaty](#) states, that whereas the person nominated must meet the qualifications in the Treaty, he/she must fulfil qualifications for appointment to such high judicial position in the Partner State.
63. The petition before this court raises the issue of whether Mr. Muruka qualifies to hold high judicial office in Kenya. This is a matter which requires interpretation of the [constitution](#) of the Republic of Kenya. Article 165(3)(d) confers on this court jurisdiction to hear any question respecting interpretation of the [constitution](#). In that respect, the East African Court of Justice cannot determine whether Mr. Muruka qualifies to hold the office of judge in Kenya under the [constitution](#) of the Republic of Kenya.
64. The respondents argued that this court cannot interpret the Treaty. As this court has already pointed out, the Treaty merely identifies qualifications and leaves determination whether a person fulfils qualification to hold a high judicial office in the Partner State to the Partner State and her institutions. In that respect, this court is called upon to apply the provisions of the Treaty as it interprets the [constitution](#) and domestic laws of the Republic of Kenya in determining the issue before it.



65. This view was well captured in *Attorney General of Republic of Uganda v Kyaburwenda* (Case Stated 1 of 2014) [2015] EACJ 58, where the East African Court of Justice, Appellate Division, agreed with the position taken by the First Instance Division, stating;

(54) This court agrees with the postulation of the law by the First Instance Division of this court that it would be absurd if national courts and tribunals were to be excluded from the application of Treaty provisions should the occasion arise before them.

66. This petition presents an occasion that calls on this court to apply the Treaty in interpreting the *constitution* of the Republic of Kenya, a Partner State. I therefore find and hold that this court has jurisdiction to hear and determine this petition.

Nomination

67. The next issue is whether Mr Muruka's nomination violated the *constitution* of the Republic of Kenya and her laws. Put differently, does Mr Muruka have proven integrity, impartiality and competence, or is he a jurist of recognised competence and fulfils the requirements for appointment to the high judicial office in Kenya. The petitioner and interested parties argued that his nomination violated the *constitution* of the Republic of Kenya and that he does not fulfil the qualifications in article 24(1) of the *Treaty*. The respondents submitted that his nomination did not violate the *constitution* of Kenya and that he has the qualifications required by both the Treaty and the *constitution* of the Republic of Kenya.

68. To answer this question, calls on the court to consider who determines whether a person qualifies for appointment as judge in Kenya. This is so, because article 24(1) of the *Treaty* is clear that the person nominated for appointment as judge of the East African of Justice, apart from possessing the qualifications in the Treaty, should fulfil the requirements for holding a high Judicial office in the Partner State.

69. Qualifications for appointment to hold the position of judge in Kenya are provided for in article 166(2) of the *constitution*. The article provides that a judge of a superior court shall be appointed from among persons who—

- (a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under clause (3) to (5) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

70. Article 166(5) provides that each judge of the High Court shall be appointed from among persons who have-

- (a) at least ten years' experience as a superior court judge or professionally qualified magistrate; or
- (b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

71. Under article 172(1)(a) as read with section 30 of the *Judicial Service Act* and the First Schedule to the Act, the JSC has the mandate in Kenya to recommend to the President persons for appointment as judges. The JSC discharges this mandate under both the *constitution* and the *Judicial Service Act*.



The *Judicial Service Act*, (section 30 and the First Schedule to the Act), provides for the procedure for declaring vacancies, calling for, receiving and reviewing applications to ascertain qualifications of the applicants. It also calls for and receives reports from stakeholders, including, the Law Society of Kenya, the petitioner, as the umbrella body responsible for the conduct and discipline of advocates in Kenya. The JSC then conducts interviews to determine suitable persons to recommend for appointment as judges.

72. The JSC is thus, responsible for determining whether a person fulfils qualifications for appointment to the high judicial position in Kenya. It is also important to note, that the *constitution* requires that appointments to public positions be done in an open and transparent manner and there be public participation. The *Judicial Service Act* has incorporated these requirements when determining suitability of a person to hold the high judicial position of a judge in Kenya.
73. The petitioner argued that the JSC was not involved in determining Mr. Muruka's suitability for nomination and there was no public participation before his nomination and recommendation for appointment as Judge of the East African Court of Justice, a position the interested parties supported and agreed with. The respondents did not dispute this argument. Their position was that the Executive Office of the President was right in nominating Mr Muruka and sending his name to the 2nd respondent who forwarded the name to the EAC Secretariat.
74. The respondents' argument is a clear admission that the JSC was not involved in determining whether Mr Muruka is of proven integrity, impartiality and competence, or a jurist of recognised competence in Kenya. It is also not clear, who determined whether he fulfils the requirements for appointment as a judge in Kenya given that the *constitution* provides for other requirements, such as high moral character and distinguished academic, which are not in the Treaty, before nominating and recommending him for appointed as a Judge of the East African Court of Justice.
75. Article 24(1) of the *Treaty* only identifies the qualifications one has to have and leaves the issue determining the person's qualifications to the Partner States. This is important because each Partner State has its own qualifications and standards on appointment to the position of judge. In so far as the Republic of Kenya is concerned, only the JSC has constitutional mandate and legal mechanism for determining whether a person meets the qualifications for appointment as a judge in Kenya and, therefore, can be nominated for appointment to the East African Court of Justice.
76. The executive office of the President does not have constitutional and legal mandate to determine whether a person fulfils the requirements for appointment to the position of judge in Kenya and which he/she must also possess to qualify for nomination and recommendation for appointment to the East Africa Court of Justice. Fulfilment of the requirements and suitability for appointment as a judge in Kenya and nomination for appointment to the East African Court of Justice, is not about the outward view of the person. It requires a lot more, including the input of the JSC which must also seek information about the person from other agencies, such as the petitioner and members of the public in compliance with articles 10(2) and 232 of the *constitution* of the Republic of Kenya.
77. Similarly, the principles of transparency, accountability, equal opportunities and gender equality in article 6(d) of the *Treaty* can only be complied with before nomination of a person by the Partner State and which the respondents do not seem to have complied with in this case.
78. The respondents again argued that there is no law or procedure in Kenya on the nomination of persons to be recommended for appointed as Judges to the East African Court of Justice and, therefore, the President acted properly in nominating Mr Muruka. This argument cannot be correct. the *constitution* and the *Judicial Service Act*, provide for qualifications and the procedure for determining suitability of persons for appointment as judges. If the *constitution* and the *Judicial Service Act* were insufficient for



purposes of determining qualifications and suitability of persons to be nominated by the Republic of Kenya for appointment as Judges to the East African Court of Justice, the Partner State, Kenya, would have enacted a law and procedure for doing so, just as it did with regard to elections of persons to the East African Legislative Assembly. The only reason why this was not done, must have been, because Kenya has an elaborate procedure for determining qualifications, suitability and recommendation of persons for appointment as judges. (See The [East African Legislative Assembly Act, 2011](#) and The [East African Legislative Assembly Elections Rules, 2017](#), formulated pursuant to section 12 of the Act-Kenya Gazette Supplement No 57 April 21, 2017 (Legislative Supplement No. 24)-Legal Notice No 58.)

79. The petitioner again argued that it had received complaints on Mr. Muruka's professional standing thus, impugning his integrity, an issue that had not been resolved by the time of hearing this petition. This is one of the issues the JSC considers in determining one's suitability to hold a high judicial office. There is also contestation on whether Mr. Muruka is jurist of recognised competence, an issue that can only be determined by the JSC after conducting, due diligence and interviews.
80. In the circumstances, and flowing from my analysis above, I agree with the petitioner that Mr Muruka's nomination and subsequent recommendation for appointment as Judge of the East African Court of Justice, First Instance Division, violated the [constitution](#) and the laws of the Republic of Kenya, a Partner State.

Conclusion

81. Having considered the petition, responses and arguments by parties, decisions relied on, the [constitution](#) and the law, I come to the following conclusions. First, this court has jurisdiction to hear and determine this petition. The petition challenged the nomination of Mr Mokuza Zablon Muruka without the input of the Judicial Service Commission which has constitutional and legal mandate to determine suitability of persons for appointment as judges and recommending them to the President as required by the [constitution](#) of Kenya and the Judicia Service Act.
82. Second, the nomination and subsequent recommendation of Mr Mokuza Zablon Muruka for appointment as Judge of the East African Court of Justice, First Instance Division, violated articles 166(1)(b) and 172(1)(a) of the [constitution](#) since his suitability was not determined by the Judicial Service Commission and was not subjected to public participation, including the Law Society of Kenya (the petitioner) the body responsible for the conduct and discipline of advocates in Kenya. The nomination also violated the principles of transparent and accountability in article 10(2) of the [constitution](#). Only the Judicial Service Commission has the constitutional mandate to determine whether a person is of proven integrity, impartiality and independence, or is a jurist of recognised competence and fulfils the requirements for appointment to the high judicial office in Kenya for him/her to be nominated and recommended for appointment to the East African Court of Justice.

Disposal

83. Based on the above conclusions, the court makes the following declarations and orders which it considers appropriate.
 1. A declaration is hereby issued that the manner in which Mr Mokuza Hezbon Muruka was nominated for appointment as a Judge of the First Instance Division of the East African Court of Justice lacked transparency and accountability thus, violated articles 10(2) (a)& (c) and 232(1) (e) & (f) of the [constitution](#) of the Republic of Kenya.
 2. A declaration is hereby issued that the manner in which Mr Mokuza Zablon Muruka was nominated for appointment as a Judge of the First Instance Division of the East African Court



of Justice denied other eligible Kenyans an opportunity to apply for the position of Judge of the East African Court of Justice in violation of article 27(1) & (3) read with article 232(1)(g) of the constitution of the Republic of Kenya.

3. A declaration is hereby issued that the nomination of Mr Mokua Zablon Muruka as a Judge of the East African Court of Justice, First instance Division violated articles 166(2) and (5) of the constitution of the Republic of Kenya.
4. A declaration is hereby issued that the nomination of Mr Mokua Zablon Muruka as a judge of the East African Court of Justice, First Instance Division without the input of the Judicial Service Commission violated article 172(1)(a) of the constitution of the Republic of Kenya, and is null and void.
5. An order of *certiorari* is hereby issued quashing the letter dated April 18, 2024 by the Cabinet Secretary, Ministry of East Africa Community, Arid and Semi-Arid Lands and Regional Development forwarding the name of Mr Mokua Zablon Muruka to the Secretary General, East African Community for appointment as a judge of the East African Court of Justice, First Instance Division.
6. This being a public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

E C MWITA

JUDGE

